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Editors

# Eleanor M. Fox

## Antitrust Ambassador to the World

*Liber Amicorum*

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Maciej Bernatt, Darryl Biggar, Tembinkosi Bonakele, Dennis M. Davis,  
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**ELEANOR M. FOX**  
**Antitrust Ambassador to the World**

*Liber Amicorum*

Foreword by Maria Coppola and David Lewis

Introduction by Ilene Knable Gotts

**Editors**

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# Foreword

MARIA COPPOLA AND DAVID LEWIS

US Federal Trade Commission | Corruption Watch South Africa

Times have changed, and questioning antitrust orthodoxy was not always popular as it is today. Looking outside the US borders for inspiration was perhaps even less popular. And yet this book honors someone who has done both for decades and is unequivocally one of the most beloved and vibrant figures in the international competition community. An intellectual vanguard and a treasured friend.

When we think of *avant-garde* and an octogenarian, the assumption is that person was a pioneer in his or her “day”. Eleanor was indeed a pioneer as a young woman in law school, one of eight females in her graduating class. When she became the first female partner at her white-shoe law firm in 1970, only two other women were or had ever been partners in major Wall Street law firms. In the early 1980s, as the Chicago School began to dominate thinking, she questioned the efficiency narrative and argued for antitrust to encompass not only consumer interests, but others as well, such as dispersion of economic power and protection of the competitive process as market governor. In 1986, long before international antitrust was even a concept, she was writing comparisons of US and EU approaches to single firm conduct. When market reform and the Washington consensus began to gain traction in the early 1990s, Eleanor was already in Central Europe, working on a book about how competition law was changing economies, asking why central European nations need to adopt EU competition law instead of one more adapted to their needs? At the turn of this century, when the US, EU, and others realized there was a need for a new international approach to competition policy, Eleanor was busy drawing up plans for the Global Competition Initiative, an enterprise that later materialized as the International Competition Network, today the preeminent multilateral competition body. And in 2007, the so-called high-water mark of consensus that antitrust was on the right course, Eleanor was writing articles that eschewed consideration only of aggregate consumer or total wealth and advocating for an analytical standard that opens paths of mobility and access to markets so critical for economic success, particularly in developing countries. These days, she writes about how competition agencies in developing nations can use their public interest standard to address the economic strains imposed by the coronavirus, and what

an international framework for addressing competition concerns of digital platforms might look like. Her “day” encompasses more than sixty years.

Eleanor’s scholarly work spans a broad array of subjects, but it is her comparative work, particularly in regard to the US and the EU, that is the most celebrated. Her work is regularly consulted by scholars, practitioners, and agency officials, and has shaped profoundly how we approach and think about these two systems. Her work offers deep insight into ways the transatlantic titans could learn not only from one another but also from younger agencies, including those in the developing world. While others pressed for convergence and harmonization, Eleanor recognized that those pursuits needed to be complemented by understanding and respecting differences, and successfully advocated for informed divergence to be part of the ICN’s mission, alongside convergence.

Eleanor’s written contributions are testament to the pioneer she is. Her legacy, however, will be in her human interactions. While others with unorthodox views might run for cover, time and again Eleanor has raised her hand to participate, often the only female in the room and even more often, the only one with a different viewpoint. For decades Eleanor has espoused her views on a stage physically and metaphorically full of traditionalists, engaging them with grace. Indeed, Eleanor’s intellectual curiosity and fairmindedness leads her to *seek out* people with different views, an exercise in pluralism, as she seeks to understand diverse views and how they relate to her own. From the earliest days of her career, she has been a mentor and friend not only to her students but to agency officials, fellow academics, and others. How typical that, during the pandemic lockdowns, while others secluded themselves from social engagements Eleanor was reaching out to friends, colleagues, and students – offering kindness, sympathy, and words of positivity.

It is fitting that Eleanor received a lifetime achievement award for her “substantial, lasting, and transformational impact on competition policy and/or practice” in 2011: she was a transformationalist before transformationalism was in vogue. Today’s advocates for change may be unaware of the debt they owe to this remarkable woman, but this volume is one of many testaments to the decades Eleanor has spent defying gravity.

# Introduction

ILENE KNABLE GOTTS

Wachtell, Lipton, Rosen & Katz

It is my great honor to provide this introduction for Eleanor Fox's *Liber Amicorum*.

