



United States of America  
**Federal Trade Commission**

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**U.S. – E.U. Convergence: Can We Bridge the Atlantic?**

**Remarks at the 2016 Georgetown Global Antitrust Symposium Dinner  
The Metropolitan Club  
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<sup>1</sup> The views expressed here are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. I would like to acknowledge the important contributions of Alan Devlin to this speech.

## I. Introduction

Good evening and thank you for your warm introduction. It is a pleasure to address such a distinguished group. In preparing for this evening's speech, I was struck by the rich variety of possible topics. International antitrust has come of age. More than 120 countries today have adopted competition laws.<sup>2</sup> Coupled with globalization, such ubiquitous competition enforcement has led enforcers around the world to face questions of first impression together. Hence, a luxury of choice:

I could discuss the rich intersection of antitrust and IP, questions surrounding institutional design and due-process protections, disruptive innovation, merger-clearance procedures, international cooperation via the ICN, OECD, and UNCTAD, or many other issues. But instead I return to an issue at the heart of global antitrust, namely harmonization between the competition laws of Europe and America.<sup>3</sup> Always interesting, the issue of U.S.-E.U. convergence is especially apt today. Brexit threatens to deprive the European Union of a voice that favored market liberalization and competition.<sup>4</sup> We hear populist sentiments across the political spectrum in America. Meanwhile, the proliferation of technology has created a stream of new antitrust questions. Opportunities for further convergence, but also divergence, abound.

Commentators have long debated whether Europe and America are moving closer together or further apart. We have made big advances in reviewing mergers and clamping down on price-fixing conspiracies, where our collaboration is invaluable. U.S. and E.U. authorities have also taken similar approaches on some other recent issues. For instance, in *Huawei v. ZTE*, the CJEU explained what a FRAND-encumbered SEP owner must do before seeking an

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<sup>2</sup> See, e.g., THE GLOBAL LIMITS OF COMPETITION LAW vii (Ioannis Lianos & D. Daniel Sokol eds., 2012).

<sup>3</sup> Commentators hotly debate the fact and cause of transatlantic antitrust divergence to this day. See, e.g., DANIEL J. GIFFORD & ROBERT T. KUDRLE, THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY (2015).

<sup>4</sup> See, e.g., *From Brexit to Brangst: German business leaders fear Brexit could lead to a less competitive Europe*, THE ECONOMIST, July 4, 2016.

injunction.<sup>5</sup> If the infringer does not express a willingness to license on FRAND terms or diligently respond to the patentee's offer, the SEP owner may seek an injunction.<sup>6</sup> In its consent decree in *Google-MMI*, the FTC similarly allowed Google to request injunctive relief on its FRAND-limited SEPs if the accused infringer did not commit to pay a FRAND-determined royalty.<sup>7</sup> The challenge, of course, is to determine who is a willing licensee.

Nevertheless, the E.U. and U.S. antitrust regimes differ in many significant ways. State-aid rules are unique to E.U. law, while the U.S. ban on monopolization finds no exact parallel in Brussels. The abuse-of-dominance standard in Europe is stricter and reaches further than American rules on exclusionary conduct. Excessive pricing can violate Article 102, but never the Sherman Act. U.S. law treats vertical restraints more leniently than E.U. law does. And, just ten days ago, the General Court held in *Lundbeck* that the European Commission can challenge pay-for-delay agreements as restrictions by object.<sup>8</sup> The U.S. Supreme Court in *Actavis*, by contrast, required the FTC to prove its case under the full-fledged rule of reason.<sup>9</sup>

And that is to say nothing about the different institutional and procedural frameworks of the antitrust regimes of America and Europe. Even recent actions reveal distinct approaches. Beyond the example of reverse-exclusionary payments, we see differences in how European and American antitrust enforcers approach issues of dominance in the new economy. On the topical issue of Google search, the FTC closed its investigation, while the European Commission has

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<sup>5</sup> Case C-170/13, *Huawei Techs. Co. v. ZTE Corp.*, 2014 E.C.R. \_\_\_ [not yet reported], ¶¶ 60-69 (Nov. 20, 2014), <http://curia.europa.eu/juris/liste.jsf?num=C-170/13>. Note that a "SEP" is a standard-essential patent, which becomes "FRAND-encumbered" when its owner agrees to license it on fair, reasonable, and nondiscriminatory terms.

