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MONOPOLIZATION STANDARDS IN US COMPETITION LAW: EVOLUTION AND EVALUATION

The aim of this article is to provide a short overview and analysis of the US antitrust law. Section 2 of the Sherman Act stipulates that it is unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. The article presents case law that reflects the evolution of monopolization standards and provides some interpretations of undertakings' behavior that can be defined as monopolization. US practice shows that monopolization standards have changed several times, in accordance with the need to increasingly consider economic efficiencies and the consequences of making wrong decisions, which may lead to reduced innovation and other behaviors of undertakings that increase economic efficiency and improve competition, which is a type I error.

Key words: *Monopolization. – Antitrust law. – Sherman Act. – Competition law. – Abuse of dominance.*

1. INTRODUCTION

One of the major differences between competition law in United States of America (US) and European Union (EU), that is highlighted in the literature when conducting comparative analysis, is that there is no prohibition of abuse of a dominant position in US antitrust law. US law does not recognize the legal concept of abuse of dominance (the so-called

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second pillar of the EU competition policy), but rather stipulates that undertakings will be punished for market *monopolization* or *attempted monopolization*. However, both legal institutes were introduced for the same purpose: to prohibit single-firm conduct (unilateral behavior) by undertakings that have a dominant position, i.e. that have significant market (monopoly) power and can undermine competition in the market.[1]

The prohibition of monopolization was introduced into US antitrust law as early as 1890, with the adoption of the Sherman Antitrust Act. Section 2 of the Sherman Act stipulates that it is unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. Attempted monopolization is regarded as the use of improper business strategies to attain monopoly position and monopolization as the use of such strategies to attain or maintain a monopoly, or to extend it still further, which means that the improper strategies are prohibited even when the accused undertaking is not the only market participant, i.e. when the undertaking does not have 100 per cent market share (Canoy, Rey, van Damme 2004, 254).

Monopolization is not regulated by special rules, so the interpretation of this prohibition is left to the courts, which have, for many years, by implementing the widely laid down Section 2 of the Sherman Act, built practice in the application of monopolization standards. The standards have changed over time, without the adoption of any guidance for their implementation, so the question of their interpretation has often been raised in practice, especially because the Sherman Act did not specify what is implied under the term "market monopolization".

This paper presents case law that reflects the evolution of monopolization standards and provides some interpretations of undertakings' behavior that can be defined as monopolization. US practice shows that monopolization standards have changed several times, in accordance with the need to increasingly consider economic efficiencies and the consequences of making wrong decisions, which may lead to reduced innovation and other behaviors of undertakings that increase economic efficiency and improve competition, which is a *type I error*.

After the adoption of the Sherman Act, the *(specific) intent test* was implemented until 1945, but following *Alcoa* in 1945,[2] the courts started to implement the *balancing test*, rejecting the specific intent test.[3] The

[1] Market power is defined as the ability of an undertaking to raise prices above the competitive level, i.e. to set prices above marginal cost (Landes, Posner 1981, 937 and 939; Motta 2009, 41).

[2] *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

[3] The literature on monopolization standards still points out that specific intent approach has re-emerged, especially since 1975, when the predatory pricing cases began

main difference between these two approaches is that the intent test is applied to demonstrate that the intention of dominant undertaking is only to destroy competition, whereas the balancing test is based on assessment of the effects of that undertaking's behavior on competition, i.e. on balancing the negative and positive effects of such behavior (Hylton 2010, 82).

It is indisputable that an undertaking cannot be punished only because of its monopoly position on the market, and such a definition of monopolization is not applicable. In particular, this means that the undertaking with the highest or high market share cannot be accused of monopolization simply because of this. The mere monopoly position is not unlawful *per se* and cannot be regarded as an abuse or a breach of the antitrust rules.