I met Eleanor for the first time in the Spring of 1984. As a graduating law student heading to the FTC to begin my antitrust career, I decided to attend the Antitrust Section's Spring Meeting. Scanning the large banquet room, I saw a sea of over 1,000 men in dark suits talking and engaged with each other—and seated in the front row, a sole woman reviewing the program materials. I worked my way over to that woman and saw an empty seat next to her. Not sure what to do, I shyly asked whether that seat was available; the woman looked up, immediately smiled, and said enthusiastically “Yes, I am Eleanor, nice to meet you.” Little did I know at the time, that as Humphrey Bogart said in *Casablanca*, this was “the beginning of a beautiful friendship.”

Fast forward three years. I decided to go to the Fordham Law conference in New York City, which at that time focused only on European Commission and US law. I, who up to that time had been a student and practitioner only of US competition law—with a focus on economics and the developing Chicago School principals—was intrigued by the discussions about a different approach to some of the basic principles of competition law and policy. And who on the panel opened my eyes to the possibilities that we, in the US, might not necessarily have it “all right,” or perhaps not right for all economies and circumstances: no one other than Eleanor Fox.

We stayed in touch after that conference, and I followed Eleanor's prolific writings, and her unfashionable call for the human aspects of competitive policy. By the late 1990s, Eleanor's reach had extended beyond the US, Europe, and the “developed” economies, to the developing world, including Africa.

Eleanor has been a trail blazer throughout her career. In doing so, she has been a mentor and role model for me, multiple generations of US lawyers, and, as evidenced by this *liber*, throughout the world.

Eleanor joined the New York law firm of Simpson Thacher & Bartlett as an associate in 1962—right after the birth of her first child (she ultimately had three

children while continuing to work at the firm). Her talents were immediately recognized by one of the finest antitrust litigators in the country at that time—Whitney North Seymour, Sr. — and under his tutelage she developed a love for antitrust law. Eleanor became the firm’s first female partner in 1970 and remained a partner at Simpson until 1976, when she embarked on her full-time academic career at NYU, while still remaining affiliated with Simpson in a counsel role.

Forty-five years later, Eleanor is the Walter J. Derenberg Professor of Trade Regulation at the NYU School of Law, where she continues to teach, both inside and outside the classroom, the next generation of competition lawyers.

When I was the International Officer of the ABA’s Antitrust Section (2013-2016), I affectionately referred to Eleanor as the “Competition Ambassador to the World.” If you went to the NYU website around that time, you would have seen the usual materials that you would expect for a Professor of Eleanor’s high stature—a bio with a long list of articles, prestigious positions, etc. But, if you searched the NYU website more broadly, you would find under “news” a story that really provides some insight into the fervor with which Eleanor has undertaken her role. The title of the article is “Eleanor Fox goes on global tour” and states with respect to Eleanor’s upcoming summer plans, “Don’t look for Eleanor Fox at the beach in coming weeks. Instead, Fox ... will be crisscrossing the globe.” The site then provides an interactive map, which, if you click on any of the pins, provides a summary of the competition authorities and topics she covered at each site during her summer break. Of course, Eleanor’s role as “Competition Ambassador to the World” has been much more pervasive than a single summer hiatus.

Eleanor has never seen antitrust as confined to narrow concerns and has constantly reminded us of the importance of the social and political concerns that have historically been part of the fabric of antitrust. Eleanor’s 1987 article on “The Battle for the Soul of Antitrust” epitomizes this philosophy. So, too, does her 1987 article co-written with Larry Sullivan, “Antitrust-Retrospective and Prospective: Where Are We Coming From? Where Are We Going?”, which notes that legacies of the antipower, prodiversity era remain as the historical preference for pluralism, freedom of trade, access to markets, and freedom of choice. In these and subsequent articles, Eleanor challenges us to see the basis for recognizing the human aspects of competition and industrial policy—the potential to create a regime that will best incentivize firms to be, using Eleanor’s words, “lively, creative, innovative, and responsive; to produce and invent what people want.”

These articles also reflect another part of Eleanor’s enduring character, her optimism. Eleanor identified herself as “an optimist” in her 1989 Fordham Law Review article “Being a Woman, Being a Lawyer and Being a Human Being.” As she further recognizes, part of being an optimist is recognizing that success can be slow to achieve.