<sup>6</sup> *Id.*

<sup>7</sup> *In re Motorola Mobility LLC & Google Inc.*, FTC File No. 121-0120, Comm'n Letter to Commenters, July 23, 2013, p. 2 n.4, <https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolaletter.pdf>.

<sup>8</sup> Case T-472/13, *Lundbeck v. Comm'n*, 2016 E.C.R. \_\_\_ [not yet reported], ¶¶ 354-55, 369, *passim* (Sept. 8, 2016), <http://curia.europa.eu/juris/liste.jsf?num=T-472/13>.

<sup>9</sup> *Fed. Trade Comm'n v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013).

served two statement of objections.<sup>10</sup> And touching on the intersection of antitrust and consumer protection, there is the German Federal Cartel Office's decision to investigate Facebook under Article 102 for alleged data-privacy abuses.<sup>11</sup> As I stated in a recent article, I am skeptical that U.S. law would address such concerns under an antitrust theory.<sup>12</sup>

These departures raise questions about who is right, about extraterritorial effects, and about whether more learning will unify our competition-law systems. Many commentators argue that we need to do more to harmonize antitrust enforcement. But there is a nuance missing from this conversation. How people discuss divergence suggests a strong normative dimension. The implication is that stepping apart means a stumble. The reality is more complicated.

E.U. and U.S. competition authorities serve the public interest. Yet, despite our best efforts, we sometimes disagree. What can we learn from such divergence? We might expect to refine our methodologies to learn a better way. Jurisdictions should converge as their tools become more sophisticated, allowing enforcers to more accurately measure and predict competitive effects. Substantive doctrine should evolve, accordingly, away from rules and toward more nuanced standards.

In my view, that conventional narrative only goes so far. It assumes—sometimes wrongly—that we are pursuing the same goals. E.U. and U.S. law occasionally pose different questions. When that occurs, there is little point asking whether our answers are the same. To draw meaningful conclusions, we must understand the source of our disagreement.

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<sup>10</sup> Compare, e.g., *In re Google Inc.*, Statement of the Fed. Trade Comm'n Regarding Google's Search Practices, Jan. 3, 2013, <https://www.ftc.gov/public-statements/2013/01/statement-federal-trade-commission-regarding-googles-search-practices>, with Press release, European Comm'n, Antitrust: Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach E.U. rules, July 14, 2016, [http://europa.eu/rapid/press-release\\_IP-16-2532\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2532_en.htm).

<sup>11</sup> Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules, Mar. 2, 2016, [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02\\_03\\_2016\\_Facebook.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html).

<sup>12</sup> See Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121 (2015).

When we agree on the precise goal of antitrust enforcement, then there is much to learn from inconsistent outcomes. Ongoing tests and refinement ought to lead to further convergence as we settle upon the most accurate tools. After all, when we agree on the question, we are simply trying to find the same truth.

By contrast, divergence is more difficult to “cure” when the disagreement stems from the goals of enforcement. Thus we must consider whether we always ask the same question.

## **II. Convergence: Two Levels of Detail**

### *A. Do We Ask the Same Questions?*

Consider the famous *Microsoft* litigation.<sup>13</sup> One question was whether the law should require dominant firms to share proprietary information with their competitors to facilitate interoperability? U.S. and E.U. law answer that question differently.<sup>14</sup> It is tempting to think that this divergence is solely a function of factual uncertainty.

When we do not know all the key facts, we fall back on our priors and reach different results. For example, if we knew when mandatory licensing enhanced efficiency, we would presumably reach the same answers. But perhaps not, and this is a crucial point. What if two jurisdictions promote different values through antitrust laws on mandatory sharing? Then, even perfect information may not produce convergence. Thus, in evaluating divergence, we should first identify each jurisdiction’s goals.

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<sup>13</sup> See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam); Case T-201/04, *Microsoft Corp. v. Comm’n*, 2007 E.C.R. II-3601.

