

The EU and US antitrust law provisions on unilateral conduct are often understood as remedying the competitive harm resulting from the exercise of significant market power. They only apply when firms hold dominance or monopoly positions. Nonetheless, this chapter explores existing laws and planned legislative proposals diverging from this premise. It highlights the different degrees and types of economic power embedded in the EU and US rules that limit the conduct of firms holding lower thresholds of market power, relative power (e.g., economic dependence, and unfair practices), or gatekeeper powers. The chapter exposes a gap between the notions of power and the theory of harm, challenging the dividing line between protection against harm to effective competition and harm to competitors. Accordingly, the chapter calls upon legislators and enforcers to align the notions of power with the harm and interests covered by the laws.

Keywords: abuse without dominance; monopolisation without monopoly; market power; relative power; gatekeepers; harm

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15. Abuse without dominance and monopolisation without monopoly

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I. INTRODUCTION

Antitrust law is said to be concerned with the harm caused by the use of market power.¹ Monopolies can create losses to society – such as inefficiencies, deadweight loss, wealth transfers, and lost investment incentives - which would not have occurred in the absence of significant market power.² Market power, therefore, creates ‘the potential for competitive harm’.³ Indeed, both the EU and the US antitrust provisions on unilateral conduct only apply when there is a significant degree of market power.⁴ The assumption is that, but for market power, the harmful effects of the practice could not have occurred.⁵ Thus, even though some EU case law has dismissed the need to prove causality between the existence of market power and the harmful conduct,⁶ the link between market power and harm to competition cannot truly be severed.⁷

Despite the importance of the notion of market power, there is no consensus as to the *degree and type* of economic power which translates into harm to competition:⁸ First, while

¹ Alan J. Meese, ‘Market Failure and Non-Standard Contracting: How the Ghost of Perfect Competition Still Haunts Antitrust’ (2005) 1(1) *Journal of Competition Law and Economics* 23; Robert O’Donoghue, and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (Hart Publishing, 2020), 3.

² Keith Cowling and Dennis C. Mueller, ‘The Social Costs of Monopoly Power’ (1978) 88(352) *The Economic Journal* 727; Chiara Fumagalli et al, *The Economics of Monopolisation and Abuse of Dominance* (CUP, 2018) 7-8 O’Donoghue and Padilla (n 1) 318.

³ George A. Hay, ‘Market Power in Antitrust’ (1992) 60(3) *Antitrust Law Journal* 808; See also Baker, citing *Indiana Federation of Dentists*: ‘market power is “but a surrogate for detrimental effects”’ (Jonathan Baker, ‘Competitive Price Discrimination: The Exercise of Market Power Without Anticompetitive Effects (Comment on Klein and Wiley)’ (2003) 70(3) *Antitrust Law Journal* 650).

⁴ As clear from the wording of the provisions themselves: abuse of *dominance* (Article 102 TFEU) and *monopolise* (Section 2 of the Sherman Act).

⁵ Robert O’Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (3rd ed 2020 Hart Publishing) 318; Fumagalli et al (n 2) 7-8; Louis Kaplow, ‘On the Relevance of Market Power’ (2017) 130(5) *Harvard Law Review* 1329.

⁶ Case C-6/72 *Europemballage Corp and Continental Can Co Inc v Commission* EU:C:1973:22, para 27; Case 85/76 *Hoffmann-La Roche & Co AG v Commission* EU:C:1979:36, para 91; Case C-457/10P *AstraZeneca AB and AstraZeneca plc v Commission* EU:C:2012:770, para 267.

⁷ Case C-333/94P *Tetra Pak International v Commission* ECLI:EU:C:1996:436, para 27; Case 27/76 *United Brands Continentaal BV v Commission* EU:C:1978:22, para 249.

⁸ See for an overview of the foundations of unilateral conduct laws in different jurisdictions and their relationship to market power: Katharine K. Kemp, *Misuse of Market Power: Rationale and Reform* (CUP, 2018) 32 and 39; Douglas Bernheim and Randal Heeb, ‘A Framework for the Economic Analysis of Exclusionary Conduct’ in Roger D Blair and D Daniel Sokol (eds), 2 *The Oxford Handbook of International Antitrust Economics* (OUP, 2014) 4.

many firms have some ability to influence the conditions under which a product is offered, it is not evident at which point market power is sufficiently ‘substantial’ to be capable of having an impact on competition that merits intervention.⁹ Second, it is unclear whether the EU and US antitrust prohibitions on unilateral conduct should apply where a firm only possesses *relative power* over the other economic actors active on a different (downstream or upstream) market. Relative power may be (ab)used to limit the opportunities of those actors, and thus their ability to profitably operate on their own markets. For example, a firm enjoying relative power may price its products above the competitive price range and jeopardise its customers’ profitability, knowing that all or some of its customers have no other alternatives. Yet, it is unclear whether and when such harm to the individual businesses’ interests should be classified as harmful to competition. This is by no means an automatic conclusion. The line between protecting competition and protecting competitors is a hard one to draw.¹⁰

Moreover, the *relationship between market power and competitive harm* is not straightforward. Equating market power with harm to competition does not only raise questions about what is meant by market power, but also what is meant by harm. The harm described in much of the modern antitrust literature reflects a very specific notion of competitive harm. What is protected is effective competition,¹¹ where effectiveness is measured by the degree of competitive constraint in the market and its potential for efficient outcomes. It is possible, however, to conceptualise the harm in a broader manner, focusing on the detriment of other firms’ participation in their markets, regardless of the extent to which they contribute to

⁹ Einer Elhauge, ‘Defining Better Monopolization Standards’ (2003) 56 *Stanford Law Review* 259, 330.

¹⁰ See Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economics Approaches* (Hart Publishing 2012) 134-144; Eleanor Fox, ‘Abuse of Dominance and Monopolization: How to Protect Competition Without Protecting Competitors’, in Isabella Atanasiu and Claus Dieter Ehlermann (eds) *European Competition Law Annual 2003: What Is an Abuse of a Dominant Position?* (Hart Publishing 2006), 69; Adrian Künzler, ‘Economics Content of Competition Law: The Point of Regulating Preferences’ in Daniel Zimmer (ed), *The Goals of Competition Law - ASCOLA* (Edward Elgar 2012) 208.

¹¹ For an interesting analysis on the meaning of competition in Article 102 TFEU, see Thomas Eilmansberger, ‘How To Distinguish Good from Bad Competition Under Article 82: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses’ (2005) 42(1) *Common Market Law Review* 129.

efficient market outcomes. There is no – or at most a fragile – consensus on the harm to be tackled through abuse of dominance and monopolisation provisions.¹²

This lack of clarity about the notion of market power and its link to theories of harm is evidenced not only by provisions falling formally within antitrust law, but also by the existence of provisions on unilateral conduct outside the narrow antitrust framework. Both EU and US laws have considered lower thresholds of market power, relative power, and provisions on gatekeepers as extensions to the antitrust rules on unilateral conduct. The extent to which these rules should be considered as competition law is not always clear and, most importantly, there is a distinct lack of clarity on the link between power and harm, and whether there is a dividing line between harm to effective competition and harm to competitors.

This chapter explores to what end the EU and US prohibitions on unilateral conduct apply or could apply to situations falling short of market power. In doing so, it makes two significant contributions. First, it is the first to comprehensively compare the EU and US approaches to abuse without dominance and monopolisation without monopoly. It analyses existing and proposed unilateral conduct rules in the two jurisdictions, found both in and outside of competition laws, which are based on lower market power thresholds, relative power, and gatekeeping power. Second, it shows that no evaluation of abuse without dominance or monopolisation without monopoly can be complete without querying what kind of harm the laws are meant to address. Nonetheless, the chapter shows that, in practice, there is a distinct lack of clarity on the link between market power and the theory of harm. As such, this chapter concludes by advancing that the degrees and types of power addressed by the provisions on unilateral conduct should correspond to the harm the EU and US laws intend to fight and interests they seek to protect. This is linked to the question on the objectives of competition law, which is related but distinct, and falls outside of the scope of this chapter.

¹² See, Eleanor Fox, ‘What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect’ (2002) 70 *Antitrust Law Journal* 371; Akman (n 10), 25, noting *inter alia* the following possible goals: ‘the maximisation of consumer welfare, economic efficiency, the dispersion of economic and political power, the unclogging of markets, the protection of easy entry into business and the protection of small businesses’ welfare’.

The remainder of this chapter is structured as follows: Section II focuses on EU law. After presenting the notion of abuse of dominance in its meaning under Article 102 TFEU, it discusses three situations in which EU law may apply to abuse without dominance: lower degrees of market power, national rules on relative power, and a new EU proposed legislation on gatekeepers. Section III shifts the focus to US law. It explores the limits of applying Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act to situations short of monopoly, and reviews proposals of extending antitrust law to include exploitation by firms with relative or gatekeeping power. Section IV concludes.