Eleanor's successes in broadening the role of antitrust outside of the US have been well-recognized and noted but have been slow to gain broad acceptance here in the US. For much of the last four decades, her views were a departure from mainstream economic thinking. Eleanor's patience, however, may finally be paying off. Today's debate on US competition policy in the halls of Congress, Presidential campaigns, and among Neo-Brandeisian enforcers suggests that Eleanor's harkening back to the principles and objectives that formed the basis of our federal antitrust laws is not so much sentimental, but rather, as with a good vintage wine, may be just now coming into their peak time. In fact, her unabated focus on equality and fairness as part of the antitrust law mandate has been prescient and may more accurately reflect the reach of the antitrust laws in the emerging new world order than the narrower Chicago School approach, she began questioning decades ago.

In sum, Eleanor has made a difference with her optimism and compassion for all of us who have been fortunate enough to know her, to count her as a friend, and to have witnessed all that she has achieved in the United States and globally to make the world a better place.

# Contributors

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# Eleanor M. Fox

## Biography & Publications

### Biography

Eleanor M. Fox is a professor of law and is the Walter J. Derenberg Professor of Trade Regulation at New York University School of Law. She teaches, writes, lectures, and advises on antitrust law, competition policy, and globalization, and has a special interest in developing countries and the interrelationship between equality and efficiency.

Eleanor was a partner at the New York law firm Simpson Thacher & Bartlett. She served as a member of the International Competition Policy Advisory Committee to the Attorney General of the US Department of Justice (1997–2000) (President Clinton) and as a Commissioner on President Carter’s National Commission for the Review of Antitrust Laws and Procedures (1978–79). She has advised numerous younger antitrust jurisdictions including South Africa, Egypt, Kenya, Tanzania, The Gambia, Indonesia, Russia, Poland, and Hungary, and the common market COMESA. Eleanor received an honorary doctorate degree from the University of Paris-Dauphine (2009). She was awarded an inaugural Lifetime Achievement Award in 2011 by *Global Competition Review* for “substantial, lasting and transformational impact on competition policy and/or practice” and lifetime, inaugural, or other achievement awards from ASCOLA, AALS Antitrust Section, New York State Bar Antitrust Association, and the American Antitrust Institute. With Mor Bakhom, she wrote *Making Markets Work For Africa* (2019). Her other books include US and EU competition casebooks (with Dan Crane and Damien Gerard, respectively), *Global Issues in Antitrust and Competition Law* with Dan Crane, and readings on developing countries and competition with Abel Mateus.

## Publications

(as of September 2021)

### Books

*Case and Materials on US Antitrust in Global Context* (with Daniel Crane). West Academic Press, 4th ed., 2020.

*Making Markets Work For Africa: Markets, Development, and Competition Law in Sub-Saharan Africa* (with Mor Bakhoum). Oxford University Press, 2019.

*EU Competition Law: Cases, Texts, and Context* (with Damien Gerard). Edward Elgar, 2017.

*Global Issues in Antitrust and Competition Law* (with Daniel Crane). West Academic Press, 2d ed., 2017.

*The Design of Competition Law Institutions: Global Norms, Local Choices* (ed., with Michael J. Trebilcock). Oxford University Press, 2013.

*Antitrust Stories* (ed., with Daniel Crane). Foundation Press, 2007.

### Articles, Essays and Chapters in Collection

“Mergers, Antitrust, and the China Card.” In *Research Handbook on Global Merger Control*, edited by Nicholas Levy & Ioannis Kokkoris (forthcoming).

“Antitrust and Inequality: The History of (In)Equality in Competition Law and Its Guide to the Future” (with Philipp Bazenov). In *Competition Law and Economic Inequality*, edited by Jan Broulik & Kati Cseres (forthcoming).

“Integrating Africa by Competition and Market Policy” *Rev. Indus. Org.*, special issue on Africa edited by T. Ross & Liberty Mncube (2021) (forthcoming).

“The new US antitrust administration” (with Alden F. Abbott, Robin Adelstein, Megan Browdie, Michael A. Carrier, Peter C. Carstensen, Samuel Clark, Lisl J. Dunlop, Harry First, Albert A. Foer, Eleanor M. Fox, Jacqueline Grise, Ryan Kantor, Donald C. Klawiter, John Kwoka, James Langenfeld, Tad Lipsky, Alessandro Massolo, Howard Morse, Gabriella Muscolo, James Bo Pearl, Noah Pinegar, Chris Ring, Christopher Sagers, Richard S. Taffet, Willard K. Tom, Eliot Turner, Doug Tween, Tommaso Valletti and Michael L. Weiner) *1-2021 Concurrences* (2021).

