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Monopoly and Monopolization — Fundamental But Separate Concepts in U.S. Antitrust Law

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Summary

Antitrust doctrine holds that viable competition will best protect consumers; it is concerned with the viability of individual competitors only insofar as their fates affect marketplace competitiveness. Moreover, the Rule of Reason[1] generally modified "competition" with "reasonable." Viewed in the context of the Rule of Reason, the general prohibitions against monopolization and attempted monopolization (Sherman Act § 2, Clayton Act §7) and any assessment of "unfair acts" in commerce (Federal Trade Commission Act § 5) require two inquiries: whether an entity is in fact a monopolist; and whether that monopolist has *unlawfully* monopolized the market(s) within which it operates (the applicable, "relevant market," which may be either product- or geographically based, or both). This report will attempt to illustrate the difference between the concepts of "monopoly" and "monopolization" by touching on the monopoly/monopolization thinking in the Antitrust Division of the Department of Justice (DoJ) and the Federal Trade Commission (FTC), as illustrated in (1) statements on merger enforcement made by recent antitrust enforcement officials (generally indicative of the agencies' concerns about competitive conditions and the effect of various market transactions), (2) the 1992 Horizontal Merger Guidelines [2] and (3) some observations on the Government actions against the Microsoft and Intel Corporations.

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[1] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911). Rule of Reason analysis balances (with the exception of the relatively few instances of *per se* violations of the antitrust laws (*e.g.*, price fixing, boycotts)) the anticompetitive results of a transaction against any procompetitive effects that might be produced.

[2] Jointly issued Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, published and released April 2, 1992 ["Merger Guidelines" or "Guidelines"], reprinted at 1559 ANTITRUST & TRADE REGULATION REPORT (ATRR) (Special Supplement) (April 2, 1992) and 1806 ATRR 359 (April 10, 1997).

Section 2 of the Sherman Act prohibits both the monopolization and attempted monopolization of interstate or foreign trade or commerce.[3] Section 7 of the Clayton Act prohibits mergers or acquisitions "where in any line of commerce or any activity affecting commerce in any section of the country, the effect of such [transaction] ... may be substantially to lessen competition, or to tend to create a monopoly."[4] Section 5 of the Federal Trade Commission (FTC) Act prohibits "unfair acts" in commerce.[5]

A shorthand definition of "monopoly" is "the power to control prices or exclude competition."[6] The significance of the ability to exclude competition is, however, as is the ability to control prices, in the supposed deleterious effect of the lack of competition on, *consumers*, who are presumed to benefit from the existence of largely competitive markets, and *not* on the excluded *competitors*:

> '[t]he antitrust injury requirement obligates [complainants] to demonstrate, as a threshold matter, "that the challenged conduct has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice."'[7]
>
> "... it is axiomatic that the antitrust laws were passed for 'the protection of **competition, not competitors**.'"[8]

There is no concept of "no fault" monopolization in United States antitrust law;[9] absent a finding by a court of "guilty behavior,"[10] therefore, there can be no finding of "monopolization": a finding of "*monopoly power*" does *not*, by itself, *necessarily equate to a finding of* the *monopolization* prohibited by either section 7 of the Clayton Act or section 2 of the Sherman Act,[11] or the "unfair practices" prohibited by section 5 of the FTC Act. Practically, then, there must be a determination of the market(s) within which

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[3] 15 U.S.C. § 18.

[4] 15 U.S.C. § 2.

[5] 15 U.S.C. § 45.

[6] United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391-92 (1956).

[7] Anheuser-Busch, Inc. v. G.T. Britts Distributing, Inc., 44 F.Supp. 2d 172,174 (N.D.N.Y. 1999), quoting George Haug Co. v. Rolls Royce Motor Cars, Inc., 148 F.3d 136, 139 (2d Cir. 1998), which quoted Capitol Imaging v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993), *cert. denied*, 510 U.S. 947(1993).

[8] Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp., 45 F.Supp. 2d 1164, 1193 (D. Kansas 1999), quoting Brooke Group v. Brown & Williamson Tobacco, 509 U.S. 209, 224 (1993), which quoted Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis in Brown Shoe).