Only *certain behaviors* of undertakings acquiring or attempting to acquire a monopoly position are prohibited, i.e. to monopolize the market, for example, by destroying competitors.[4] Therefore, the violation of the Sherman Act is monopolization – not the existence of the monopoly itself. This interpretation was confirmed in *Standard Oil*, where the Supreme Court of the United States unambiguously determined that the purpose of Section 2 of the Sherman Act is not the direct prohibition of monopoly.[5] Judicial practice early confirmed that "normal" or "ordinary" conduct does not offend the Sherman Act, even if such conduct leads to or protects a monopoly (Meese 2005, 744). The courts also held that "the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices [i.e. prices above marginal costs] at least for a short period is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct* [emphasis in original]."[6]

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to develop after the publication of an academic paper on predatory pricing. It is paper by Phillip Areeda and Donald F. Turner: "Predatory Pricing and Related Practices under Section 2 of the Sherman Act", *Harvard Law Review* 4/1975, 697–733 (Hylton 2010, 87).

[4] As in the US, under EU law, an undertaking cannot be punished because of its dominant position but only if it *abuses* that position.

[5] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62 (1911). Likewise, under Article 102 of the Treaty on the Functioning of the European Union (TFEU), it is not illegal or prohibited to hold a dominant position. However, abuse of a dominant position is prohibited.

[6] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 124 S.Ct. 872, 879 (2004).

2. EVOLUTION OF MONOPOLIZATION STANDARDS

2.1. Standard Oil Company of New Jersey v. United States

In *Standard Oil*, the oil company Standard Oil was accused for monopolization and the Supreme Court ruled that the company was liable due to the excluding of competitors from the market through predatory pricing. The company had a 90% market share, so the question raised in the proceedings was not whether the company had attained a monopoly position and the corresponding market power, nor whether the similar position was achieved, for example, in a price war, but rather whether such practice can be established as a behavior that hinders competition. Thus, the court required a finding of specific intent to monopolize, which could be reasonably assumed based on conduct that cannot be justified on the basis of legitimate competitive goals, conduct that can be understood only as an effort to destroy competition (Hylton 2010, 84–85).

The question raised before the Court whether the activities of the *Standard Oil* company were illegal *per se* or only deemed illegal if viewed as unreasonable or undue – led to the Court's position that Section 2 of the Sherman Act prohibits only unreasonable restraint of trade, conductive to creating monopolies.[7] The Court believed that the Act only prohibits the abuse of monopoly power or its unduly influence,[8] leading to the ruling in *Standard Oil* to be known in literature as the *theory of abuse* and the adoption of *abuse* as a standard of monopolization (Hylton 2010, 84; Hylton 2003, 187).[9]

The implementation of this standard requires a finding of a specific intent to monopolize, which implies an objective fact-based investigation to infer a conclusion on the conduct of the undertakings concerned.[10] This means that the standard of abuse is comprised of two elements: establishing the *conduct*, and establishing the specific *intent to monopolize*, which is

[7] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62.

[8] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 61. Similar arguments are also given in *United States v. American Tobacco Co.*, 221 U.S. 106, 177–81 (1911). See Meese 2005, 750–753.

[9] For the criticism of the *Standard Oil* case, see McGee 1958.

[10] The specific intent to monopolize should not be equated to the subjective intent, which is used in other areas of law and which requires evidence of the defendant's actual state of mind. Instead of directly ascertaining the defendant's minds (subjective intent), the objective approach analyzes the state of mind that can be reasonably attributed to the defendant's conduct (Cass, Hylton 2001, 659). For similar, see Meese 2005, 753–756. This is the manner in which the evidence on the undertaking's monopolistic intent to destroy competition and create a monopoly is sought, either as direct evidence (e.g. in the form of company documents) or indirect evidence (e.g. business strategies that are only rational as part of a plan to eliminate competition) (Canoy, Rey, van Damme 2004, 259). For more about intent in US antitrust law, see Cass, Hylton 2001, 657–745.

based on the intent to exclude competitors, without any credible efficiency justifications for the defendant's conduct (Hylton 2003, 187).[11] Courts actually determine whether the undertakings' conduct is based on a credible increase in economic efficiency or improvement of competition, and if so, the undertaking concerned should not be found liable of unlawful monopolization (Hylton 2010, 85).

