

COMPETITION LAW AND POLICY: LESSONS FROM THE WORLD

ELEANOR FOX

PROFESSOR EMERITA, NEW YORK UNIVERSITY SCHOOL OF LAW

FOR FEDERAL COMPETITION AND CONSUMER PROTECTION COMMISSION,
NIGERIA, NOVEMBER 2022

BACKGROUND AND COVERAGE - I

- Competition law has a strong, stable inner core, e.g., cartels and mergers, but --
- Some **basic issues are in play**
 - including What is *dominant power*? What does *anticompetitive* mean? When is *exclusionary* conduct anticompetitive? When is *exploitation* prohibited?
- **New issues and perspectives** are being debated
 - Are there *new forms of power*? **Big Tech** and its regulation
 - **Goals (economic/market)** – is **Consumer Welfare** too narrow?
 - **Social goals** – sustainability, inequality – should they be relevant, and with what limits?

BACKGROUND - 2

THREE APPROACHES TO COMPETITION LAW

WHAT IS FITTING FOR NIGERIA? AFRICA?

THE THREE COMPETING APPROACHES:

1) Conservative (e.g. US Supreme Court)

2) Progressive but considering only market values

- More aggressive; more likely to see power and its abuse
 - See EU competition law and the US progressive movement

3) Progressive incorporating public interest values: SMEs, workers, inclusiveness, fairness+

- South African competition law; US neo-Brandeis movement and Biden administration



OUTLINE

1. Context – competition law through the modern lens
2. Old issues -- selective current problems
3. New issues and perspectives
 - a. The Goals debate
 - b. Power and its abuse; public utilities, Big Tech, pharma, mergers
 - c. Integrating social issues – public interest

I. THROUGH THE MODERN LENS

The rise of:

- Economic concentration
- E-commerce: Big Tech, Big Data
- Global value chains
- Inequality; inflation – food, health care
- Climate threat to the planet
- Nationalism

Perfect Storm

II OLD ISSUES; SELECTIVE CURRENT PROBLEMS

Example: **Agreements** -

Cartels are illegal, but what is a cartel?

- 1 If it is a hard core cartel, is it per se illegal? (yes, in most jurisdictions) Any justification?
 - But is it a hard core cartel?
 - If it is not hard core, when to shift the **burden**? Do facts indicate a serious restraint?
 - Nigeria, South Africa, US, EU
- 3 Is there even an agreement? AI: “The robot did it.”