[9] *I.e.,* there is no "bright line" for the size beyond which an entity may grow before it is deemed a "monopoly." Attempts during the 1970s to create "no fault monopolization" were not successful (*e.g.,* S. 1167, 93d Congress, sponsored by Senator Philip Hart).

[10] *I.e.,* predatory pricing or tying the purchase of an unwanted product to the purchase of one over which the seller has a monopoly. In this respect, note cases filed against Microsoft and Intel by DoJ and the FTC, discussed, *infra*, beginning at p. 4.

[11] "... [the] power that, [for example], automobile or soft-drink manufacturers [who, admittedly, produce non-standardized, differentiated products] have over their trademarked products is not the power that makes an illegal monopoly." 351 U.S. at 393.

the alleged monopolist operates (*i.e.*, the relevant product market and/or the relevant geographic market) in order to determine the extent to which he is actually capable of exercising any meaningful price-controlling or competition-excluding power, or the extent to which he has already done so.[12]

At least four views of economic markets provide some context to the "relevant market" and subsequent monopolization determinations: **free market**, which holds that (a) market forces produce the best allocation of resources, and (b) the non-anecdotal evidence indicates no correlation between concentration and profits; **centrist**, which is somewhat similar to the "free market" view that size and distribution don't necessarily signify the intensity of competition, but does believe that collusion is more likely in concentrated markets; **moderate structuralist**, which emphasizes that the greater the number of competitors in a market the more likely there will be downward pressure on prices; and **strict structuralist**, which holds that competition is directly and inversely related to concentration levels.[13] The "bottom-line" goal of U.S. antitrust policy should be "to encourage producers to make and sell better products at lower prices and pass those savings on to consumers."[14]

The jointly issued Horizontal Merger Guidelines[15] were promulgated in order to inform the business community of the agencies' (DoJ, FTC) governing philosophy and "analytical framework" when they are reviewing the permissibility of proposed mergers. The "Purpose and Underlying Policy Assumptions" section of the Introduction states

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[12] United States v. E.I. duPont de Nemours & Co. (351 U.S. 377 (1956)) is considered a landmark monopolization case. There, in order to determine whether duPont's dominance in the cellophane wrapping market amounted to unlawful "monopolization," it was necessary for the Court to define a product market that included, but was larger than, "cellophane wrapping" before it could ultimately determine "whether [duPont] control[led] the price and competition in the market for such part of trade or commerce as [it is] charged with monopolizing" (*Id.* at 392, *i.e.*, whether there was significant enough competition from non-cellophane, flexible wrapping materials to dilute duPont's admitted monopoly in the cellophane wrapping market). The monopoly enjoyed by duPont in the cellophane wrapping market was found not to amount to unlawful monopolization of the market for flexible packaging materials: "... despite cellophane's advantages it has to meet competition from other materials in every one of its uses. ... We conclude that cellophane's interchangeability with the other materials mentioned suffices to make it a part of this flexible packaging material market." (351 U.S. at 398, 400).

[13] MERGER STANDARDS UNDER U.S. ANTITRUST LAW, ABA Monograph 7, 1981.

[14] Pitofsky, Robert. *Proposals for Revised United States Merger Enforcement in a Global Economy,* 81 Georgetown Law Journal 195, 205 (note 3) (December 1992).

[15] *See* f.n. 2. The *Guidelines* were issued in 1962, and revised in 1982, 1984, 1992, and 1997. The 1984 version indicated that the Department would consider foreign as well as domestic competition in determining the geographic market for the products or services of a potential merger (§ 2.34). The 1992 version (issued jointly with the FTC) states that the "unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise" § 0.1). The 1997 revision dealt only with the agencies' treatment of the so-called "efficiency defense": a merger that is, on balance, anticompetitive, will not generally be "saved" by claimed or actual efficiencies, nor likely be approved by the reviewing agencies (§ 4). Although the Guidelines are not binding on either the Antitrust Division or the FTC (or, for that matter, the courts), they are indicative of the agencies' thinking with respect to the competitive concerns inherent in all market transactions.