II. EU: ABUSE WITHOUT DOMINANCE

A. Abuse of dominance under Article 102 TFEU

Article 102 TFEU, the EU prohibition on the abuse of a dominant position, includes two substantive constituent elements: dominance and abusive conduct. Market power, thus, plays a dual role. Market power is essential for establishing dominance and underpins the theories of harm that justify calling conduct ‘abusive’. Article 102 TFEU is, thus, premised on the existence of market power which weakens the conditions for competition on the market. The abusive conduct itself ought to be understood by reference to the existing market power.¹³

Unlike US antitrust law, the concept of abuse in the EU competition law encompasses both *exploitative conduct*,¹⁴ in which a dominant firm uses its market power to impose on its trading partners conditions it could not impose in the absence of market power, and *exclusionary conduct*, by which a dominant firm prevents or hinders competition on the market. As a Commission official put it: ‘the [EU] Founding Fathers’ faith in competition as a process of rivalry between competitors was not strong enough to tolerate customer/consumer exploitation in the short run’.¹⁵ The theories of harm under Article 102 TFEU are notoriously

¹³ See *Hoffmann-La Roche* (n 6), para 91.

¹⁴ Accordingly, the imposition of ‘unfair’ prices and conditions is expressly listed as an abuse in Article 102(a) TFEU. In *Continental Can* (n 6), paras 20-27, the CoJ held that Commission could not validly pursue a policy of refusing to prosecute such cases.

¹⁵ Luc Gyselen, ‘Rebates: Competition on the Merits or Exclusionary Practice?’ in Claus-Dieter Ehlermann and Isabela Atanasiu (eds.) *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?*

varied,¹⁶ even if, since modernisation, the Commission expresses a focus on impairments of ‘effective competition’ with ‘an adverse impact on consumer welfare’.¹⁷

As elaborated below, the possibility to sanction abuse of market power which does not amount to a dominant position arises in three contexts in the EU: First, the Commission, EU Courts, and national competition authorities and courts were often criticised for finding that a firm holds a dominant position in the meaning of Article 102 TFEU even in situations where such firm held *a low degree of market power*. The Article had been applied to firms that did not hold substantial market power, particularly by finding dominance despite comparatively low market share. Second, EU law leaves some room for the parallel application of *national laws on relative power* (such as abuse of economic dependence or superior bargaining power). Those provisions regulate different types of economic powers, which might overlap or conflict with the provision of Article 102 TFEU. Third, a new EU initiative calls to regulate the operation of large online platforms. Such initiative views *gatekeepers* as a new type of market power, which differs from the traditional concept of dominance. Each of these alternatives will be discussed in turn, highlighting the uncertainty in the manner in which they reflect the relationship between market power and the competitive harm.

B. Abuse of dominance in cases of low degree of market power

As mentioned, Article 102 TFEU only applies to firms holding a dominant position. According to the Court of Justice (CoJ), such a position confers on the dominant firm ‘a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market’.¹⁸ The EU prohibition does not restrict conduct by a non-dominant firm that will allow the firm to achieve dominance or that causes harm to consumers.

(Bloomsbury Publishing, 2006), 290. Although Article 102 TFEU applies to both types of conduct, in practice, priority has been given to exclusionary conduct. See the Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C45/2 (Commission Article 102 TFEU Guidance), para 7.

¹⁶ Akman (n 12) 130.

¹⁷ Commission Article 102 TFEU Guidance, para 19.

¹⁸ Case 322/81 *Nederlandsche Banden Industrie Michelin v Commission* ECR 3461, para 57.

Despite the importance of the notion of dominance, it is neither defined in the EU Treaties and secondary laws nor does it correspond to solid economics literature. Rather, it was developed on a case-by-case basis to determine the point at which unilateral conduct becomes subject to scrutiny under Article 102 TFEU.¹⁹

In *United Brands*, the CoJ famously defined a dominant position as ‘a position of *economic strength* enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent *independently of its competitors, customers and ultimately of its consumers*’.²⁰ The reference to ‘appreciable extent’ is vital here, as no company is ever truly and completely independent: what matters is whether there is a lack of appreciable competitive constraint.²¹ The Court emphasised that such a position does not entail absolute market power (perfect monopoly) or preclude the existence of some competition. Rather, a firm will be deemed dominant when it has ‘an appreciable influence on the conditions under which that competition will develop’.²²

In establishing the required degree of market power, the EU Courts have often relied on market shares as a proxy. In *Hoffmann-La Roche*, for example, the CoJ held that although the importance of the market shares may vary from one market to another, ‘very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position’.²³ Later, the Court clarified that 50 per cent or more of the relevant market can be deemed as the ‘very high market share’ indicative of dominance, establishing the ‘*Akzo* threshold’.²⁴

The Commission and EU Courts have been criticised for finding dominance even when firms held only a comparatively low market share.²⁵ For example, they have found that a

¹⁹ Richard Whish and David Bailey, *Competition Law* (OUP, 2018), 187.

²⁰ Emphasis added. *United Brands* (n 7), para 65. Also see *Hoffmann-La Roche* (n 6), paras 38 and 91.

²¹ See Alison Jones et al, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (OUP 2019), 302.

²² *Ibid*, para 39.

²³ *Ibid*, para 4.

²⁴ C-62/86 *AKZO Chemie BV v Commission* EU:C:1991:286, para. 60. Also see *AstraZeneca* (n 6), para 176.

²⁵ John Vickers, ‘Market Power in Competition Cases’ (2006) 2(supp1) *European Competition Journal* 13; Niels Gunnar and Helen Jenkins, ‘Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down’ (2005) 26(1) *European Competition Law Review* 606.

market share between 40-50 per cent could be an indication of dominance when taken together with other market conditions.²⁶ Moreover, even when the market share was below 40 per cent, dominance was possible, even if unlikely.²⁷ In *Gøttrup Klim*, accordingly, the CoJ did not dismiss the possibility that a firm holding 36 and 32 per cent market shares in the two relevant markets could be classified as dominant.²⁸

A similar trend is also observed at the national level, when national competition authorities and courts apply Article 102 TFEU and/or the national equivalent provisions. Studies have shown that national rules heavily rely on market shares as a proxy for dominance and explicitly set very low market share thresholds above which dominance is presumed.²⁹

While the above demonstrates that there is no single market share threshold above which dominance is a given, and indeed there is no uniform direct relationship between market share and the level of market power, there seems to be some doubt whether market power is sufficiently substantial to merit intervention when market shares are below 50 per cent.³⁰ Below this threshold, there are likely competitive forces constraining the conduct of the firm. If so, the EU practice of establishing dominance mostly on the basis of a low market share proxy may result in a disconnect between the harm alleged and the market power. Kaplow explained that ‘where market power is negligible (...) a practice cannot be anticompetitive’,³¹ at least in so far as the definition of ‘anticompetitive’ is not the *exercise* of market power itself.

The *United Brands* definition of dominance was also criticised for offering merely vague and contentious criteria that do not clarify the type of economic power caught by the

²⁶ For example, in *United Brands* (n 7), para 105, dominance was established with respect to 45 per cent market share, and in Case T-219/99 *British Airways v Commission* EU:T:2003:343, para 183, with respect to 39.7 per cent.

²⁷ Commission Article 102 TFEU Guidance, para 14.

²⁸ Case C-250/92 *Gøttrup Klim v KLG* EU:C:1994:413, para 48.

²⁹ College of Europe, ‘Study on The Impact of National Rules on Unilateral Conduct that Diverge from Article 102 of the Treaty on the Functioning of the European Union’ (2012) https://ec.europa.eu/competition/calls/tenders_closed.html, 12-13 and Annex VII.

³⁰ William Landes and Richard Posner, ‘Market Power in Antitrust Cases’ (1981) 94 *Harvard Law Review* 946; American Bar Association, *Market Power Handbook: Competition Law and Economic Foundations* (2nd ed., ABA Publishing, 2012) 111, footnote 49; Eleanor Fox, ‘The Market Power Element of Abuse of Dominance – Parallels and Differences in Attitudes’ in Claus-Dieter Ehlermann and Mel Marquis (eds) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing, 2008); John Vickers, ‘Market Power in Competition Cases’ (2006) 2 *European Competition Journal* 14

³¹ Kaplow (n5) 1329.

provision.³² Situations of dominance clearly arise where a firm can act independently from its *competitors*, not facing appreciable competitive constraints. Indeed, the dominance test often equates such independence with the economic concept of substantial market power, that is the ability profitably to raise prices above the competitive level for a significant period of time.³³ This is reflected in the GC's judgment in *AstraZeneca*,³⁴ as well as by the Commission's Article 102 TFEU Guidance.³⁵

For the most part, the focus in practice and scholarship is therefore on the ability to behave independently of competitors. Yet, according to *United Brands*, a firm would be deemed dominant also where it can act independently from its *customers*. It is hard to imagine that a firm could act completely independently of its customers, as this would require demand to be entirely inelastic. No firm can, in a sustained way, appreciably ignore its demand curve. The economy validity of 'customer'-part of the definition is therefore doubtful.³⁶ Yet, it can open the door for reflections on the power of a firm *over* its customers. For example, the Commission has previously based a finding of dominance principally on an undertaking's power over customers. In *ABG/Oil* the Commission held that BP was dominant given its power over its customers, despite the existence of other oil companies.³⁷ In fact, the Commission stated that the seven producers in the case, including BP, were dominant over their customers, who had become completely dependent on them for the supply of a scarce product.³⁸ The application of this logic to other cases is unclear. *ABG/Oil* was decided against the exceptional

³² Jones et al, (n 21) 303-304.