III. NEW ISSUES AND PERSPECTIVES

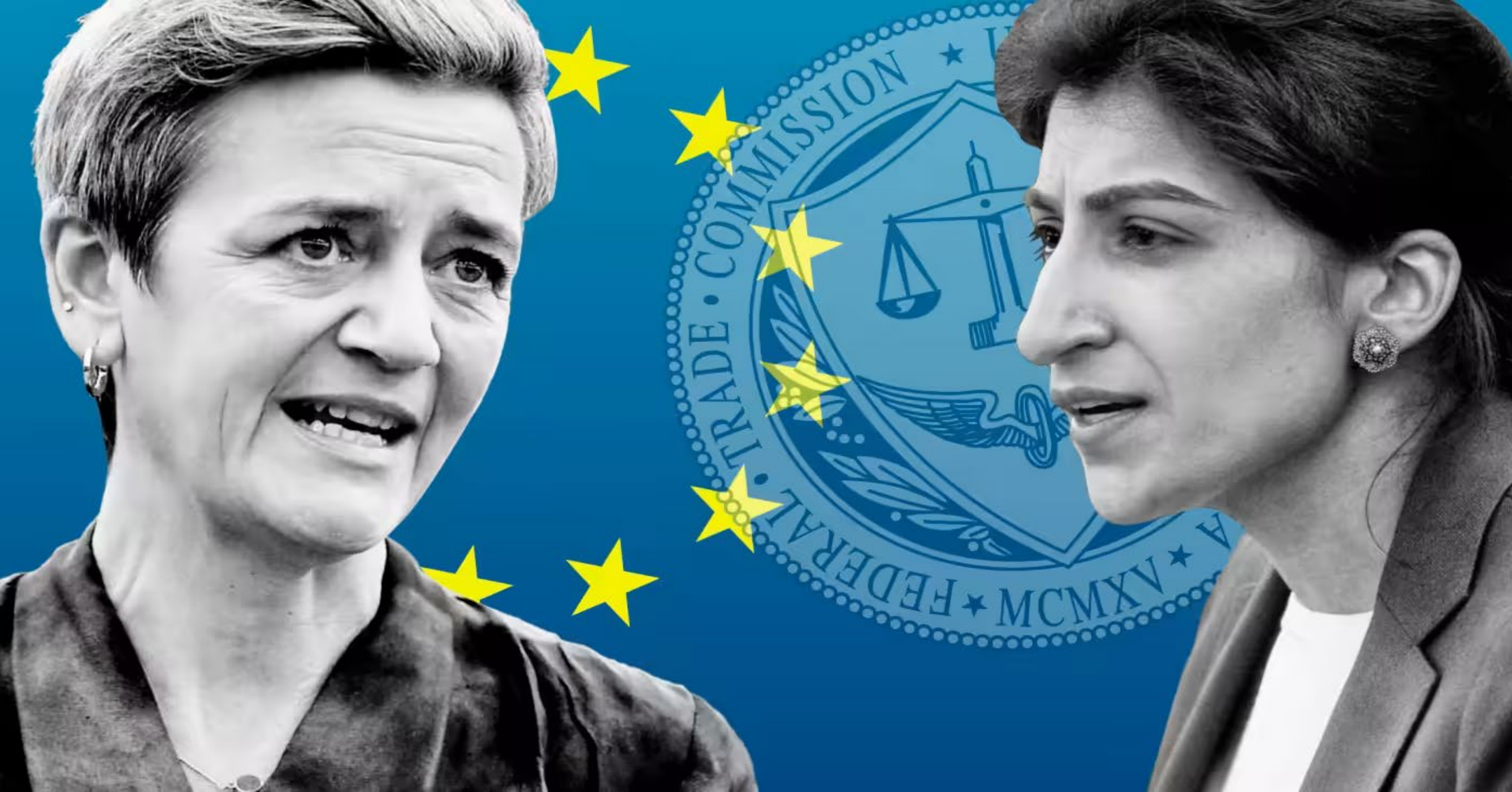
- **A. Foundational:** The goals debate
 - Is “consumer welfare” too narrow?
 - This is a huge debate