The standard established in *Standard Oil* is confirmed in *United States v. United States Steel Corp.*, in which company U.S. Steel was found not liable for monopolization. Although the U.S. Steel company was the largest market player, controlling 80 to 95 percent of domestic production, the Court deemed the fact insufficient to establish the infringement of competition since the Act does not punish undertakings for their size in itself.[12] U.S. Steel was not applying aggressive techniques to foreclose rivals in the market, but its growth resulted from the economies created by vertical integration and specialization within subsidiary units.[13]

2.2. United States v. Alcoa

The ruling in *Alcoa* found that it is not necessary to prove the specific intent to monopolize in each individual case since "no monopolist monopolizes unconscious of what he is doing."[14] With this, the practical use of the hitherto applicable intent test was altered. The *Alcoa* company was accused of monopolizing the aluminum market under Section 2 of the Sherman Antitrust Act, as it was held that the company's intent was to maintain the market monopoly through its conduct. Although the Court believed that the *Alcoa* company had violated the Act, it nonetheless rejected the claims that it was necessary to establish the intent to monopolize (Hylton 2003, 190–193; Meese 2005, 796).

The Court held that the violation of the Act must be established by balancing the procompetitive and anticompetitive effects of the defendant's conduct. The defendant's behavior needs to be justified by a substantial efficiency for its conduct (i.e. credible efficiency justification) that simultaneously neutralizes the negative effects of the conduct on competition (Hylton 2010, 85), while – in order to establish monopolization

[11] The Court found that it can be assumed that the intent to monopolize and preserve market dominance exists if the defendant's conduct is not a result of normal methods of industrial development, but different new methods with the purpose of excluding competitors from the trade. See *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 75.

[12] See *United States v. United States Steel Corp.*, 251 U.S. 417, 450–451 (1920). The Court said that the "law does not make mere size an offense" (*Ibid.*, 451).

[13] *Ibid.*, 442–445.

[14] *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (1945).

– it is necessary to demonstrate the existence of monopoly power, as well as that the effects of the distorted competition caused by the defendant's conduct outweigh the consumer benefits and efficiency gains (Cass, Hylton 2001, 672). Underlining the existence of monopoly power, as a condition for monopolization, does not imply that monopoly power must exist *ex ante*, i.e. before the potential or actual monopolist engaged in alleged anticompetitive conduct. It is necessary that obtaining or maintaining monopoly power is an *ex post* result of such conduct, i.e. that it was gained only after the defendant had been engaged in improper business strategies. Therefore, the courts ask whether this monopoly power was acquired or maintained through improper conduct, i.e. whether these unreasonable methods resulted in monopoly.[15]

This practice was soon confirmed in *United States v. Griffith* since the Supreme Court held that the specific intent to monopolize does not have to be demonstrated.[16] However, it is maintained that only in the case of attempt to monopolize is it necessary to prove the existence of a specific intent – the intent to eliminate competition or build a monopoly.

2.3. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.

The *Alcoa* criteria were used decades later, for example in *Aspen Skiing*, in which the *Grinnell* criteria were also confirmed,[17] although today the majority of federal courts reject the views presented in *Alcoa*.

In *Aspen Skiing*, the Supreme Court held that the specific intent to monopolize cannot be equated to an intent to drive competitors from the market through legitimate means. The evidence of irrational business conduct (conduct not related to any apparent efficiency) can be taken as indirect evidence of a specific intent to monopolize.[18] This practice can be considered reasonable, seeing that the intent to eliminate competitors is in the very nature of competition, where only the fittest can survive, and that the goal of every (dominant) undertaking is to become a monopolist, i.e. a market leader. Based on the case law and literature, penalizing undertakings for their intent to do their best to be more efficient than their competitors (for example, by reducing prices), would turn into

[15] This is a difference between US and EU law, because in the EU only an already dominant firm can be liable of unlawful abuse of dominance, in accordance with the Article 102 TFEU. EU law prohibits abusive conduct only by companies that hold a dominant position *ex ante* in the relevant market.

[16] *United States v. Griffith*, 334 U.S. 100, 105–06 (1947).

[17] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n. 19, 603 (1985).

[18] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 609 n. 39 (1985).

the penalizing competition itself, i.e. penalizing the motive forces of competition.[19]

Aspen Skiing is also significant because of the Supreme Court held that the exclusionary conduct refers to a practice whose purpose is to exclude or restrict competition and which is not based on the increase of economic efficiency,[20] thus the conduct of a dominant undertaking that makes economic sense and increases economic efficiency (i.e. valid business reasons) cannot be regarded as behavior that falls within the scope of Section 2 of the Sherman Act. The Court explained that the question whether certain conduct may be properly characterized as exclusionary cannot be answered by simply considering the effects of such conduct on competitors, but it is relevant to consider the impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.[21] The Court also showed that an undertaking, even a monopolist, does not have an obligation to cooperate with its rivals, thus the case is considered one of the most important cases that establish the practice of providing options to undertakings to refuse cooperation with competitors.

