

The Future of Monopolization: The FTC and DOJ Take on Single-Firm Conduct in Joint Hearings

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The world itself, so put-upon by terrorism, war and other inconvenient truths, appears to be approaching a crossroads on the somewhat more mundane question of what governments' policies should be toward monopolists and monopolization. Among the current activities worth highlighting:

- ∞The Antitrust Modernization Commission is preparing recommendations on Section 2 of the Sherman Act.
- ∞The European Commission is working on a discussion paper that may lead to guidelines on exclusionary conduct that are more interventionist than current U.S. policy.
- ∞Communist China is advancing toward final passage of an anti-monopolization statute.
- ∞Policies toward Microsoft continue to evolve with the European Commission levying substantial penalty fines for non-compliance with its order, the Court of First Instance on the verge of deciding whether the underlying order is itself valid, and Microsoft issuing a well-publicized statement of twelve voluntary principles of fair competition.
- ∞Oversight of Intel intensifies on three continents, with an order in Japan, investigations in the E.U. and Korea, and litigation (by competitor AMD) in the U.S.
- ∞An International Competition Network (ICN) Working Group on unilateral conduct is being co-chaired by the U.S. Federal Trade Commission.
- ∞A long-awaited opinion by the FTC in its *Rambus* "patent ambush" case has opened up increased discussion of the role of standards and patents in monopolization cases, even as the continuing extension of patent rights appears to expand the realm of legal monopoly.
- ∞The Supreme Court will hear argument in the *Weyerhaeuser* case, which raises new questions about the exercise of monopolistic power by a buyer (most precedents involving sellers), even as the Wal-Mart phenomenon draws

additional voices into the argument over what we want from competition and market regulation.

∞ While a reasonable amount of consensus exists on policies toward cartels and mergers, controversy swirls in academic journals, conferences, and amicus briefs around the appropriate treatment of unilateral conduct by large firms.

Given this much activity, it is not surprising to see the FTC and DOJ undertake joint hearings on single-firm conduct. Such hearings commenced on June 20 with introductory presentations by FTC Chairman Deborah Majoras and Assistant Attorney General Tom Barnett followed by overviews by noted academics Herb Hovenkamp and Dennis Carlton. Two sets of hearings have now been held and additional hearings are anticipated during the fall and early winter.

A number of questions have surfaced about the joint hearings, which we will attempt to answer.

What is the need for joint hearings if the Antitrust Modernization Commission (“AMC”) is already covering the same ground?

It is true that the AMC has considered topics relating to single-firm conduct, but its agenda ranges far and wide, incorporating nearly two hundred separate questions on matters both procedural and substantive, from criminal remedies for price fixing to international comity. While seeking input from the public and invited witnesses, the AMC has not focused on generating or even gathering fresh empirical information. Its deliberations on exclusive dealing resulted in a recent straw vote that overwhelmingly favored continuing development of the common law rather than recommending statutory changes; favored the movement toward greater clarity of the law in ways that would give greater recognition to the value of aggressive competition by monopolists; and urged the joint agency hearings to consider ways to achieve this. Although it is possible that the AMC’s further deliberations will develop recommendations on specific standards or tests for bundling and exclusive dealing, discussions to date suggest that the AMC’s final report, due in April of 2007, will treat single-firm issues at a fairly high level of generality. The joint agency hearings, on the other hand, will devote much more time and focused attention to a range of specific single-firm issues with a greater intended emphasis on empirical information.

How will the joint hearings work?

The two agencies confer on all matters. The key staff people involved are Alden Abbott and Pat Schultheiss at the FTC and Robert Potter and Gail Kursh at the Antitrust Division. The agencies will arrange hearings once a month (taking August off) by inviting a panel of experts to focus on a particular topic. To date the topics have been

predation (June 22, the morning dealing with seller side predation and the afternoon with buyer side predation) and refusals to deal (afternoon of July 18).

In the hearings, each expert speaks for about twenty minutes and then the moderators facilitate a panel discussion. Sometimes the moderators present statements (e.g., “The legality of a refusal to deal should depend on whether the refusal constitutes a change from prior business practices.”) that are intended to elicit agreement or disagreement. Sometimes they also present hypothetical situations to stimulate panel discussion.

Additional topics that have been placed on the agenda according to the agencies’ releases include bundled loyalty discounts and market share discounts; product tying and bundling; exclusive dealing; most-favored-nation clauses; product design; and misleading or deceptive statements or conduct. Schedules and speakers have not been announced.

What end product is anticipated?