The conservative US Supreme Court versus the populace



So. Africa Minister Patel





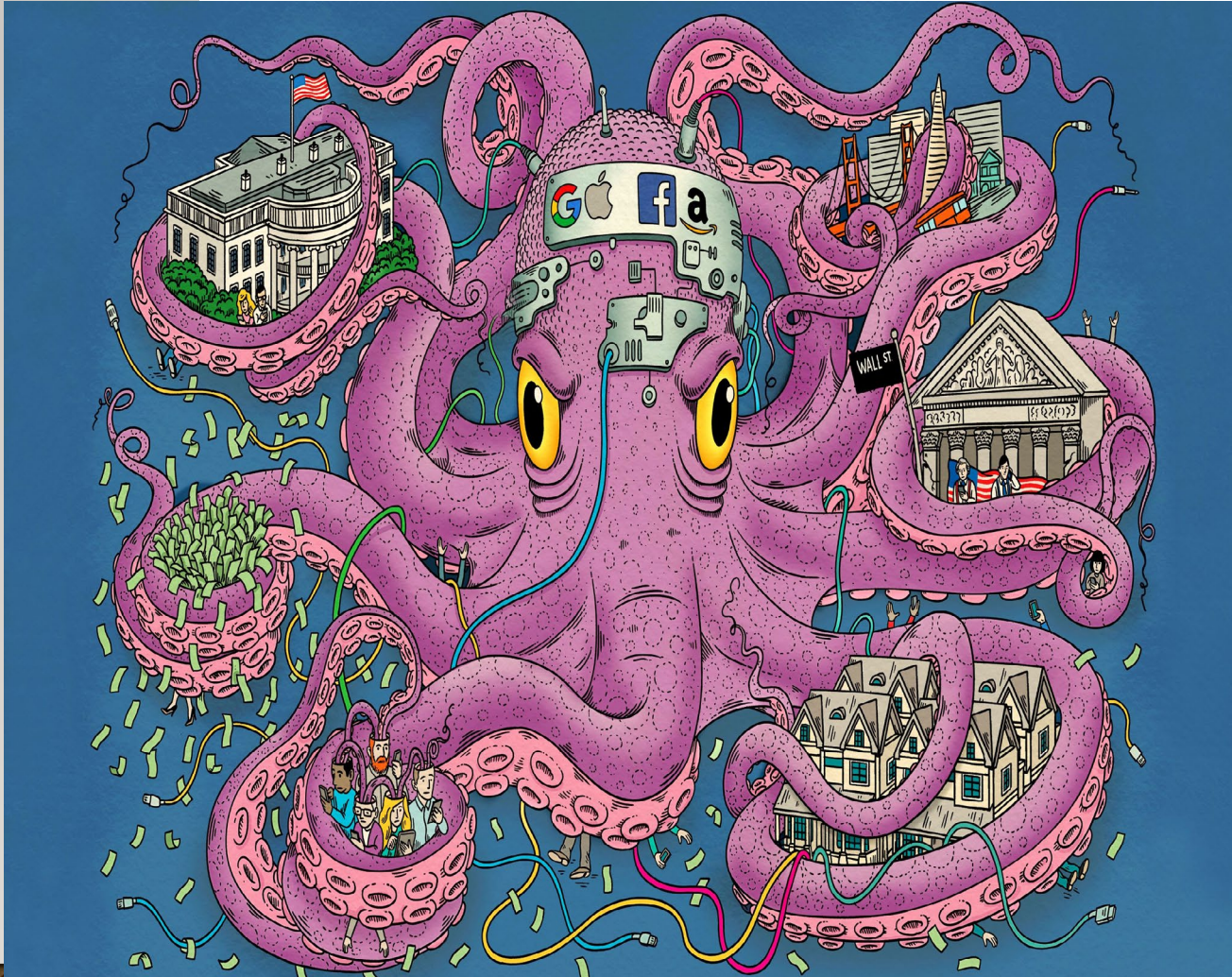
“We are now aligned”

III B POWER, ABUSE: TECH, PHARMA, MERGERS

- Proving sufficient **power** (monopoly, dominance) is the first necessary step to condemning unilateral conduct
 - Utilities, railroads
- Are there new forms of power? Big tech
- Are these firms monopolies?
 - Are they firms whose conduct the law should control?
 - Google Apple Facebook Amazon; Big Food, seed

BIG TECH/BIG DATA - HAS GALVANIZED ATTENTION AROUND THE WORLD

WHAT BIG TECH DOES AND WHY IT CHALLENGES BORDERS



- Abuses and exploitations
 - Of users like us
 - Our data, our privacy, our minds
 - Of business users who use their platforms
 - Gatekeepers: they host, squeeze, demote (Google Shopping)
 - Take their data and their best ideas (Facebook, Amazon)
 - Destroy them when they won't heel (Facebook/Vine)
 - Create bottlenecks and overcharge (Apple app store/Epic, Spotify)
- Build moats to keep competition out
 - Interoperability, portability of data
 - Buy up all start-ups that could grow into competitors - Killer acquisitions (Facebook-WhatsApp, Instagram)

TYPICAL CASE: EUROPEAN COMMISSION v. GOOGLE

EU GENERAL COURT FOUND A VIOLATION (2021)

DID GOOGLE HAVE **POWER**? A **DUTY** NOT TO PREFER ITSELF? **HARM** TO COMPETITION?

- Google has 95% of search; competes with rivals on its platform – e.g. maps
- Launched own comparative shopping app, Froogle
 - Foogle did poorly; changed name, set algorithm to prefer self, demoting better rivals
- Google's self-favouring found to abuse dominance; Google had undisputed ultradominant position, had special responsibility not to impair competition
 - Was akin to essential facility
 - This was an unjustified difference in treatment

CASE 2

SO.AFRICA: FACEBOOK THREATENS TO DROP GOVCHAT

GovChat is citizens' engagement platform
Has almost 9 million users, gives access to services
– process social security applications,
apply for distress support
Meta: GovChat refused to comply with our policies
It signed up organizations without going through
onboarding process
So African CompComm got interim relief



RESPONSES AROUND THE WORLD TO THE POWER AND ABUSES OF BIG TECH: IS ANTITRUST ENOUGH?