³³ Commission Article 102 TFEU Guidance, paras 10-11. Despite the wording of the guidance, substantial market power is not only limited to power over prices. It also includes the power to limit output or innovation, to decrease the quality of production, or limit the choice of goods or services. See, for example, *Google Search (Shopping)* (AT.39740) Commission Decision C(2017) 4444 final [2017] OJ C9/17 593 2, paras 168, 321–324; Case T-691/14 *Servier and Others v Commission* EU:T:2018:922, paras 1567-1586.

³⁴ Case T-321/05 *AstraZeneca v Commission* EU:T:2010:266, para. 267, as indirectly affirmed by the CoJ in appeal in *AstraZeneca* (n 6), paras 177-181. Also see Jones et al, (n 21) 302-303.

³⁵ Commission Article 102 TFEU Guidance, para 11.

³⁶ Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2010), 228; O'Donoghue and Padilla (n 1) 186.

³⁷ *ABG/Oil companies operating in the Netherlands* (IV/28.841) Commission Decision [1977] OJ L 117/1, 9. The CoJ has overturned this Commission's decision based on the conduct and remedy analysis rather than on the assessment of dominance: Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v Commission* [1978] ECR 1513.

³⁸ *ABG/Oil* (n 37) 8-9.

backdrop of the 1973 oil crisis, with its peculiar economic circumstances, and later cases have not classified firms as having a dominant position solely due to the dependence of their customers. In *Metro I*, for example, the CoJ rejected the claim that brand dependence can be an indication of dominance when a firm held only 5-10 per cent market share.³⁹ At the same time, the Court has left some room for finding dominance by virtue of power over a customer. In *Metro II*, it clarified that ‘shares of the market as insignificant as that held by Saba preclude the existence of a dominant position save in *exceptional circumstances*’.⁴⁰ This raises the question as to the possible harm when a firm has power over a customer. In the *ABG Oil* decision, the Commission was concerned because, as part of its response to the oil shortage, BP (and others) had reduced its deliveries to ABG, so that ABG was ‘threatened with a total lack of product’, putting it at a competitive disadvantage.⁴¹ The harm to competition as a whole was not clear, and the Court held that BP did not violate Article 102 TFEU by prioritising its long-term customers over ABG.⁴²

The application of Article 102 TFEU to firms with low market shares, as well as to firms which exclusively have power over customers, raises questions about the harm fought and interests protected by Article 102 TFEU - what is the anticompetitive harm alleged: harm to competition as a whole or to individual firms?

C. National laws on abuse of relative power and unfair competition

National laws of some EU Member States contain provisions limiting the abuse of relative power. Such provisions are found in national competition and private laws, and result in significant fragmentation across the EU.⁴³ This has given rise to interesting questions as to the relationship between EU competition law and national laws regulating a superior position compared to a commercial partner, or an advantageous market position short of dominance, which are explored in this section.

³⁹ Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* ECLI:EU:C:1977:167, paras 17-18.

⁴⁰ Emphasis added. Case 75/84 *Metro SB-Großmärkte GmbH & Co. KG v Commission* ECLI:EU:C:1986:399, para 86.

⁴¹ *ABG/Oil* (n 37) 3.

⁴² *BP v Commission* (n 37) para 32.

⁴³ For a comprehensive overview of national practices, see College of Europe (n 29).

The EU Treaties have not determined the relationship between EU competition law and national laws, leaving this question to be determined by secondary EU law.⁴⁴ For many years, this question was left open, and was determined on an *ad hoc*, case-by-case basis. Beginning with the *Walt Wilhelm* judgment of 1969, the CoJ's case law had reflected the principle of supremacy of the EU competition law provisions, while accepting the parallel application of national laws when they did not prejudice the full and uniform application of EU law.⁴⁵

This relationship was first codified by Regulation 1/2003 (the 'Regulation'), decentralising the enforcement of EU competition law to national competition authorities.⁴⁶ The Commission's initial proposal for the Regulation had called to alter the *Walt Wilhelm* rule, in favor of granting greater primacy to EU competition law. Accordingly, it suggested that in situations of conflict, Articles 101 and 102 TFEU would apply 'to the exclusion' of conflicting national laws.⁴⁷ This was justified by the need to level the playing field across the EU. The Commission explained that it would be inconsistent with the notion of a single market if practices that are capable of affecting cross-border trade would be subject to different standards.⁴⁸

Nevertheless, this relationship turned out to be one of the most contentious points in the drafting of Regulation 1/2003.⁴⁹ After years of negotiations between the Member States, the Regulation adopted a more nuanced approach: First, Article 3(1) of the Regulation

⁴⁴ Article 103(2)(e) TFEU (ex. Article 83 EC).

⁴⁵ Case 14/68 *Walt Wilhelm v Bundeskartellamt* ECLI:EU:C:1969:4. While this principle was first adopted with respect to Article 101 TFEU, in further cases it also applied to conflicts with Article 102 TFEU. see, for example, C-253/78 *Procureur de la République v Giry and Guerlain* ECLI:EU:C:1980:188, para 15; C-67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others* ECLI:EU:C:1992:330, para 11; C-550/07P *Akzo Nobel Chemicals Ltd and others v Commission and others* ECLI:EU:C:2010:512, para 103; C-17/10 *Toshiba Corporation v Úřad pro ochranu hospodářské soutěže* ECLI:EU:C:2012:72, para 81.

⁴⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] *OJL 1* (Regulation 1/2003).

⁴⁷ Commission, 'Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ('Regulation implementing Articles 81 and 82 of the Treaty') 2000/C 365 E/28 (Commission's Proposal for a Council Regulation on the implementation of the rules on competition).

⁴⁸ *Ibid*, Recital 8 and Explanatory Memorandum, para 14.

⁴⁹ As declared, in particular, in the Presidency Progress Report, 'Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87' 11848/00 RC 13 – COM(2000) 582 final, para 10.

expresses the principle of *parallel application*, noting that national competition authorities must apply the provisions of EU competition law when they apply the national competition law prohibitions on anticompetitive agreements or abuse of dominance. Second, Article 3(2) of the Regulation expresses a qualified principle of *supremacy of EU law*, stating that the application of national competition law may not lead to the prohibition of *agreements* that may affect trade between Member States and are not prohibited according to Article 101 TFEU. Yet, with respect to *abuse of dominance*, Article 3(2) opted for a more limited obligation. It specifies that Member States are not precluded from adopting ‘stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings’.⁵⁰

The limits of the supremacy of Article 102 TFEU are not fully clear. Article 3(2) of the Regulation does not explain what ‘stricter’ national competition laws are. Are they stricter in the sense of imposing more severe *sanctions* on abuse of a dominant position? Are they stricter because they may prohibit a wider range of *abusive conduct* by dominant firms? Are they stricter in terms of the required *market share or market power*, prohibiting abusive conduct by firms that would not be classified as having a dominant position according to EU competition law?

The latter interpretation leaves considerable room for conflicting national competition laws on relative power. This interpretation was supported by the Commission’s Staff Working Paper preceding the adoption of the Regulation summarising the political negotiations with the Member States. Departing from its initial proposal, the Commission explained that the proposed wording of Article 3 - suggesting it will give primacy to ‘the *abuse* of a dominant position’⁵¹ – implies that the Regulation would only exclude the application of national rules that are equivalent to those contained in Article 102 TFEU. Hence, national competition laws could remain applicable to the extent they would either apply to unilateral conduct of a non-

⁵⁰ This statement refers to ‘stricter national laws’ rather than to ‘stricter national competition laws’. Yet, the wording of Recital 8 clarifies that it regulates situations of conflict between EU and national competition laws.

