Why US Antitrust Law Should Not Emulate European Competition Policy

Oral Testimony of

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On

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Oral Testimony

Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee: Thank you for giving me the opportunity to testify before you today.

The urge to treat antitrust as a legal Swiss Army knife capable of correcting all manner of economic and social ills is difficult to resist. Conflating size with market power, and market power with political power, recent calls for regulation of large businesses are often framed in antitrust terms — even though they are rarely rooted in cognizable legal claims or sound economic analysis.

But this strong attraction to a powerful regulatory tool is precisely why we *should* care about the scope, process, and economics of antitrust and its politicization.

For the last 50 years or so US law has developed a position of relative restraint in the face of novel, ambiguous conduct, while the EU tends to read uncertainty as the outward expression of a lurking threat.

In spite of — or perhaps because of — this, many assert that the US should emulate the EU in its approach to competition policy.

Today I would like to call your attention to four themes that define the key areas where the two regimes diverge, and where the EU approach is less likely to serve consumer interests.

First, the EU tends to address antitrust issues within a "precautionary principle" framework, where the US takes an error-cost approach.

Differentiating pro- from anticompetitive conduct has always been the central difficulty of antitrust. When the very same conduct can either benefit or harm consumers depending on complex and often-unknowable circumstances, the cost of *over*-enforcement is at least as substantial as the cost of *under*-enforcement.

The US Supreme Court has repeatedly recognized that "false positive" errors might be greater than those attributable to "false negatives" because "the economic system corrects monopoly more readily than it corrects judicial errors."

The EU's "precautionary principle" approach is the antithesis of this. It is rooted in a belief that markets are unlikely to function well in general, and certainly not sufficiently to self-correct in the face of monopolization.

Now, no one believes that markets are perfect, or that antitrust enforcement can never be appropriate. The question is the marginal, comparative one:

Given the limits of knowledge, and the errors it can lead to, are we better off with a more discretionary regime or one in which enforcement is limited to causes of action we're fairly certain will serve consumer interests?

This is a question about changes at the margin, but it is far from marginal in its significance.

Second, and related, EU antitrust rests heavily on presumptions of harm where US courts require plaintiffs to demonstrate that complained-of conduct actually has anticompetitive effects.

The US approach is consistent with the learnings from modern economics, which near-universally counsel against presuming competitive harm on the basis of industry structure, and in favor of presuming benefit from vertical conduct. The EU approach often disregards these findings, and presumes the contrary.

Even the EU's highest court has finally recognized the paucity of the Commission's analysis in this area in its recent *Intel* decision. But because judicial review of antitrust decisions in the EU is so attenuated, it's not clear if the High Court's admonition will actually affect the Commission.

Third, The EU penalizes the *existence* of monopolies, where the US prohibits only the *extension* of monopoly power.

US monopolization law prohibits only predatory or exclusionary conduct that results in harm to consumers. The EU, by contrast, also regularly punishes the mere possession of monopoly power, even where lawfully obtained.

Indeed, the EU even goes so far as to target companies that may lack monopoly power but merely possess an innovative and successful business model. For example, in actions involving companies ranging from soda manufacturers to digital platforms, the EU has required essential facilities-style access to companies' private property for less successful rivals.

Fourth, and crucially, competition policy in the EU is purposefully subject to politicization, while political, and non-economic aims are not a part of US law.

The European Commission is a policy-making body, charged with enacting the Commission President's agenda. As such, the goals of European competition enforcers are both diverse, and often *untethered from economic thinking*.

For example, under article 102, the EU's equivalent of Section 2 of the Sherman Act, firms can be liable for practices that are either "unfair," prejudice consumers, place trading

partners at a disadvantage, *or* impose obligations that depend on the behavior of other, non-contracting parties.

Not only are these broad categories sometimes mutually exclusive but many of these concepts are almost impossible to translate into economic thinking.

The result is that EU regulators can readily pursue cases that best fit within a political agenda, rather than focusing on the limited practices that are most injurious to consumers.

Conclusion

Endorsing the European approach to antitrust in order to justify high-profile cases against large Internet platforms would prioritize political expediency over the rule of law and consumer well being.

The risk of an EU-like approach is that it will end up thwarting technological evolution and enshrining mediocrity in the digital economy, where innovative practices with positive welfare effects — such as building efficient networks or improving products and services as technology and consumer preferences evolve — can be easily demagogued, especially by inefficient firms looking for a regulatory leg-up.

While advocates for a more European approach to antitrust assert that their proposals would improve economic conditions in the US, economic logic and the evidence suggest otherwise, especially in technology markets.

GDP per capita has long been larger in the US than in Europe, and the gap is growing, not shrinking. Tech industry venture funding is significantly greater in the US, and, again, the gap is widening.

Although innumerable factors contribute to these trends, and antitrust policy probably plays only a small part, these sorts of numbers should at the very least dispel the myth that reforming antitrust law would somehow alleviate all of the ills that allegedly dog the American economy.

Once antitrust is expanded beyond its economic constraints and imbued with political content, it ceases to be a uniquely valuable tool for addressing real economic harms to consumers, and becomes a tool for routing around legislative and judicial constraints - hardly the promotion of democratic ideals that proponents of a more EU-like regime claim to want.

I urge this subcommittee to consider not just whether the EU approach seems to permit the government to reach a preconceived outcome — i.e., placing large tech platforms under increased antitrust scrutiny — but whether it is truly desirable to emulate the EU's approach.