- *European Union*
 - **Digital Markets Act:** 18 obligations on big digital platforms for contestability and fairness
 - Big gatekeepers: may **not prefer own** products, may **not use competitors' data** to compete, must allow use of 3rd party apps, must give **fair nondiscriminatory treatment** to ranking, may **not keep customers from switching** platforms, must **allow data portability**, must give 3rd party search engines **access to gatekeepers' ranking, query, view and click data**.
 - *There is no efficiency defense.*

WORLD RESPONSES, CONT'D

- **Germany:** Art. 19A regulates firms of Paramount Significance Across Markets
 - **UK:** Digital Markets Unit- to designate firms with Strategic Market Status
 - **Australia** – interim report for Digital Platform Services Inquiry, recommending range of measures, Nov. 11, 2022; Media act to protect newspapers
 - **Nigeria, South Africa, Egypt, Kenya, Mauritius** – MOU to foster collaborative action against obstacles that limit emergence and expansion of African digital platforms, March 2022
 - **US** – cases – Google, Meta; FTC policy statement on Unfair Methods of Competition under Sec. 5 of Federal Trade Commission Act, Nov. 10, 2022
- 

OTHER INITIATIVES:

DOMINANCE: EXCESSIVE PRICING

ESPECIALLY A PROBLEM WITH PHARMACEUTICALS

- Pfizer debranded life-saving epilepsy drug Epanutin, taking it out of price regulation; raised prices about 2600% including to National Health Service. UK's CMA held: Illegal. Tribunal(CAT) reversed: CMA did not establish “economic value” and failed to take account of comparable products. Court affirmed. Remitted, more evidence, CMA again found abuse of dominance by unfair prices.
 - (Why was this so complicated? So expensive?)
- South African amendments now avoid the usual extremely high burdens

MERGER ISSUES IN THE SPOTLIGHT

- 1. Killer acquisitions and nascent competitors
 - Facebook acquired startups WhatsApp and Instagram
 - Meta wants to acquire VR fitness app Supernatural; Meta “could compete” with it
 - Did/do the acquisitions increase market power? Harm competition?
- 2. Industrial policy defense? Not yet in EU or US, but politicians want one
 - European Commission v. Siemens/Alstom -- fast railroads
 - Defendants argue:
 - Clear the merger or China will take over the market -- US: T-Mobile Sprint

III C. INTEGRATING SOCIAL ISSUES

- Workers and labor: covenants not to compete; gig workers
- Inequality
- Sustainability
- These issues are very much in the scholarship and debate today
- Is there an industrial policy defense?
 - Not now in US, EU, but politicians want one; EU Siemens/Alstom (fast trains);
 - Merging parties: clear the merger or China will take over the market – T-Mobile Sprint
- Many jurisdictions do not admit public interest issues in antitrust analysis
 - But many are considering labor markets; are exploring ways to take account of sustainability: Netherlands, Greece, Nigerian law objectives

IV. CONCLUSIONS ON RULES OF THUMB FOR ANALYSIS

- Despite divergences, competition analysis (without extra social values) is similar in different jurisdictions:
- *Look for:* Where is the market power? Does the conduct enhance the market power? Does it make goods scarcer and more expensive? Does it keep rivals from getting to market by conduct that does not help consumers?
 - If so it is a core, traditional restraint; most restraints are core and traditional
- *Contrariwise,* Does the conduct help consumers and help the market work better? If so, be cautious about prohibiting or burdening it.
- Much space in between: consider anticompetitive effects, procompetitive/efficiency benefits
- Social, unfairness values: Can cloud the analysis, but need not. Analyze “competition only” issues first

CONCLUSION

- THE FUTURE OF THE THREE APPROACHES: A COMMENT