⁵¹ Emphasis in original.

dominant firm or would regulate unilateral conduct of a dominant firm in a stricter way than Article 102 TFEU.⁵²

According to the Commission, this more lenient approach to national rules on unilateral conduct was warranted because Article 102 TFEU only applies to dominant firms, which are likely to raise prices and reduce output in order to increase their profits.⁵³ Article 3, therefore, merely aimed at introducing a common minimum standard for practices covered by Article 102 TFEU and certain cooperation mechanisms of the network of competition authorities. While this interpretation is not explicitly articulated in the final version of Regulation 1/2003, it may be supported by the unique phrasing used in Article 3(2); while Article 3(1) refers to an ‘abuse prohibited by Article [102]’ (namely, to an abuse of a dominant position), Article 3(2) applies more generally to any ‘unilateral conduct’. This interpretation is also supported by the wording of Recital 8, noting that ‘[t]hese stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings’.⁵⁴

Third, in addition to the room left by Article 3(2) to national competition rules, Article 3(3) governs the adoption and application of *other* national laws. This paragraph was agreed upon in the final stage of the negotiations, after the Council had pressured the delegations to reach a compromise.⁵⁵ Article 3(3) adds that ‘[w]ithout prejudice to general principles and other provisions of Community law’, the principles of parallel application and supremacy of EU competition law expressed by Articles 3(1) and (2) do not preclude the ‘application of

⁵² Commission, ‘Staff Working Paper: Commission’s proposal for a new Council Regulation implementing articles 81 and 82 – Article 3’, 2000/0243(CNS), 15-16.

⁵³ Ibid.

⁵⁴ This sentence was introduced by the delegations of the Member States in November 2002; see Council of the European Union, Competition Working Party ‘Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No. 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86 and (EEC) No. 3975/87’, ST 13983 2002 INIT <https://data.consilium.europa.eu/doc/document/ST-13983-2002-INIT/en/pdf>.

⁵⁵ Presidency Conclusions, ‘Barcelona European Council 15-16 March 2002’, SN 100/1/02 REV 1 https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/69871.pdf, para 17; Council of the European Union, Competition Working Party ‘Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No. 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86 and (EEC) No. 3975/87’ ST 12998 2002 INIT <https://data.consilium.europa.eu/doc/document/ST-12998-2002-INIT/en/pdf>.

provisions of national law that predominantly pursue an objective different from that pursued by Articles [101] and [102]’.

Recital 9 clarifies the scope of Article 3(3), noting that because Articles 101 and 102 TFEU ‘have as their objective the protection of competition on the market’, Member States may adopt national legislation that ‘pursues predominantly an objective different from that of protecting competition on the market’. The Recital refers to the example of national laws on unilateral or contractual unfair trading practices, explaining that such legislation

pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits firms from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.

Drawing the borderline between practices that fall under Articles 3(1) and (2) of the Regulation and those covered under Article 3(3) is not straightforward. According to the Commission, a practice should be classified as national competition law governed by Articles 3(1) and (2), where it combats excessive market power or protect smaller firms against larger competitors.⁵⁶ This combines two types of theories of harm: in addition to ensuring the competitiveness of the market, it includes national provisions on abuse of superior bargaining power or significant influence aiming to regulate disparities of bargaining power in distribution relationships, including where neither the supplier nor the distributor holds a dominant position.

This entails that national rules on abuse without dominance would have to be applied alongside Article 102 TFEU. By comparison, a practice should be classified as ‘other national rule’ falling under Article 3(3) if its objective is to regulate contractual relationships between firms by stipulating the terms and conditions that, for instance, suppliers must offer to distributors (rather than firms’ competitive behavior on the market).⁵⁷

⁵⁶ European Commission, ‘Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council, Report on the functioning of Regulation 1/2003’ COM(2009) 206 final, para 181.

⁵⁷ *Ibid*, para 162.

Citing De Smijter and Kjoelbye, the Commission argued that the main distinction between national competition law and other national laws is whether the aim of the provision is limited to regulating a contractual relationship with a view to protecting a weaker party against a stronger party or whether *competition on the market* is taken into account in the elaboration or the application of the rule. Each individual provision of national law should be examined, rather than the overall statute in which it is contained.⁵⁸

While this distinction may have its merits, it does not directly flow from the wording of the Regulation. Vaguely declaring that it aims at the ‘protection of competition on the market’,⁵⁹ the Regulation does not fully explain what interests are governed by EU competition law in general, and Article 102 TFEU, in particular. It does not detail the legal or economic theory of competition it aims to protect or what its limits are. De Smijter and Kjoelbye, for example, advocated interpreting the Commission’s ‘competition on the market’ requirement as protecting competition *in situations of market power*. They held that a national rule should be deemed as national competition law when one of the conditions of its application is that ‘one of the parties possesses market power’.⁶⁰

The limits between national competition and other laws also cannot be inferred from Article 3 of the Regulation itself. Article 3(2) and Recital 8 classify as national competition law, legislation that prohibits or sanctions ‘unilateral conduct’, including ‘abusive behaviour toward economically dependent undertakings’. This wording does not explicitly refer to the possession of (relative or market) power. Nor does it specify that the unilateral conduct should have an effect on competition, or that the national law would take into account the process or structure of competition in the market.

In similar vein, Article 3(3) of the Regulation and Recital 9 suggest that a rule may be classified as *other* national law when it is either contractual or unilateral in nature. Such rules, it is stated, pursue a different objective, ‘irrespective of the actual or presumed effects of such

⁵⁸ Ibid, footnote 213, citing Eddy De Smijter and Lars Kjoelbye ‘The Enforcement system under Regulation 1/2003’, in Jonathan Faull and Ali Nikpay (eds), *The EC Law of Competition* (OUP, 2007), para 2.59.

⁵⁹ Regulation 1/2003, Recital 9.

⁶⁰ De Smijter and Kjoelbye (n 58), para 2.63.

acts on competition'.⁶¹ Thus, it is conceivable that unfair trading practices which a dominant firm is able to impose in light of its (relative or market) power may well fall under Article 3(3).

Although the rules governing national laws on abuse without dominance and their relationship with Article 102 TFEU are unclear, Article 3 has received very limited attention in EU jurisprudence and scholarship.⁶² In practice, many Member States adopted national laws on abuse of dominance, abuse of superior market power, abuse of relative power (economic dependence), and unfair commercial practices. It is uncertain when those rules are aimed at the protection of competition as such, and when they are directed at the protection of competitors. The relationship between these different types of economic power and the harm which they seek to avoid is not yet settled.

D. Gatekeeping powers

The European Commission's Digital Markets Act proposal (the 'Act') offers an additional way to regulate market power of firms, in a manner distinct from dominance. The proposed Act introduces a new type of power. This power is premised on *access to markets* rather than a *dominant position on a specific market*. While the prohibition on abuse of dominance of Article 102 TFEU will remain applicable to the conduct of gatekeepers, it will be limited to situations of market power over competitors in a relevant market. The Act suggests imposing special obligations on an online platform if it operates as a *gatekeeper*, namely where

- (a) it has a significant impact on the internal market;
- (b) it operates a core platform service which serves as an important gateway for business users to reach end users; and
- (c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.⁶³

Whereas the premise of Article 102 TFEU is that the use of market power may create harm to competition, the Act assumes that gatekeeping power can make markets less contestable and

⁶¹ Regulation 1/2003, Recital 9.

⁶² For example, see Wouter Wils, 'The obligation for the competition authorities of the EU Member States to apply EU antitrust law and the Facebook decision of the Bundeskartellamt' 3 *Concurrences* (2019).

⁶³ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), art 3(1)."

less fair.⁶⁴ According to the Act, the characteristics of gatekeepers are likely to lead to serious imbalances in bargaining power, and, consequently, to unfair practices and conditions for business and end users and to lower contestability of markets.⁶⁵ Hence, the proposed Act suggests imposing obligations and prohibitions to allow businesses and users to ‘reap the full benefits of the platform economy and the digital economy at large, in a contestable and fair environment’.⁶⁶ These include, but are not limited to: a prohibition on the combination of personal data collected across services unless there has been consent in accordance with the GDPR; prohibitions on requirements that business users use one or more of their services (such as their identification service) for the use of the core platform service the users actually want; a prohibition of self-preferencing in ranking services; obligations of portability; obligations to provide fair and non-discriminatory access to products such as app stores; and obligations to provide access to tools and information.

It is worth contrasting the Act with the reform of national competition law in Germany, in which a new section in the Act against Restraints on Competition targets digital undertakings ‘with paramount significance across markets’.⁶⁷ Both the EU’s proposed Act and the new German provision on competition target a type of gatekeeping power, by which the firm plays an important role for the access by others to one or more markets. The German parliamentary documentation indicates that this was seen as ‘market power of a new nature’. It is not based on market shares, but rather on the key position a firm holds in comparison to other market participants, allowing it to determine how they interact with each other.⁶⁸

While the EU adopts new regulation at least formally distinct from the EU provisions on competition law, the German legislator included its new prohibition into the German competition law. Like other competition law prohibitions, the new German provision would be

⁶⁴ Ibid, Recitals 5, 9-11.