<sup>14</sup> That was true even in the *Microsoft* case. See *id.*; Press Release, Thomas O. Barnett, Assistant Att’y Gen. Antitrust Div., U.S. Dep’t of Justice, Statement on European Microsoft Decision, Sept. 17, 2007, [https://www.justice.gov/archive/atr/public/press\\_releases/2007/226070.htm](https://www.justice.gov/archive/atr/public/press_releases/2007/226070.htm); Renata B. Hesse, *Counseling Clients on Refusal to Supply Issues in the Wake of the EC Microsoft Case*, 22 ANTITRUST 32, 35, *passim* (2008); see also WILLIAM H. PAGE & JOHN E. LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE* (2007) (explaining how the European Commission’s interoperability requirements went beyond those imposed on Microsoft in the United States).

Europe and America have largely zeroed in on common principles. Antitrust laws protect competition, promote consumer welfare, and do not protect favored competitors.<sup>15</sup> From 10,000 feet, E.U. and U.S. law seem to apply their competition laws to the same end. But on closer inspection, there are some differences.

In practice, there are different schools of thought on what protecting competition means. In my view, it means protecting constraints on market power created by demand- and supply-side substitution.<sup>16</sup> Others view competition not as a process by which market forces limit pricing power and encourage innovation, rather, they see competition as a function of industry structure. To them, “competition” is a result rather than a process.<sup>17</sup>

That approach held sway in America under the Harvard School during the 1960s.<sup>18</sup> That was the heyday of the Structure-Conduct-Performance paradigm, which viewed market efficacy as a function of concentration. Economists have largely discredited the SCP approach, and it finds little favor today in U.S. antitrust thinking.<sup>19</sup> Nevertheless, ghosts of that perspective linger in America. For instance, the Federal Communications Commission sometimes appears to construe “competition” to mean an unconcentrated market characterized by a wide variety of choice.<sup>20</sup>

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<sup>15</sup> Compare, e.g., *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (“It is axiomatic that the antitrust laws were passed for ‘the protection of competition, not competitors.’”) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) with European Comm’n, Guidance on the Commission’s enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, 2009 O.J. (C 45) 7, ¶ 5 (“In applying Article [102] to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers.”); see also Neelie Kroes, Editorial, *Why Microsoft Was Wrong*, WALL ST. J. EUROPE, Sept. 26, 2007, at 13 (“U.S. and EU antitrust laws agree on most things, not least the objective of benefiting consumers.”).

<sup>16</sup> See Maureen K. Ohlhausen, *The Elusive Role of Competition in the Standard-Setting Antitrust Debate*, 20 STAN. TECH. L. REV. \_\_\_ (forthcoming 2017) (expounding that view).

<sup>17</sup> See *id.*

<sup>18</sup> See, e.g., Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 227-29 (1995).

<sup>19</sup> See Maureen K. Ohlhausen, *Does the U.S. Economy Lack Competition?*, 1 CRITERION J. ECON. 47, 50-52 (2016). <https://www.criterioninnovation.com/articles/u-s-economy-lack-competition/>.

<sup>20</sup> See, e.g., *In re Protecting & Promoting the Open Internet*, GN Dkt. No. 14-28, Report & Order on Remand, Declaratory Ruling, and Order, 30 F.C.C. Rcd. 5601 (2015), ¶¶ 84, 148 (concluding that “threats to Internet-enabled

In Europe, of course, the ordoliberal tradition views competition differently than does modern U.S. thinking.<sup>21</sup> Under the ordoliberal line of thought, a competitive market is one in which no one firm dominates others. It is one where economic—and hence political—power is dissipated among many. Dominance is a problem, thus justifying strict rules meant to facilitate the dispersion of economic power as an end in itself.

These various schools can come into tension. For example, the ordoliberal approach runs into difficulty if scale economies in a given industry require high concentration to achieve productive efficiency. Similarly, in the new economy, Schumpeterian waves of creative destruction may produce a series of dominant positions as successful innovators displace one another. There, the fact of industry concentration may mask fierce competition in the laboratory. In both such cases, antitrust enforcement to engineer “superior” market outcomes may be counterproductive, depending—again—on how one perceives competition.