2.4. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. and United States v. Microsoft Corp.

Brooke and *Microsoft* introduced a broader shift toward the specific intent formulation, considering that the courts focused on conduct when addressing intent. This new approach reflects modern jurisprudence, which generally rejects the criterion of anticompetitive intent and instead requires a heavier burden of proof of market effect (Werden 2006, 426). The courts were not concerned with subjective motivation but rather merely asked whether the conduct would be considered rational when assessed by objective criteria, such as unreasonable business methods or legitimate business justification. In *Brooke* it is stated that "even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."[22] In *Microsoft*, it is stated that in considering whether the defendant's conduct was

[19] See *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1339 (7th Cir. 1986); *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401–1402 (7th Cir. 1989); Werden 2006, 426, fn. 57; Kolasky 2002, 16.

[20] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). In its ruling, the Court supported its position by relying on academic papers on competition for sources and quotations, such as Robert Bork's *The Antitrust Paradox* (1978) and Phillip Areeda and Donald Turner's *Antitrust Law* (1978).

[21] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985).

[22] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).

exclusionary, for the purposes of Section 2 of the Sherman Act, the focus was on the effect of that conduct, not on the intent behind it.[23]

2.5. United States v. Grinnell Corp. and Verizon Communications Inc. v. Law Offices of Curtis V. Trinko

In *Grinnell*, the Supreme Court determined two cumulative conditions for monopolization, making very important progress in the implementation of Section 2 of the Sherman Act, given that all criteria (the so-called elements of monopolization) established in this case are also applicable today. The Court held that monopolization means a willful acquisition or maintenance of monopoly power by exclusionary practices of undertakings or illegal conduct directed at foreclosure of rivals from competition. Therefore, monopolization defined as such corresponds to conduct that in EU practice is regarded as exclusionary abuse of dominance.

The Court established that the monopolization consists of two elements: 1) the possession of monopoly power in the relevant market, and 2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[24]

The ruling was reaffirmed in *Trinko*, changing the evaluation of monopoly power. It particularly emphasized that the possession of monopoly power will not be found unlawful unless it is accompanied by elements of anticompetitive conduct.[25] Thus, monopoly power is a necessary element of monopolization, accompanied by exclusionary conduct, i.e. conduct that is not simply competition on the merits, and that would make no economic sense but for its tendency to eliminate competition (Werden 2006, 421).

3. EVALUATION OF MONOPOLIZATION STANDARDS

Today it is a well-established that obtaining or maintaining a monopoly is an antitrust violation only in cases when the potential or actual monopolist has engaged in exclusionary conduct. The courts examine whether companies have "monopoly power" in the relevant market as well as whether that position was gained or maintained through

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[23] *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc) (per curiam).

[24] *United States v. Grinnell Corp.,* 384 U.S. 563, 570–571 (1966).

[25] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407, 124 S.Ct. 872, 879 (2004).

improper conduct, i.e. through unreasonable methods. In order to evaluate the anticompetitive and procompetitive effects of the conduct, the courts must determine whether the conduct has a legitimate business justification.

It is not always easy to distinguish between conduct that should be allowed and conduct that should be prohibited, because the monopolization standards used to assess whether conduct is forbidden under US antitrust law are vague (Elhauge 2003, 255). The standards have changed over time, because they were not specified in the Sherman Act. The law offers the courts some general principles, but the courts ultimately explain and distinguish which conducts should be deemed undesirable or illegal. This is why the US courts play an important role in the implementation and interpretation of these standards and their evolution; they help the understanding of the general concept of monopolization and define precisely the standards. Still, it is clear that a company is allowed to hold or attempt to achieve monopoly, even by certain aggressive methods. This is because the essence of the US system is that honest, tough competition is never forbidden (Canoy, Rey, van Damme 2004, 259).