⁶⁵ Ibid, Recital 4.

⁶⁶ See wording in Commission, ‘Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)’ COM(2020) 842 final, pp. 2-3.

⁶⁷ German Act against Restraints of Competition: Gesetz gegen Wettbewerbsbeschränkungen (GWB), Section 19a.

⁶⁸ Deutscher Bundestag, ‘Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie’ (13 January 2021) Drucksache 19/25868, 7.

enforced *ex post* by the national competition authority, based on a prohibition of abuse, and will enable the gatekeepers to provide objective justifications for its conduct. This formal inclusion in competition law creates at least an expectation that the German provision aligns with the same harm and interests as other provisions of national competition law. Yet, its objectives sound quite similar to the descriptions of the objectives of the EU's proposed Act which appears, at least formally, not to be competition law. For the most part, the power and conduct covered by the provision seem predicated on the ability of firms to access and compete on a market, though it is not evident that efficiency plays a role in the expected harm. There are, however, references to 'fair' competition and ensuring equality, in the parliamentary discussions.⁶⁹

It is noteworthy that the new German provision, differently from other competition law prohibitions, does not require the German competition authority to prove anticompetitive effect. This means the decisional practice will likely not be very useful in clarifying what the harm and interests are which enforcement is meant to address.

The introduction of a new type of market power and the corresponding obligations in the Act and the German provision raises questions relating to the harm and interests covered by Article 102 TFEU compared to these new rules on gatekeeping power. Both the EU Act and the German new provision of competition law seem less concerned with efficiency-focused theories of harm, moving towards contestability, access, and even fairness. In contrasting them, it is not only apparent that the harm fought and interests protected may be varied and unclear, but moreover that the distinction between what is competition law and what is not (at least formally) is far from evident. It has also not yet been clarified – and, given the lack of effects analysis, is unlikely to ever be clarified in decisional practice or jurisprudence – how gatekeeping power creates these harms and whether they would have occurred in the absence of this power. Similarly to the dividing line between national laws on the abuse of relative power and the abuse of dominance under Article 102 TFEU that have been examined in the

⁶⁹ Deutscher Bundestag, 'Wettbewerbsrecht 4.0 – Digitales Monopoly beenden' (28 October 2020) Drucksache 19/23698(neu), 1; Deutscher Bundestag (n 68) 8.

previous section, this raises the question as to where harm to competition ends, and when concerns with fairness and the interests of individual firms begin.

III. US: MONOPOLISATION WITHOUT MONOPOLY

A. Monopolisation under Section 2 of the Sherman Act

Section 2 of the Sherman Act prohibits monopolisation, namely the offense of creating or maintaining a monopoly through anticompetitive exclusionary means.⁷⁰ The Section is principally concerned about the *process* of creating a monopoly through nefarious means. As such, it implies fault or at least negligence on behalf of a firm: it is the means to reach market power which are frowned upon, not the position itself.⁷¹

Similar to the EU prohibition, the provision has two substantive constituent elements: monopoly power and harmful conduct. Market power is vital not only to the identification of a monopoly position, but also to the assessment of the harmful effects. Causality is inherent in the language of Section 2 ('to monopolize'),⁷² making it even more evident than in the EU that conduct has to be considered in light of existing market power. Exclusionary strategies (including input or customer foreclosure) are often only harmful because the firm has a degree of power on the market.⁷³

A crucial difference with the EU lies in the type of conduct that is considered problematic under the provision. Section 2 does not cover exploitative conduct. As noted, the focus of the monopolisation offense is on the acquisition of monopoly position through unacceptable means, namely through exclusionary strategies. The exploitation of monopoly power (i.e., charging prices or setting terms that would have not been accepted in the absence of market power), accordingly, is not prohibited.⁷⁴

⁷⁰ 15 U.S. Code § 2.

⁷¹ Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (5th edn, West Academic Publishing 2016) 24, 361.

⁷² Elhauge (n 9) 330.

⁷³ Hovenkamp (n 71) 357.

⁷⁴ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* (2004) 540 U.S. 398, 407.

As in the EU, market shares are often used as a proxy for market power. At first glance, it may seem that US courts require a different type, or at least a different degree, of market power. Where in the EU a 50 per cent market share creates a presumption of dominance,⁷⁵ US courts expect at least a 70 per cent market share to establish monopoly, with a finding of monopoly below 60 per cent being doubtful.⁷⁶ Nevertheless, such practical differences do not necessarily point to different theoretical frameworks of market power. As Hovenkamp rightly notes, ‘the antitrust “monopolist” is a dominant firm’.⁷⁷ Monopoly power, dominance, and market power are variations on the same theme.⁷⁸ In both the EU and the US, such market power refers to the firm’s relative freedom from competitive constraints, which in the US is generally described as the ‘power to control prices’.⁷⁹ As noted above, market power is unlikely to be absolute, since most firms will face some demand elasticity, potential entry, or countervailing power at some point of their lifespan.⁸⁰

As such, the difference between the EU and US lies not in the expectation of an absolute monopoly position, but rather in the degree of market power which is sufficient to bring the conduct within the scope of the provisions. By relying on different market share thresholds as indirect evidence of market power, the two jurisdictions deploy different presumptions to find sufficient dominance to bring a firm and its conduct within the scope of the law.

The possibility to sanction unilateral conduct in cases falling short of monopoly power potentially arises in three contexts in the US: First, Section 2 prohibits attempts to monopolise, and considers the ‘dangerous probability of success’ requirement in light of market power. Second, Section 5 of the Federal Trade Commission Act (‘FTC Act’) may possibly apply to

⁷⁵ See Section II(B) above.

⁷⁶ *United States v. Aluminum Co. of America (Alcoa)* (2d Cir. 1945) 148 F.2d 416, 424. It is important to note that the Supreme Court has not established a precise number as a threshold, but rather given broad indicative ranges.

⁷⁷ Hovenkamp (n 71) 15. See also George Raitt, *The Metaphysics of Market Power: The Zero-Sum Competition and Market Manipulation Approach* (2019, Hart Publishing) 52; Dennis Carlton and Jeffrey Perloff, *Industrial Organization* (Pearson, 2015) 110.

⁷⁸ Hay (n 3) 817; Thomas G. Krattenmaker et al, ‘Monopoly Power and Market Power in Antitrust Law’ (1987) *Georgetown Law Journal* 247; American Bar Association (n 30) 14.

⁷⁹ *United States v. E.I. du Pont de Nemours & Co.* (1956) 351 U.S. 377, 391.

⁸⁰ See O’Donoghue and Padilla (n 1), 187-222; Bishop and Walker (n 36), 70-84; Carles Esteva Mosso and Stephen Ryan, ‘Article 82 – Abuse of a Dominant Position’, in Jonathan Faull and Ali Nikpay (eds), *The EC Law of Competition* (OUP 1999), para 3.27.

firms holding a lower degree of market power or different types of power than that required in Section 2. Third, calls to regulate digital platforms have included proposals to introduce abuse of dominance provisions with 30 per cent market share presumptions, as well as prohibitions on the abuse of superior bargaining positions. Each of these will be discussed in turn.

B. Attempted monopolisation in cases of low degree of market power

Section 2 of the Sherman Act includes an attempt to monopolise offense,⁸¹ which is another notable distinction with Article 102 TFEU. This offense can reach strategies aimed at the creation of a monopoly, even where they have fallen short of attaining a monopoly position. It requires a ‘specific intent’ to monopolise a relevant market and a ‘dangerous probability’ that it will succeed.⁸²

Does this offense require a (minimum) degree of market power? Courts have defined the relevant market and established market shares in cases involving alleged attempts to monopolise.⁸³ Indeed, the reflections by the Fourth Circuit in *M&M Medical Supplies* that cases above 50 per cent should be treated as attempts to monopolise (when the other elements are also satisfied) and that claims between 30 per cent and 50 per cent should be rejected unless it is very likely that monopoly will be achieved or the conduct is particularly undesirable,⁸⁴ may sound familiar to EU competition lawyers reminiscing on the *Akzo* dominance thresholds.⁸⁵

Nevertheless, it may be misleading to focus on the existence of market power as such. An *attempt* to monopolise implies not so much a prohibition of conduct at lower levels of market power, but rather a proscription of strategies *intended* to achieve market power. While the existence of market power may be relevant in establishing the probability of success of the

⁸¹ *Spectrum Sports Inc. v. McQuillan* (1993) 506 U.S. 447, 455.

⁸² *Swift & Co. v. United States* (1905) 196 U.S. 375, 25 S.Ct. 276; *Spectrum Sports Inc. v. McQuillan* (1993) 506 U.S. 447, 113 S.Ct. 884.