unequivocally that "mergers should not be permitted to create or enhance market power or to facilitate its exercise, but goes on to note that while "competitively harmful" mergers will be challenged, there is a "larger universe of mergers that [is] either competitively beneficial or neutral."[16] Emphasizing that distinction, the Assistant Attorney General in charge of the Antitrust Division in 1998 testified:

> Sometimes people complain about a merger solely based on its size. ... I want to make clear[, however,] that antitrust analysis focuses on the *specific competitive harms* that may be associated with a particular merger, *not* on its *size in the abstract.* Thus, for example, a big merger may not be challenged because the merging parties are not competitors or potential competitors of one another and the merger does not raise any vertical antitrust issues. At the same time, we may challenge a smaller merger that involves the only two firms that make a particular product. *The key for our review is whether the merger will harm consumers, not the sheer size of the corporate entities involved*.[17]

Two relatively recent cases (one ongoing) clearly illustrate the antitrust enforcement agencies' currently existing differentiation between the existence of monopoly power and active monopolization: the Department of Justice suit against Microsoft[18] and the FTC's complaint against Intel.[19] In *Microsoft*, the Antitrust Division stated that "Microsoft possesses (and for several years has possessed) monopoly power in the market for personal computer operating systems,"[20] but filed its action not to challenge Microsoft's monopoly status, but rather, the company's actions:

> To protect its valuable Windows monopoly against ... potential competitive threats, and to extend its operating system monopoly into other software markets, *Microsoft has engaged in a series of anticompetitive activities*. Microsoft's conduct includes agreements tying other Microsoft software products to Microsoft's Windows operating system;[21] exclusionary agreements precluding companies or potential

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[16] Merger Guidelines, § 0.1.

[17] Joel I. Klein, Assistant Attorney General, Antitrust Division, testimony before the Senate Judiciary Committee, June 16, 1998 (emphasis added).

[18] United States v. Microsoft, Civil Action No. 98-1232, filed in the United States District Court for the District of Columbia on May 18, 1998 (hereinafter referred to as "Complaint") "to restrain anticompetitive conduct by defendant Microsoft Corporation ..., the world's largest supplier of computer software for personal computers ...." (Complaint ¶ 1); 87 F.Supp. 2d 30 (D.D.C. 2000) ("Conclusions of Law"), 97 F.Supp. 2d 59 (D.D.C. 2000) ("Final Judgment"); *aff'd in part, rev. in part, "Final Judgment" vacated, remanded,* 253 F.3d 34 (D.C. Cir. 2001); *reh. denied,* ___F.3d___ (8/2/2001), *petition for certiorari filed,* ___U.S.___(8/7/2001).

[19] In re Intel Corporation, Doc. No. 9288, filed June 8, 1998 (hereinafter referred to as Docket No. 9288), settled May 17, 1999 by means of a Consent Decree; *See* <www.gov.ftc/opa/1999/9903/intelcom.htm> for details of the Consent Decree and <www.gov.ftc/opa/1999/9904/intelst.htm> for FTC comments on the decree.

[20] Complaint, ¶ 2.

[21] Simply, "tying" is refusing to sell one product to a buyer unless the buyer agrees also to take a designated second product ("you can't buy X without Y"), thus precluding the buyer's choice concerning where to purchase each component, and foreclosing to other sellers a portion of the market in the tied product. The established "test" for a tying violation first requires that there be (continued...)

> competitors from distributing, promoting, buying, or using products of Microsoft's software competitors or potential competitors; and exclusionary agreements restricting the right of companies to provide services or resources to Microsoft's software competitors or potential competitors.[22]

The district court's finding that Microsoft acted anticompetitively in violation of section 2 by tying its Internet Explorer (IE) browser to its operating system, and thus *per se* violated section 1 of the Sherman Act, was upheld in the United States Court of Appeals for the District of Columbia.[23] But, although the appeals court supported the district court finding that Microsoft is, in fact, a monopolist, it nevertheless refused to find that the bundling of IE with the operating system could, therefore, be characterized as a *per se* violation. The court was willing to suspend judgment on the issue in light of the dearth of case law addressing it, and the relative lack of actual experience with the arrangements ("the poor fit between the separate-products test and the fact of this case"),[24] and so felt compelled to remand the *per se* finding to the district court for further consideration in light of its opinion that the tying activity at issue could at most be considered a violation of the antitrust laws because unreasonable under the Rule of Reason:[25]