Chairman Majoras, the moving force behind the hearings, is hopeful that the discussions will lead to “signposts” for when single-firm conduct harms competition and when it does not, and that these might lead to “guiding principles” and perhaps some rules or tests. However, she said in her introductory remarks, “Even if these hearings do not produce consensus on a universal test or a set of tests, I am optimistic that they can identify relative consensus on a number of principles and on how to approach a significant fraction of the single-firm conduct we encounter.” Assistant Attorney General Barnett has spoken of possible “safe harbors” that can be defined. The agencies hope to find enough *consensus* to produce a jointly written report.

Is there a hidden agenda?

Some observers believe that the joint hearings are intended to constrain the future enforcement of Section 2 and to send out a strong message to the rest of the world that “abuse of dominance” provisions ought to be written and interpreted in line with an emerging American *laissez faire* approach. In conversations with the professional staff, Chairman Majoras and Assistant Attorney General Barnett, it is clear that the principals and key staff believe, to the contrary, that this is an open-minded effort to learn about what single-firm conduct is or is not anticompetitive because the issues are current, complex and require policy-makers’ close attention. They are strenuous in saying there are no preconceived outcomes. They are hopeful the process will reveal where consensus can be found, but do not intend to drive the engine of government toward a particular outcome. These assurances seem credible.

And yet this is an Administration that has generally followed Chicago School principles, downplaying the role of concentration, bringing few Section 2 cases (*Unocal*, *Dentsply* and *Rambus* being important exceptions), emphasizing the importance of not

chilling aggressive competition by monopolists, supporting what many consider to be weak remedies in the *Microsoft* case and more recently urging foreign governments not to push Microsoft Corp. any harder, and filing amicus briefs in *Trinko*, *Illinois Tool Works*, and *Weyerhaeuser* that argue for new limitations on the applicability of Section 2. If the hearings result in a report that merely trumpets the status quo for Section 2 – as it appears the AMC will do—the result will be to reinforce the movement to shrink-wrap the anti-monopolization tool chest.

What does it mean to find a consensus among panelists?

The agencies signal that they hope to find a consensus on various issues. They promote this by putting before their panelists a series of statements to test whether they elicit consensus. Several points might be made about this approach.

First, if finding a consensus simply means locating it among the panelists who happen to be selected by the agencies, there is a problem of defining the relevant universe of experts and the criteria for selection. Are all significant points of view to be represented? To a very large extent, the attitudes of the experts selected are predictive of what they will say about various statements. For example, both Robert Pitofsky (the former FTC Chairman) and Hew Pate (the former head of the Antitrust Division) were on the recent refusal to deal panel. Pitofsky is known to support modestly aggressive enforcement of the anti-monopoly laws and has defended the essential facility doctrine; Pate is known for arguing that the best policy is generally to keep the government's hands off and is a declared enemy of essential facilities thinking. How would these experts be expected to react to the following statement: "Courts should abandon the essential facilities doctrine."? Naturally, Pitofsky and Pate disagreed. (Interestingly, it appeared that only two of the six panelists agreed with the statement, there being many questions about what it meant.)

Of course, the agencies have the option of inviting and encouraging a wide range of comments from the public, to enlarge the data base. Their websites invite such comment, but few comments have been forthcoming to date. (It may be that the public's capacity for writing analytical comments has been exhausted, at least temporarily, by responding to the AMC. The American Antitrust Institute has eleven working groups corresponding with the AMC.)

Perhaps the purpose of the joint hearings is merely to negotiate a set of policy positions that will be mutually acceptable to the two enforcement agencies, a way of narrowing a gap that seems to have been revealed in the aftermath of the agencies' joint hearings on intellectual property. In this case, identifying a consensus of outside experts might help the agencies reach accord. But there seems also to be a larger purpose, of influencing the domestic and international antitrust communities. We should therefore ask more probing questions about where and how the hearings' consensus will be found.

By definition, a small numbers of panelists cannot be expected to represent all views worthy of consideration, even if the agencies seem intent on selecting fairly diverse panels. Thus far this appears to be the case, except that the witnesses have been mostly American antitrust lawyers and economists whose views are already relatively well-known.

Should the universe of experts be broadened?

Chairman Majoras has stated that she wants to hear from businesses who will provide the raw material for understanding what really happens in the boardroom and the marketing department as well as in the lawyer's office, but to date it has obviously proven difficult to locate and convince businesspeople to speak on the record about their experiences. Dominant firms have to be careful about what they say. Small and middle sized businesses whose ability to enter or flourish within a market may be stymied by the strategies and tactics of a dominant firm are likely to fear retribution if they speak out. What other resources could be helpful? What about investment analysts and business school experts in marketing and strategic management? (Michael Porter would likely have very interesting things to say.) What about antitrust experts from other nations? The relevant question is, who should constitute the body of experts within which a consensus is to be found? Who will be marginalized so as not to participate in the conversation?