⁸³ *Rebel Oil Co. v. Atlantic Richfield Co.* (9th Cir. 1995) 51 F.3d 1421, 1434; *Dimmitt Agri Industries Inc. v. CPC International Inc.* (5th Cir. 1982) 679 F.2d 516, 533.

⁸⁴ *M & M Medical Supplies and Service v. Pleasant Valley Hospitals* (4th Cir. 1992) 981 F.2d 160, 168.

⁸⁵ See Section II(B) above.

strategy,⁸⁶ this does not equate to a standalone requirement of market power. Thus, attempted monopolisation is not an example of monopolisation without a monopoly.

C. Unfair competition under Section 5 of the FTC Act

The possibility of prohibiting unilateral conduct in situations short of monopoly or situations of relative power in the US is even less evident than in the EU. Yet, Section 5 of the FTC Act enables the FTC to take action against ‘unfair methods of competition in or affecting commerce’.⁸⁷ Thus, it can be queried whether this provision may cover unilateral conduct by a firm without a monopoly position.

There is a consensus that any practice which violates the Sherman Act also violates Section 5,⁸⁸ but the wording of the latter provision indicates a more expansive scope whose limits are subject to debate. The Supreme Court has confirmed that in bringing cases against unfair methods of competition, the FTC can go further than what would be possible under the federal antitrust laws (i.e., the Sherman Act and Clayton Act). In *Sperry and Hutchinson*, it stated that Section 5 ‘authorizes [the FTC] to determine whether challenged practices, though posing no threat to competition within the letter or spirit of the antitrust laws, are nevertheless (...) unfair methods of competition’.⁸⁹

The FTC’s success in bringing standalone cases under Section 5 is limited. The courts have remained unimpressed by the FTC’s articulation of the manner in which conduct might amount to unfair competition. In the 1980s, a trio of rejections knocked the wind out of the

⁸⁶ *Tops Markets Inc. v. Quality Markets Inc.* (2d Cir. 1998) 142 F.3d 90, 100; *International Distr. Ctrs., v. Walsh Trucking* (2d Cir. 1987) 812 F.2d 786, 792. For an in-depth questioning of the need for market power, see Jeffrey Harrison, ‘Comments on Richard Markovits’s Claim That the Requirement of Possession of Pre or Post Market Power Is Unnecessary in Monopolization and Attempt to Monopolize Cases and a Proposed Second-Best Reconciliation of the Per Se and Conventional Approaches to Dangerous Probability’ (2016) 61(1) *Antitrust Bulletin* 155.

⁸⁷ 15 U.S. Code § 45.

⁸⁸ Hovenkamp (n 71) 80; Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement* (OUP, 2011) 135. See *FTC v. Cement Institute* (1948) 333 U.S. 683, 692-694.

⁸⁹ *FTC v. Sperry and Hutchinson* (1972) 405 U.S. 233, 233-234 (Justice White considered that the Court of Appeals had erred in holding that the FTC could only assess practices within the ‘narrow criteria’ of ‘the letter and spirit of the antitrust laws’, at 245-246); *FTC v. Brown Shoe Co.* (1966) 348 U.S. 316, 322; *FTC v. Indiana Federation of Dentists* (1986) 476 U.S. 447, 454.

FTC's sails.⁹⁰ Although these cases did not deny the FTC's competence to tackle unfair competition beyond the scope of the Sherman Act, they raised concerns as to the FTC's articulation of substantive and evidentiary standards and its formulation of theories of harm. There is a dearth of jurisprudential guidance on the scope of Section 5.⁹¹ Although *Sperry and Hutchinson* indicated that Section 5 was not limited to the scope of the antitrust statutes,⁹² it did not clarify the outer boundaries of Section 5.⁹³ Before 2022, this dearth of jurisprudence bolstered calls for a detailed policy statement.⁹⁴ Its 2015 Statement of Enforcement Principles, adopted when Edith Ramirez was Chair, was particularly brief.⁹⁵ In 2021, the FTC rescinded the 2015 Statement, followed by the adoption of a new Policy Statement in 2022.⁹⁶

The Supreme Court has highlighted Section 5's role in stopping 'in their incipiency, acts and practices which, when full blown, would violate [the Sherman and Clayton] acts'.⁹⁷ The responsibility to identify such practices would, for the most part, lie with the FTC.⁹⁸ Building on this 'incipiency' idea, some argue that Section 5 can be used by the FTC to fill

⁹⁰ *Boise Cascade Corp. v. FTC* (9th Cir. 1980) 637 F.2d 573, 582; *Official Airline Guides v. FTC* (2nd Cir. 1980) 630 F.2d 920, 927; *E.I. du Pont de Nemours and Co. V. FTC* (2nd Cir. 1984) 729 F.2d 128, 139. See also *FTC v. Abbott Laboratories* (D.D.C. 1994) 853 F. Supp. 526, for a case litigated and lost by the FTC in district court.

⁹¹ See, for a discussion on the failure of the common law method with regard to Section 5, Jan M. Rybnicek and Joshua D. Wright, 'Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines' (2014) 21(5) *George Mason Law Review* 1287, 1304.

⁹² Justice White considered that the Court of Appeals had erred in holding that the FTC could only assess practices within the 'narrow criteria' of 'the letter and spirit of the antitrust laws' (at 245-246).

⁹³ The FTC was asked to clarify its theory of harm, but the remanded case was settled.

⁹⁴ Joshua D. Wright, 'Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority' (19 June 2013) Remarks at the Executive Committee Meeting of the New York State Bar Association's Antitrust Section; Maureen K. Ohlhausen, 'Section 5 of the FTC Act: Principles of Navigation' (2014) 2(1) *Journal of Antitrust Enforcement* 1.

⁹⁵ See: Statement of the Federal Trade Commission On the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (2015), available at <https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act>.

⁹⁶ Federal Trade Commission, 'Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act' (10 November 2022), <https://www.ftc.gov/legal-library/browse/policy-statement-regarding-scope-unfair-methods-competition-under-section-5-federal-trade-commission>, accessed 19 January 2023.

⁹⁷ *FTC v. Motion Picture Advertising Co.* (1953) 344 U.S. 392, 395; *Brown Shoe* (n 89), 322; *Fashion Originators Guild of America v. FTC* (1941) 312 U.S. 457, 466.

⁹⁸ *FTC v. Texaco, Inc.* (1968) 393 U.S. 223, 225-226: 'Congress enacted § 5 of the Federal Trade Commission Act to combat in their incipiency trade practices that exhibit a strong potential for stifling competition. In large measure the task of defining "unfair methods of competition" was left to the Commission. (...) While the ultimate responsibility for the construction of this statute rests with the courts, we have held on many occasions that the determinations of the Commission, an expert body charged with the practical application of the statute, are entitled to great weight.' See also discussion in *E.I. Du Pont De Nemours & Company v. FTC* (2d Cir. 1984) 729 F.2d 128.

enforcement gaps left by the Sherman Act.⁹⁹ Fuelled by the judicial reluctance to intervene under Section 2 of the Sherman Act and the narrowing of its scope of application, there is a desire to see the FTC use Section 5 where success under the Sherman Act would be unlikely.¹⁰⁰ The FTC could intervene where conduct is anticompetitive but does not violate the Sherman Act.¹⁰¹

Arguably, a case concerning unilateral conduct could be brought under Section 5 of the FTC Act instead of Section 2 of the Sherman Act where either a) a firm falls short of the requisite market power, or b) conduct has some potential to harm competition which has not yet reached the level necessary to bring a case of monopolisation. The second option, focusing on incipiency of the anticompetitive effects, is more widely raised than the option to bring cases based on different thresholds of market power, on which the current section focuses. Nonetheless, the two options are related: as noted, a conduct's anticompetitive nature is understood through the lens of existing economic power. Thus, a different power requirement cannot be understood in isolation from the objective the law pursues, namely the question of the kind of harm the law seeks to avoid.

The first option, of an altered market power requirement under Section 5, could be conceived in several manners. First, it is plausible that a case be brought under Section 5 where the firm has a market share below the thresholds traditionally employed in monopolisation cases under Section 2.¹⁰² Thus, a firm with a 50 per cent share of the relevant market might be found sufficiently dominant to bring a case of illegitimate unilateral conduct under Section 5. In doing so, the US approach might inch closer to that of the EU, which adopts a rebuttable presumption of dominance at 50 per cent market share. Nonetheless, as emphasised earlier, it

⁹⁹ Neil W. Averitt, 'The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act' (1980) 21(2) *Boston College Law Review* 251; William E. Kovacic and Mark Winerman, 'Competition Policy and the Application of Section 5 of the Federal Trade Commission Act' (2010) 76(3) *Antitrust Law Journal* 1007; Daniel Crane, 'Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel' (2010) 2 *CPI Antitrust Chronicle* 8; Herbert Hovenkamp, 'The Federal Trade Commission and the Sherman Act' (2010) 62 *Florida Law Review* 878.