I wish I could say that we have achieved universal consensus on the precise goal of antitrust enforcement, but sadly that is not the case. Above all, we disagree internationally—and sometimes even domestically—about the significance of imperfect market outcomes to antitrust analysis. Do high prices, low output, and limited choice always signify a competition problem? According to some observers, the answer is yes.

In my view, however, negative market outcomes, though concerning, are not dispositive of whether an antitrust violation exists. The question is whether an unwelcome effect flows from

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innovation, growth, and competition do not depend on broadband providers [*sic*] having market power with respect to their end users” and that, “even if the mobile market were sufficiently competitive, competition alone is not sufficient to deter mobile providers from taking actions that would limit Internet openness.”); *cf.* Barbara van Schewick, *Net Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like*, 67 STAN. L. REV. 1, 10 (2015) (explaining “the deep disconnect between those, including the FCC in the Open Internet Order, who base calls for network neutrality regulation on a broad theoretical framework that considers a wide range of economic and noneconomic harms and those who evaluate calls for network neutrality regulation based on an antitrust framework”).

<sup>21</sup> See, e.g., Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2509-13 (2013).

a restraint, practice, or acquisition that dissolves a market constraint. Standing alone, high prices may reflect the exercise of lawful market power, which antitrust law should respect to protect incentives to invest and compete. And, standing alone, high prices spur more competition by encouraging entry and output expansion. In those cases, I would not see an antitrust problem. By contrast, if high prices flow from an agreement that suppresses a dimension of competition, there is harm to the competitive process. The question is not whether negative effects are present, but whether they flow from a discrete act that injured the competitive process. Not everyone seems to agree with—or appreciate—that proposition, however.

In short, we do not yet agree on what precisely it is that antitrust protects. And without agreeing on that, we cannot always define what competition law prohibits. Of course, for certain forms of conduct, there is widespread agreement. That we should challenge naked, horizontal cartels and mergers to monopoly is a widely accepted truth. And in many cases we agree on a broad swathe of enforcement principles. But we part company in answering difficult questions at the margin, often because we still debate the very goal of antitrust.

Continuing disagreement takes the form of proclaimed adherence to various antitrust philosophies. The Harvard, Chicago, post-Chicago, neo-Chicago, and (the latest addition) Behavioral Schools claim their respective share of followers.<sup>22</sup> To a degree, those overlapping schools turn on distinct methodological approaches, differing views on the efficacy of market self-correction, the capacity of courts and agencies to err, and the relative roles for neoclassical economics, game theory, empiricism, and cognitive psychology in teasing out cause and effect. But those schools also turn on the particular goals that antitrust enforcement should pursue.

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<sup>22</sup> See, e.g., Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911 (2009); Avishalom Tor, *Understanding Behavioral Antitrust*, 92 TEX. L. REV. 573 (2014).



Where does this leave us? Absent consensus on which precise goals that competition enforcement should serve, it is unclear whether E.U. and U.S. agencies and courts always ask the same questions. To talk of divergence when E.U. and U.S. authorities reach inconsistent rulings is thus to skip a step. The problem may be more fundamental than economic analysis or interpretation of facts. It may go to the definition of the antitrust mission.

B. *Should We Ask the Same Questions?*

So, E.U. and U.S. competition laws sometimes pursue distinct goals. Is there room for convergence here? The answer turns on why different objectives exist and whether they are susceptible to rapprochement through debate.

Europe's competition regime emerged as part of a larger socioeconomic movement whose aim was political. In integrating the economies of the original six Member States in 1957, and the—for now—twenty-eight states today, the European project seeks an “ever closer union” through economic ties. From the outset, E.U. competition law has promoted Member State integration. At times, that goal is in tension with economics, which promotes consumer welfare through static- and dynamic-efficiency gains.

The clearest example of this phenomenon lies in the law governing vertical restraints. In *Consten & Grundig*, the European Court of Justice famously refused to entertain economic justifications for giving a trademark-licensee exclusive selling rights in France.<sup>23</sup> The court could not accept the contractual impediment to cross-Member State trade. E.U. competition law thus takes a harder line against certain vertical restraints. Whether one thinks that law wise or not, distinct policy goals explain the different approaches.