The US antitrust law is not regulatory but allows monopolists to exploit their monopoly position and exercise monopoly power vis-à-vis the consumers. For instance, such "monopolistic exploitation" is not allowed in EU competition law because exploitative abuse are considered anticompetitive conduct. In other words, in US law no attempt is made to address exploitative conducts because the US approach is aimed at preventing "monopolization" of markets; it is primarily focused on preventing companies achieving a monopoly or a dominant position, not on constraining monopolies in their conduct, which is what is reflected in EU competition law (Canoy, Rey, van Damme 2004, 259).

In the US it is believed that the law should not stand in the way of companies using regular means to maximize their profit by trying to become monopolist through improper methods to suppress competition on the merits. The law is not concerned with actual behavior once a monopoly has been established (Canoy, Rey, van Damme 2004, 223), because it protects the openness and competitive structure of the market where the competition process is responsible for determining price and output levels (Schweitzer 2008, 144). The US law does not control the exercise of monopoly power but only its acquisition or maintenance which, in contrast, seems to be proof of the regulatory approach embraced by EU competition law (Schweitzer 2008, 143). According to judicial practice in Europe, dominant companies have a "special responsibility" not to allow their conduct to impair genuine undistorted competition in the market, i.e. to not abuse their powerful market position by distorting competition. In Europe, dominant companies must ensure that competition is maintained by rivals, while in the US, large companies are entitled to

compete aggressively and to be freewheelingly focused on their own success as soon as they attain monopoly on their competitive merits.

This could be the reason why the US economy has changed in the last twenty years in terms of experiencing a growing concentration of economic power in large corporations. As a model of competition for the world and the land of free markets, the US has allowed the great expansion of firms and increase of market concentrations to such an extent that some authors even claim that it has been transformed into the land of market power (Philippon 2019). Due to the these changes, there is an idea that competition in the US has decreased because the industry leaders increased productivity, which in turn leads to their competitive advantage and the lack of competition (Philippon 2019). However, high concentration does not necessarily imply market power and negative effects on consumer welfare, nor should market concentration be confused with competition. A small shift towards more monopolistic structures (i.e. increased market concentration) – which is an inevitable consequence of market forces such as technological development, globalization, and economy of scale – does not necessarily mean a decrease in competition. The increase in market concentration is beneficial as there are more large firms and economy of scale occurs. This means that higher market concentration could be caused by increased as opposed to decreased competition, since competition is about incentives for the firm. Therefore, it should not be ruled out that the US still has a freer and more competitive economy than Europe.

This is the most important difference between the US and the EU approaches to monopolization, which could affect companies' incentives to innovate and invest. The EU competition law reaches more broadly to regulate abuses by a dominant firm, taking an interventionist approach, while the US courts have taken a relatively conservative approach toward monopolization, in the sense of showing reluctance to penalize a firm simply because of its monopoly status (Hylton 2005, 7). While the US courts are mainly concerned with preventing a market structure where anticompetitive practices are likely (with emphasis on the behavior of the monopolist), European competition authorities are more concerned with the status of the company, asking whether it is dominant or not. Additionally, dominance is easier to establish under EU competition rules than monopoly power under US antitrust law. The US law is demanding, passing down a hard burden after *Trinko*, as it is difficult to prove a monopolization violation (Fox 2014, 142). This means that monopolistic conduct prohibited by US law is likely to constitute an abuse of dominance under EU law, although not vice versa (Fox 2014, 150).

The EU underestimates the ability of markets to self-correct and it is concerned more with avoiding type II (false negative) errors, while the

US approach believes that efficiency drives companies' choices and it tends to put more emphasis on reducing type I (false positive) errors in order not to chill competition (Kolasky 2004, 42). Such error-cost analysis provides justification for the US approach because too much intervention runs the risk of destroying competition in the name of saving it. Therefore, competition law should not intervene where the markets tend to be self-correcting and where the competition can restore or create competitive conditions. This is why antitrust intervention that may chill or stop efficient transactions far costlier than allowing harmful transactions to proceed and relying on the market to correct the problem (Fox 2008, 72).