¹⁰⁰ The fact that the FTC is a specialised agency, bringing public enforcement proceedings rather than private actions, is no doubt a convincing factor. See Kovacic and Winerman (n 99) 1011; Crane (n 99) 6.

¹⁰¹ Kovacic and Winerman (n 99) 1021.

¹⁰² Wright (n 94) 20; Richard Dagen, 'Rambus, Innovation Efficiency, and Section 5 of the FTC Act' (2010) 90 *Boston University Law Review* 1535.

is not evident at which point market power is sufficiently ‘substantial’ to be capable of having an impact on competition that merits intervention.

Second, it may even be conceivable to argue in favour of applying Section 5 where a firm has a different type of economic power, even in the absence of *market* power as such. This would cover a scenario where a firm encountered lively competition in its market, but had power over another economic actor, through its own superior bargaining position or that actor’s economic dependence. This could enable the firm to impose onerous conditions on that actor, likely the firm’s customer, which hampers the customer’s ability to (effectively) compete on the downstream market.

It is likely that the former option – based on lower market shares – would be less controversial than the latter.¹⁰³ Scholars have suggested bringing Section 5 cases where market power has not yet risen to the level of monopoly power,¹⁰⁴ but there seems to be little appetite to expand Section 5 to cases of relative (bargaining) power.¹⁰⁵ This can be explained by querying the harm US antitrust law is supposed to remedy.

With the lack of FTC guidance on the harm caught by Section 5’s ‘unfair competition’ and no clear answer on the boundaries of this Section in the Supreme Court jurisprudence,¹⁰⁶ many scholars advocate to anchor unfair competition on the notions of antitrust injury in the Sherman Act. They state that Section 5 should not be used to contradict the antitrust statutes,¹⁰⁷ or ought to focus on harm to competition as understood in those statutes.¹⁰⁸ In a similar vein, the 2015 Statement of Enforcement Principles in the same vein indicated the FTC’s reluctance to deviate from ‘the public policy underlying the antitrust laws, namely, the promotion of

¹⁰³ See, in this regard, Federal Trade Commission, ‘Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act’ (13 August 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act>, in which the FTC appears reluctant to adopt an expansive intervention standard.

¹⁰⁴ Wright (n 94) 20; Dagen (n 102) 1535.

¹⁰⁵ Yee Wah Chin, ‘What Role for Abuse of Superior Bargaining Position Laws’ (2016) 256(3) *New York Law Journal* 1, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2806417; Albert A. Foer, ‘Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners?’ (2016) AAI working paper, 17, available at <https://www.antitrustinstitute.org/work-product/working-paper-no-16-02-abuse-of-superior-bargaining-position-asbp-what-can-we-learn-from-our-trading-partners/>.

¹⁰⁶ Kovacic and Winerman (n 99), 1017 state that they ‘view the relevant language in S&H with skepticism’.

¹⁰⁷ Averitt (n 99), 256.

¹⁰⁸ Wright (n 94) 16; Douglas Melamed, ‘A Solution in Search of a Problem’ (2013) *CPI Antitrust Chronicle*.

consumer welfare'.¹⁰⁹ Even scholars who see the merits of a broader scope for action under Section 5, urge the FTC to consider 'marketplace competition (...) [which] helps consumers'.¹¹⁰ Wright, Kovacic and Winerman have been clear in arguing that conduct would amount to unfair methods of competition where it harms competition rather than competitors.¹¹¹

Again, the dividing line between protecting competition and protecting competitors rears its head. It would be misleading to pretend that there has always been a clear consensus on which conduct is anticompetitive.¹¹² Kovacic and Winerman describe competition 'in the modern sense' as 'fostering improvements in economic performance rather than equating the health of the competitive process with the well-being of individual competitors, per se'.¹¹³ This seems to align with modern, if not consistent, thought.¹¹⁴ If effective competition is used as the benchmark for antitrust harm, it is not clear that relative power could be covered by Section 5. A firm may have the power to set the conditions under which a product is offered to a specific customer, who has no one else to turn to, but this does not necessarily translate into market power (influencing the market conditions) and harm to effective competition on the market as a whole. The exclusion of a customer from its own market might reduce the number of competitors on its market, but that does not always translate into a reduction of effective competition as such. In that sense, a prohibition based on relative power seems a far cry from the prevailing concept of monopolisation under Section 2.

Applying Section 5 of the FTC Act to cases involving relative power over other economic actors, rather than market power, also moves the needle further in the direction of intervention against exploitative conduct. Exploitation centres on the use of market power to

¹⁰⁹ Statement of the Federal Trade Commission On the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (2015), available at <https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act>.

¹¹⁰ Harry First, 'What About Green Stamps? A Comment on the FTC's Section 5 Authority' (2013) *CPI Antitrust Chronicle* 6.

¹¹¹ Wright (n 94) 18; Kovacic and Winerman (n 99) 1017.

¹¹² See the continued discussion on the meaning of 'anticompetitive conduct' in scholarship: Fox (n 12); Elhauge (n 9) 264.

¹¹³ Kovacic and Winerman (n 99) 1017.

¹¹⁴ Wright (n 94) 18.

impose unreasonable conditions.¹¹⁵ Arguably, these are conditions which not have been possible in the absence of market power.¹¹⁶ These conditions harm consumers or customers. Although exploitation may lead to exclusion – onerous conditions imposed on downstream or upstream firms may foreclose them from their own market – and potentially justify intervention under the Clayton Act,¹¹⁷ the US antitrust laws do not address the exploitation of market power in itself. The foreclosure of efficient competitors may warrant intervention, but for the sake of competition itself rather than to protect the individual firms. It seems unlikely therefore that Section 5 could tackle exploitative conduct as ‘unfair methods of competition’,¹¹⁸ where it does not lead to the exclusion of effective competitors at the expense of competition as a whole.

It seems clear that the current standards for both Section 2 of the Sherman Act and Section 5 of the FTC Act make it unlikely that those provisions will be applied to firms without monopoly power. On paper, Section 5 is a likely candidate for a shift towards a lower degree of market power or claims based on different types of power. Nonetheless, it would likely require evidence that the harm to individual firms also affects effective competition as a whole, or else require a significant change in what is considered to be the spirit of US antitrust law. A recent change in the Federal Trade Commission’s leadership may, however, signal a change in attitude to Section 5. In a 3-2 vote, led by the new Chair Lina Khan, the 2015 Statement was rescinded for being ‘short-sighted’.¹¹⁹ In 2022, a new Policy Statement was adopted. The new Statement is written in very broad terms, making it difficult to draw definite conclusions on

¹¹⁵ O’Donoghue and Padilla (n 1) 294; Jones et al (n 21) 361.

¹¹⁶ Or, put differently, if there had been ‘sufficiently effective competition’: O’Donoghue and Padilla (n 1) 295 and 318, referring to Commission Memorandum of 1966 (see H.W. de Jong, ‘A Comment on a Memorandum of the E.E.C. Commission’ (1967) 4(2) *Common Market Law Review* 166, 176).

¹¹⁷ For example, discrimination between customers or suppliers may cause secondary line injury by putting these trading partners at a competitive disadvantage in their own downstream or upstream market. This kind of discrimination is covered by Article 102(c) TFEU. It is in principle also covered by the Clayton Act (as amended by the Robinson-Patman Act), but the Supreme Court has established a requirement of ‘antitrust injury’ (*J. Truett Payne Co. v. Chrysler Motors Corp.* (1981) 451 U.S. 557; see also footnote 4 in cited case on the ‘weak’ argument of the petitioner that if a disfavoured purchaser has to pay more, it will be less able to compete) and indicated it ‘would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition’ (*Volvo Trucks North America, Inc. v. Reeder-Simco GMC* (2006) 546 U.S. 164, 180).

¹¹⁸ See *Rambus* case as reference by Dagen (n 102) 1538.

¹¹⁹ Statement of Chair Lina M. Khan, Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (2021) available at <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under>.

whether the FTC is willing to use Section 5 where a) a firm has a different type of economic power, in the absence of market power as such, or b) a firm does not meet the market share thresholds traditionally employed for monopolisation under Section 2.

There are only a few statements which could be read by a motivated person as indications that the FTC would step in to address different types of economic power, such as a superior bargaining position. The FTC refers to the fact that Congress aimed to adopt a ‘broader’ prohibition which is ‘different’ and ‘beyond the reach’ of the Sherman and Clayton Acts. It sets out that not ‘every case’ requires ‘a showing of anticompetitive harm’. It also emphasises that the FTC does not need to show market power (or define the market) under Section 5, although this may merely be read as a matter of lowering the burden on the FTC.