Unique policy objectives also underlie the most serious area of divergence between U.S. and E.U. law: unilateral conduct. Here, the gap between our jurisdictions becomes more

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<sup>23</sup> Case C-56/64, *Consten & Grundig v. Comm'n*, 1996 E.C.R. 19, 357.

pronounced.<sup>24</sup> There is one respect in which the U.S. regime is the more demanding. It proscribes monopolization, while E.U. law does not.<sup>25</sup> Otherwise, E.U. competition law is quicker to find an undertaking dominant, prohibits conduct that U.S. law would not, and arguably imposes more draconian remedies. There may be some systemic reasons for this divergence, some of which flow from the basic goals of competition enforcement.

Europeans tend to view dominant firms suspiciously. The state has long played a bigger role in industrial policy in Europe than in America.

Historically, in naturally monopolistic markets involving utilities and common carriers, the U.S. granted one private firm a certificate of public convenience and necessity. Federal or state government would then regulate the entity's pricing through rate-of-return and later price-cap regulation. Sometimes that occurred in Europe, but there the more general practice was to fulfil public demand through state-owned enterprises. Following large-scale privatization in the 1980s and beyond, dominant firms emerged throughout Europe that did not attain their monopolistic positions by superior innovation, but by mere inheritance.

There sometimes seems to be less trust in the curative powers of free-market forces generally in Europe. However, the European Commission deserves credit for its on-going efforts to promote competition, including in markets where Member State governments do not share its enthusiasm. Nevertheless, a less sanguine view on the power of markets and competition, combined with skepticism of dominant undertakings, results in a strict enforcement regime under Article 102.

In that respect, a perhaps-unspoken goal of Article 102 enforcement is to rid markets of unfair conduct by powerful undertakings. I suspect that that objective holds true even in cases

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<sup>24</sup> See, e.g., Josef Drexler, *Real Knowledge Is to Know the Extent of One's Own Ignorance: On the Consumer Harm Approach in Innovation-Related Competition Cases*, 76 ANTITRUST L.J. 677, 678 (2010).

<sup>25</sup> Compare 15 U.S.C. § 2 with Art. 102 TFEU.

where the objectionable business practice has a tenuous impact on the competitive process itself. We can see this phenomenon in the language of Article 102 itself, condemning the “abuse” of a dominant position, and in the case law. In Europe, dominant firms have “a special responsibility not to distort competition.”<sup>26</sup> The idea of distortion extends further than the closest parallel in U.S. law, which is the prohibition of actual and attempted monopolization.

U.S. law envisions a Darwinian process of competition. It is perfectly lawful for a monopolist to eliminate its rivals by competing on the merits. As Judge Easterbrook has observed, “antitrust law and bankruptcy law go hand in hand.”<sup>27</sup> Europe appears to be less keen on this point, perhaps asking whether one can have fierce competition with fewer rivals. E.U. competition law may seek to guard competitors to promote its ordoliberal vision of a competitive market. That is, the goal may not be to protect competitors as an end in itself, but in furtherance of the supposition that more rivals mean more competition. In that respect, the objectives of U.S. and E.U. antitrust law again part company.

### C. *What Room for Debate?*

This creates a quandary for commentators, including me. What works for one jurisdiction will not always be optimal for another. Countries have different economies, histories, and values. Nevertheless, there is room for robust debate on which values we should promote within modern antitrust policy.

It is fair to question the enforcement of competition laws against conduct that has an attenuated effect on the competitive process. And this is all the more so if we can agree, if only at a general level, that antitrust enforcement should only target dominant-firm conduct that harms the competitive process. At the margin, perhaps the E.U. and U.S. antitrust regimes will differ in

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<sup>26</sup> See Case 322/81, *Michelin v. Comm'n*, 1983 E.C.R. 3461, ¶ 57.

<sup>27</sup> Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL'Y 439, 440 (2008).

what “harm to competition” means. For that reason, we should not expect perfect convergence in the treatment of unilateral conduct. But there are cases where analysis may suggest a better way.

I pause here to emphasize an important point. Some have a false impression that the U.S. approach to unilateral conduct means “no enforcement.” To some ears, when U.S. enforcers counsel economics and effects-based analysis, they are saying all enforcement is bad. Europeans may reject U.S. values in policing dominant-firm conduct if they believe that Americans celebrate monopoly.