“We Need Rules to Rein in Big Tech” (with Harry First), special edition of the *CPI Antitrust Chron.* (Oct. 2020).

“Competition Law In Sub-Saharan Africa: The Market Solution Or A Faustian Pact?” (with Mor Bakhoum) in *Competition law and developing countries: Overarching themes from Africa, cartels and corruption, and mergers*, *2-2020 Concurrences* (2020).

“Antitrust and the clash of sovereigns – Bringing under one roof: Extraterritoriality, industrial policy, foreign sovereign compulsion, and (bad) applications of law against “my country’s” firms” *4-2019 Concurrences* (2019).

“Antitrust: Updating Extraterritoriality” 0/2019 (inaugural issue) *Antitrust & Pub. Policies Rev.* (2019) (published by the Italian Competition Authority) (Concurrences Best Antitrust Academic Cross-border Article, 2020).

“Platforms, Power and the Antitrust Challenge: A Modest Proposal to Narrow the US–Europe Divide” 98(2) *Neb. L. Rev.* 297 (2019).

“Extraterritorial Jurisdiction, Antitrust, and the EU Intel Case: Implementation, Qualified Effects, and the Third Kind” 42 *Fordham Int’l L.J.* 981 (2019).

“China, Export Cartels, and Vitamin C: America Second?” *CPI’s North America Column* (March 2018).

“Outsider Antitrust: ‘Making Markets Work for People’ as a Post-Millennium Development Goal.” In *Competition Policy For The New Era: Insights from the BRICS Countries*, edited by Tembinkosi Bonakele, Eleanor Fox, & Liberty Mncube. Oxford University Press, 2017.

“Antitrust Without Borders: From Roots to Codes to Networks.” In *Cooperation, Comity, and Competition Policy*, edited by Andrew T. Guzman. Oxford University Press, 2015.

“Monopolization and Abuse of Dominance: Why Europe is Different” 59 *Antitrust Bull.* 129 (2014).

“When the State Harms Competition – The Role for Competition Law” (with Deborah Healey) 79 *Antitrust L.J.* 769 (2014).

“China, the WTO, and State-sponsored export cartels: Where trade and competition ought to meet” (with Merit E. Janow) 4-2012 *Concurrences* (2012).

“The law and economics of resale price maintenance: A comparative perspective” (with Jérôme Philippe, Philippe Nasse, Lucas Peeperkorn, and Anne Perrot) 4-2008 *Concurrences* (2008).

“The Efficiency Paradox.” In *How The Chicago School Overshot The Mark: The Effect of Conservative Economic Analysis on US Antitrust*, edited by Robert Pitofsky. Oxford University Press, 2008.

“An antitrust fable – A tale of predation” 3-2008 *Concurrences* (2008).

“International Antitrust and the Doha Dome” 43 *Va. J. Int’l L.* 911 (2003).

“Toward World Antitrust and Market Access” 91 *Am. J. Int’l L.* 1 (1997).

“Being a Woman, Being a Lawyer and Being a Human Being” 57 *Fordham L. Rev.* 955 (1989).

“The Battle for the Soul of Antitrust” 75 *Cal. L. Rev.* 917 (1987).

“Modernization of Antitrust: A New Equilibrium” 66 *Cornell L. Rev.* 1140 (1981).

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# Eleanor M. Fox

## Antitrust Ambassador to the World

*Liber Amicorum*

Pioneer, avant-garde, transformationalist - Eleanor M. Fox is regularly described in these terms by the manifold antitrust practitioners who have been influenced by her industry-shaping scholarly work. Over the course of an extraordinary career, she has helped establish a coherent set of competition law and policy principles designed to promote markets that work in favor of inclusivity, and to ensure economic development that reduces unequal access to markets. Her mold-breaking contributions to the tailored development of competition law in developing economies are acknowledged today across international forums that she helped create. This book honours Professor Fox's indelible mark on antitrust law and policy with contributions from her friends and colleagues around the world. The articles explore subjects such as the role of competition policy, its intersection with social policies, external pressures, and challenges for developing economies amongst others.

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