It is often said that US antitrust law protects competition and does not protect competitors from hard or rough competition, from unfair, even fraudulent, competition; it protects consumer welfare by not intervening in the marketplace (Fox 2008, 69, 70). The basic concept of the US antitrust law is that prices should be controlled by the free market because if the firm prices at monopoly levels, the high price itself may invite new entry and expanded competition, and market forces would gradually wear away the monopoly power (Fox 1986, 993). Considering that "efficiency" is the watchword of the US antitrust law, it is understandable why the courts are prepared to apply the antitrust law only to improve efficiency (Fox 1986, 983).

Therefore, there is no need for expansive applications of antitrust law, which may reduce innovation. Therefore, the EU should not repeat the early US mistakes by protecting competitors instead of competition. EU competition policy should not be an obstacle to innovation and growth. This is why there are proposals for additionally improving and properly defining US monopolization standards, in order to assess whether the alleged exclusionary conduct is successful in furthering monopoly power solely by the monopolist improving its own efficiency or by impairing rival efficiency, regardless of whether it enhances monopolist efficiency (Elhauge 2003, 253).

REFERENCES

Areeda, Phillip, Donald F. Turner. 1975. Predatory Pricing and Related Practices under Section 2 of the Sherman Act. *Harvard Law Review* 4: 697–733.

Canoy, Marcel, Patrick Rey, Eric van Damme. 2004. Dominance and Monopolization. 210–289 in *The International Handbook of Competition*, edited by Manfred Neumann and Jürgen Weigand. Cheltenham/Northampton: Edward Elgar.

Cass, Ronald A, Keith N. Hylton. 2001. Antitrust Intent. *Southern California Law Review*. 74(3): 657–745.

Elhauge, Einer. 2003. Defining Better Monopolization Standards. *Stanford Law Review*. 56(2): 253–344.

Fox, Eleanor M. 1986. Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness. *Notre Dame Law Review* 61(5): 981–1020.

Fox, Eleanor M. 2008. Abuse of Dominance and Monopolisation: How to Protect Competition Without Protecting Competitors. 69–77 in *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, edited by Claus-Dieter Ehlermann, Mel Marquis. Oxford/Portland: Hart Publishing.

Fox, Eleanor M. 2014. Monopolization and Abuse of Dominance: Why Europe is Different. *The Antitrust Bulletin* 59(1): 129–152.

Hylton, Keith N. 2003. *Antitrust Law: Economic Theory and Common Law Evolution*. New York: Cambridge University Press.

Hylton, Keith N. 2005. Section 2 and Article 82: A Comparison of American and European Approaches to Monopolization Law. Boston University School of Law Working Paper No. 06–11. *https://ssrn.com/abstract=902655* (last visited 31 October 2020).

Hylton, Keith N. 2010. The Law and Economics of Monopolization Standards. 82–115 in *Antitrust Law and Economics*, edited by Keith N. Hylton. Cheltenham/Northampton: Edward Elgar.

Landes, William M, Richard A. Posner. 1981. Market Power in Antitrust Cases. *Harvard Law Review* 94(5): 937–996.

Kolasky, William J. 2002. What is Competition? U.S. Department of Justice, Antitrust Division. *https://www.justice.gov/atr/file/519761/download* (last visited 26 October 2020).

Kolasky, William J. 2004. What is Competition? A Comparison of U.S. and European Perspectives. *The Antitrust Bulletin* 49(1–2): 29–53.

McGee, John S. 1958. Predatory Price Cutting: The Standard Oil (N. J.) Case. *Journal of Law and Economics* 1: 137–169.

Meese, Alan J. 2005. Monopolization, Exclusion, and the Theory of the Firm. *Minnesota Law Review* 89(3): 743–847.

Motta, Massimo. [2003] 2009. *Competition Policy – Theory and Practice*. New York: Cambridge University Press. Reprint.

Philippon, Thomas. 2019. *The Great Reversal: How America Gave Up on Free Market*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press.

Schweitzer, Heike. 2008. The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC. 119–164 in *European Competition Law Annual 2007: A Reformed Approach to*

Article 82 EC, edited by Claus-Dieter Ehlermann, Mel Marquis. Oxford/Portland: Hart Publishing.

Werden, Gregory J. 2006. Identifying Exclusionary Conduct under Section 2: The "No Economic Sense" Test. *Antitrust Law Journal* 73(2): 413–433.

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