But that is not correct. The U.S. agencies do challenge anticompetitive conduct by dominant firms. Certainly, we require strong evidence of anticompetitive effects to guard against the risk of false positives, but that does not mean denial. There are many examples, and I offer some of them in the hope that we can see common ground in the objectives of antitrust intervention, even in the area of unilateral conduct.

In 2014 in *McWane*, the FTC found that exclusive dealing by a near-monopolist was unlawful.<sup>28</sup> I voted in favor of that case, which the FTC ultimately won.<sup>29</sup> Last March, in *Endo*, the Commission unanimously found reason to believe that a pharmaceutical company had unlawfully monopolized drug markets.<sup>30</sup> The FTC has challenged alleged monopolization in

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<sup>28</sup> *In re* *McWane, Inc. & Star Pipe Prod., Ltd.*, FTC Dkt. No. 9351, Opinion of the Comm’n, Jan. 30, 2014, [https://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion\\_0.pdf](https://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion_0.pdf).

<sup>29</sup> Earlier this year when the Supreme Court declined to hear *McWane*’s appeal. *McWane, Inc. v. Fed. Trade Comm’n*, 783 F.3d 814 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1452 (2016).

<sup>30</sup> Press Release, FTC Sues *Endo Pharmaceuticals Inc. and Others for Illegally Blocking Lower-Cost Generic Versions of the Branded Drugs Opana ER and Lidoderm*, Mar. 31, 2016, <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-sues-endo-pharmaceuticals-inc-others-illegally-blocking-lower>; *accord In re* *Endo Pharma, Inc.*, FTC File No. 141-0004, Dissenting Statement of Commissioner Maureen K. Ohlhausen, Mar. 31, 2016 (“I have reason to believe that the Defendants violated Section 5 of the FTC Act by entering into pay for delay agreements. I do not believe, however, that it serves the public interest to seek disgorgement in this case. The better course would be to pursue this matter administratively. The Part III process grants the Commission a unique tool to advance the law. Employing it here would allow the Commission to render a thoughtful decision applying the *Actavis* standard, providing much-needed guidance to courts and firms around the country.” [https://www.ftc.gov/system/files/documents/public\\_statements/942513/160331endostatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/942513/160331endostatement.pdf)).

other recent cases.<sup>31</sup> More generally, and although I cannot discuss any ongoing investigations, I can represent that the FTC actively investigates credible allegations of exclusionary behavior by dominant firms.

The FTC is not alone in these efforts. In 2005, the Justice Department succeeded in its monopolization case against Dentsply, which refused to supply its dealers if they carried rivals' goods.<sup>32</sup> That case is particularly notable because its prosecution crossed over from a Democratic to a Republican administration. And, of course, the DOJ has undertaken major monopolization actions in the past against companies like Microsoft and AT&T.<sup>33</sup>

### **III. Conclusion**

In conclusion, E.U. and U.S. antitrust enforcers grapple with the same difficult issues. It is natural to suppose that a single right answer always exists. Under that view, divergence betrays an error—at least on one side—and convergence is a useful barometer by which to measure progress.

But divorced from its root cause, divergence or convergence may carry little standalone meaning. A disagreement may reflect inconsistent methodologies or something more fundamental, such as a different policy objective. To draw the right conclusion, one must ask the right question. And here there is room for debate and informed discussion. If we can settle on common goals, then we will make real progress. Of course, to be realistic total uniformity seems unlikely.

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<sup>31</sup> See, e.g., *In re Victrex plc*, FTC Dkt. No. 141-0042, Statement of the Fed. Trade Comm'n, July 13, 2016, <https://www.ftc.gov/public-statements/2016/07/statement-federal-trade-commission-matter-victrex-plc>.

<sup>32</sup> See *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005).

<sup>33</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam); *United States v. Am. Tel. & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982).

But there is clearly some progress that we can make. When one jurisdiction does not fully understand the other, the result may be less convergence. Thus, it is vital that we discuss our common goals, as well as our differences, in fora such as tomorrow's conference. Thank you.