The Statement contains more wording to support the use of Section 5 below monopolisation thresholds. The FTC mentions the incipency standard, explicitly referring in footnote 19 to a House of Representatives Report which mentions ‘stop[ping] monopoly at the threshold’. In the words of the FTC, Section 5 would be adopted to practices ‘prior, or near, monopoly power’, without the need to show anti-competitive effects which ‘are typically seen only after the monopoly has passed the “embryonic” stage”’. It goes further, referring to conduct which goes beyond competition on the merits, because it is, *inter alia*, exploitative, exclusionary, collusive or abusive conduct or amounts to the ‘use of economic power of a similar nature’. As we set out in this chapter, these concepts are based on theories of harm which link the harm to the existence of a degree of market power. However, it is not obvious that the level of market power necessary is that which reaches monopoly. In the EU, dominance (with its 50% threshold) is deemed sufficient. It is not far-fetched, therefore, to imagine the FTC bringing cases on abuse of dominance under Section 5. Indeed, in its footnote 51, the Statement quotes, the Supreme Court’s reference to ‘dominant economic power’ in *Atlantic Refining Company*.

The new Policy Statement can be read as the FTC’s call for more aggressive enforcement action, through the application of Section 5 to cases where market power is low. How low this will be remains a question. The Statement is written in general terms, without

much guidance on the exact definitions or tests to be employed. Moreover, it remains to be seen how successful the FTC's Section 5 activity will be in practice. Not only did the Statement face opposition internally (with a dissenting Statement by Commissioner Wilson [insert footnote here]), but it will also need to win over the judges in Court. Only time can tell what the future holds for market power under Section 5.¹²⁰

D. Gatekeeping power and exploitation

A shift in the mentality on the objectives of US antitrust law might not be far-fetched. In October 2020, the majority staff of the U.S. House Judiciary Committee, Subcommittee on Antitrust, Commercial and Administrative Law released a report on the state of competition in the digital economy, including several recommendations to improve antitrust law and enforcement (the 'Report').¹²¹ The Report states that dominant platforms have 'outsized power to control the fates of other businesses' and 'exploit [their] gatekeeper power to dictate terms and extract concessions that third parties would not consent to in a competitive market'.¹²²

The Report thus not only wishes to introduce notions of dominance and gatekeeper power to US antitrust law, but also emphasises exploitation as conduct to be condemned. It reflects on the threat gatekeeping power and exploitative practices pose to the viability and incentives of other businesses.¹²³ This is reminiscent of the EU's Digital Markets Act,¹²⁴ since both the EU Act and the US Report emphasise the firms' abilities and opportunities to participate in their respective markets, rather than merely the effectiveness of competition on the market. Crucially, however, the EU Act is not designated as a refinement of existing EU

¹²⁰ Federal Trade Commission, 'Dissenting Statement of Commissioner Wilson Regarding "the Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (10 November 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-of-commissioner-wilson-on-policy-statement-regarding-section-5>, accessed 19 January 2023.

¹²¹ Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* (2020), available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

¹²² The Report, 39.

¹²³ Ibid 39, 47-51.

¹²⁴ See Section IID) above.

competition law, whereas the Report does appear specifically concerned with the improvement of US antitrust law.

The desired change of focus is clear from the recommendations made in the Report. First, the Report recommends the introduction of a prohibition on the *abuse of superior bargaining position*.¹²⁵ It declares that superior bargaining power is a ‘form of market power’ which can be used by dominant platforms to ‘protect and expand their dominance’.¹²⁶ Unfortunately, the term superior bargaining position is left undefined. The formulation itself makes it difficult to identify the relationship between a superior bargaining position, which arguably is a position of relative power, and dominance: would the superior bargaining position be used as evidence of dominance, or would it in itself be sufficient to bring a firm within the scope of the law? Moreover, the Report deplores the charging of excessive prices. Since a dominant platform has a superior bargaining position, its customers have no alternatives to turn to, and have no choice but to accept the prices. These prices, argues the Report, would not have been charged in a competitive market.¹²⁷ This form of exploitation may, indeed, have a link with market power and a lack of competition, but the Report does not explain how the superior bargaining position itself fits into this counterfactual. The lack of choice for an individual customer may establish relative power (it is the basis for relative power in national European systems), and be harmful to the interests of that business; but how does it relate to market power and harm to competition?

Second, the Report suggests extending the Sherman Act to prohibit the *abuse of dominance*, with a statutory rebuttable presumption of dominance at 30 per cent market share (seller) and 25 per cent market share (buyer).¹²⁸ This extension, if adopted, would represent a significant change in the law as it stands, without clarity on the rationale behind it.

The bright-line presumption suggested by the Report is noteworthy: a 30 per cent market share would create a rebuttable presumption of dominance. This lowers the market

¹²⁵ The Report, 389.

¹²⁶ Ibid, 390.

¹²⁷ Ibid, 39, 390.

¹²⁸ Ibid, 396.

share threshold below even those in the EU, which are subject to criticism.¹²⁹ While the Report recognises that a structural threshold cannot be used as an irrefutable presumption, since it is merely indirect evidence of market power, it does not further elaborate on the theory of harm justifying the suggested presumption: what are the anticompetitive effects which are assumed to flow from the existence of this degree of market power? As emphasised by this chapter, it is uncertain at which point market power is sufficiently substantial to be capable of having an impact on competition worthy of concern.

Moreover, the term ‘abuse of dominance’ is a remarkable shift in wording, compared to current Section 2 of the Sherman Act, implying a move away from a focus on the *process* by which market power is acquired to the *use* of that market power once it has been acquired. This may be fuelled by a desire to include exploitative conduct in the scope of US antitrust law, mirroring the EU system. In practice, the distinction between the EU and US system may have become less pronounced in recent years as the EU’s enforcement practice increasingly focused on exclusionary practices in the enforcement practice of the EU. This makes the reformulation in the US even more remarkable, indicating a shift away from this tentative consensus.

The inclusion of exploitation is a conscious decision. The Report states that

since courts have shifted their interpretation of antitrust law to focus primarily on the formation or entrenchment of market power, and not on its exploitation or exercise, many of the business practices (...) identified (...) could be difficult to reach under the prevailing judicial approach.¹³⁰

What is not evident, however, is whether the Subcommittee’s concern is with the individual interests of customers *per se*, or with exploitation which might render these customers less effective competitors in their own markets.

These recommendations, if accepted, might disrupt the focus on functioning and effective competition which currently underpins the enforcement of the federal antitrust laws. This raises questions for the goals of US antitrust law, as was likely intended by the drafters, who included this reflection in the Report:

¹²⁹ See Section II(B) above.

¹³⁰ The Report, 396, footnote 2491.

the Subcommittee recommends that Congress consider reasserting the original intent and broad goals of the antitrust laws, by clarifying that they are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.¹³¹

The US Report, and the debate it forms a part of, raises the spectre of the goals of competition law. This spectre may have lain buried in recent times, but has never been truly far away. The line between protecting competitors and protecting competition becomes increasingly blurred, so that the meaning of anticompetitive and the relationship with (market) power may need reconsidering.

IV. CONCLUSION

The provisions on unilateral conduct found in EU competition law and US antitrust law are often perceived to be concerned with the harm which can flow from the use of market power. The notion of market power is understood as the source of potential for competitive harm. Consequently, both the EU and the US provisions only apply when there is a significant degree of market power.

This would raise the expectation that the notion of market power and the harm it can cause is well-understood by the legislators and enforcers. Nonetheless, this chapter's overview of existing laws and legislative proposals diverging from the notions of dominance and monopoly has shown otherwise. Both EU and US laws have considered lower thresholds of market power, relative power, and provisions on gatekeepers as extensions to the rules on unilateral conduct. The extent to which these rules are competition law or not is not always clear and, most importantly, there is a distinct lack of clarity on the link between market power and the theory of harm, and whether there is a dividing line between harm to effective competition and harm to competitors. This emphasises an uncertainty surrounding the harm which the laws are meant to curb and the interests which they are meant to protect, and why the notion of power used is central to those aims. These uncertainties are inevitably linked with

¹³¹ Ibid, 391.

the unresolved question of the objectives of competition law on both sides of the Atlantic, particularly when it comes to the prohibitions of unilateral conduct by powerful firms.

This chapter does not intend to solve this question on the objectives. Instead, it calls to abandon the current *ad hoc* approach to the questions of market power and harm, whatever objective is ultimately agreed upon by legislators or enforcers. To ensure a consistent legal framework, the degrees and types of power addressed by the EU and US provisions should correspond to the harm the field of law intends to fight and interests which it seeks to protect. Legislators and enforcers need to clearly articulate why a provision is concerned with a particular degree or type of power, by explaining how it is linked to the harm the provision is meant to fight. The current knot of provisions on unilateral conduct could then be untangled, making the law more coherent overall, and providing clarity on the place of unilateral conduct provisions without dominance/monopoly in this framework.