> The District Court determined that Microsoft had maintained a monopoly in the market for [certain] operating systems in violation of § 2; attempted to gain a monopoly in the market for internet browsers in violation of § 2; and illegally tied two purportedly separate products, Windows and Internet Explorer ("IE"), in violation of § 1. ... [W]e affirm in part and reverse in part the District Court's judgment that Microsoft violated § 2 of the Sherman Act by employing anticompetitive means to maintain a monopoly in the operating system [OS] market; we reverse the District Court's determination that Microsoft violated § 2 of the Sherman Act by illegally attempting to monopolize the internet browser market; and we remand the District Court's finding that Microsoft violated § 1 of the Sherman Act by unlawfully tying its browser to its operating system. ... While every "business relationship" will in some sense have unique features, some represent entire, novel categories of dealings. ... the arrangement before us is an example of the latter, offering the first up-close look at the technological integration of added functionality into software that serves as a platform for third-party applications. There being no close parallel in prior antitrust cases, simplistic application of per se tying rules carries a serious risk of harm.

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[21] (...continued)
two separate products -- each, or either, capable of being purchased separately by a consumer, but also a defendant with monopoly power in the market for the tying product, lack of choice for the consumer, and foreclosure of a substantial volume of commerce. Tying is most generally analyzed as a *per se* violation of the antitrust laws, although when a court has failed to find the requisite "separate products," a Rule of Reason analysis has been employed. *See e.g.,* United States v. Jerrold Electronics Corp., 187 F.Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961); Broadcast Music, Inc. v. CRS, 441 U.S. 1 (1979); Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984).

[22] Complaint, ¶ 5 (emphasis added).

[23] That finding by the appeals court was the subject of the requested rehearing, denied by the court of appeals on August 2, 2001.

[24] United States v. Microsoft, 253 F.3d 34, 85 (D.C. Cir. 2001).

[25] *See* note 1, supra re Rule of Reason.

> Accordingly, we vacate the District Court's finding of a per se tying violation and remand the case. Plaintiffs [United States, various states] may on remand pursue their tying claim under the rule of reason.[26]

On remand, the district court seemed to heed the appellate court findings concerning the use of Microsoft's lawful monopoly power in furtherance of unlawful monopolization.[27]

In the charges against Intel Corporation by the FTC, the Commission acted to restrain the "pattern of *conduct* ... that violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45,"[28] and not because of Intel's acknowledged monopoly status.[29]

> As **a monopolist**, Intel **can compete by producing better, cheaper and more attractive products**. **It cannot act to cement its monopoly power by preventing other firms from challenging its dominance.** Intel has acted illegally. It has used its monopoly power to impede innovation and stifle competition [by denying necessary technical information to certain customers in retaliation for their suits against Intel to enforce their (the customers') patents, allegedly infringed by Intel].[30]

Some observers view the present enforcement posture as evidence of the flexibility and workability of the federal antitrust laws, although it is certainly possible to disagree with the way(s) in which the antitrust enforcement agencies have acted with respect to particular instances of proposed mergers or vis-a-vis specific, alleged monopolists. Given the existing rationale of the antitrust laws, however, it is difficult to disagree with their policy of prohibiting only those transactions/activities which they believe do/will, in fact, harm competition. On the other hand, Congress is free to re-examine the century-old antitrust statutes in order to change their focus.

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[26] 253 F.3d at 45, 46, 84.

[27] 231 F.Supp.2d 144 (D.D.C. 2002).

[28] Introduction to FTC Docket No. 9288 (emphasis added).

[29] Docket No. 9288, ¶ ¶ 4-10.

[30] FTC Press Release Issued to Announce Agency's Filing Against Intel, June 8, 1998 (emphasis added).