A consensus on exactly what?

Assuming that question is answered satisfactorily, another question arises: on precisely what terms is there a consensus? Too often when the hearings' expert panel was offered a statement, the panelists were at odds over what a particular term within the statement meant. For example, in the refusal to deal hearing, the moderator put forward this generalization: "The antitrust laws should never require a firm to deal with a rival." Panelists immediately wanted to know whether the refusal was to be taken as unilateral and unconditional, and then they argued over whether various scenarios reflected "unconditional" refusals. As panelist William Kolasky commented, antitrust is fact-specific and it is hard to answer questions in the abstract.

What constitutes a consensus?

And finally, assuming the panel is representative and the statement precise and well-understood, what constitutes a consensus? The word itself means "a general agreement" and that may imply less than unanimity, but more than a simple majority. Of the nine statements offered for comment by moderators at the refusal to deal hearing, I only detected three that appeared to attract unanimity or near-unanimity, and one of those was unanimous in the negative. The two that were approved were (1) "It is difficult to craft an injunctive remedy in a refusal to deal case." And (2) "Compulsory licensing of intellectual property as an antitrust remedy [apart from merger cases] should be rare."

The statement that was unanimously rejected was, “A firm can refuse to deal with its competitors only if there are legitimate competitive reasons for the refusal.”

One senses from the first three panels that finding a broadly-based consensus on some points can probably be done, but the price of consensus may be a high and not necessarily productive level of generalization.

What will come out of the joint hearings?

Let us assume that the staffs continue to bring forward representatives of relatively diverse perspectives and that the hearings will not be subject to the criticism of stacking to obtain a particular result. Three outcomes are conceivable.

First, it could prove to be extremely difficult to make useful statements that have near-unanimous acceptance. This might make it impossible for the two agencies to agree on a report that is meaningful. At worst, it could bring out into the open and exacerbate disagreements between the nation’s two antitrust enforcement agencies: a “Pitofsky heritage” at the Commission versus a “Pate heritage” at the Division.

Or, more optimistically, the process could lead to a consensus-based report that does provide useful new guidance as to enforcement policies. Such a document could be persuasive to courts and to foreign antitrust planners.

The third and most likely outcome would be a document that reflects consensus, at least within the agencies, on a limited number of principles and a discussion of the reasoning and information that stands in the way of additional consensus statements. This inventory of thinking about monopolization could be helpful in moving discussion forward without purporting to arrive at a stopping point.

What is at stake?

From a substantive point of view, a great deal is at stake in the conclusions that are reached. Do dominant firms have greater responsibilities than smaller or less powerful firms, as the Europeans and many Americans believe? Will the best production of innovative products at low prices require, as Hew Pate argues, that the government keep its hands off of firms that are acting unilaterally? Is Tom Barnett right when he stresses, “It is important to remember that every time a firm is kept from engaging in aggressive conduct because it fears an unnecessarily expansive interpretation of the antitrust laws, competition is harmed.”? Or should the other side of the card be emphasized, that every time a dominant firm is not kept from engaging in exclusionary conduct, other firms that might compete on the basis of price and innovation are made fearful and may not remain in or enter the market, to the detriment of consumers? This is the old antitrust chestnut of whether policy should prefer “Type I” errors or “Type II” errors – mistakes of over-intervention or mistakes of under-intervention. Put another way,

if you are likely to err some of the time, would you rather err on the side of fairness to corporate stockholders or fairness to consumers? Must the answer simply lie in a person's "priors" – preconceived ideological biases and situational interests—or can an empirical basis be found?

And is the only concern about monopoly the short term price impact caused by "deadweight loss" to society? In *Weyerhaeuser*, the government, supported by DOJ and FTC, argues that fairness should play no role in antitrust. Implicit may be the belief that what is important are predictability by businesses, administrability by courts and government agencies, and, above all, economic efficiency. On the other hand, proponents of strong intervention argue that the anti-monopoly laws should be concerned with the unfair advantage a monopolist may have over equally efficient rivals, the redistribution of monopoly overcharge from consumers to owners of the monopoly, short-term consumer choice, and long-term stimulation of innovation.

Advocates of weak intervention have faith in the rational behavior of corporations, emphasize the limited ability of the government to predict the future, and doubt that there is much that a government can do to remedy an economic situation without making it worse. They may also be convinced that for American corporations to succeed in global competition, they need to be supported by being allowed to act without the constraints of U.S. and other national antitrust regimes.

Strong interventionists, on the other hand, are dubious about whether corporations are entirely rational and in any event want rationality to attend to a wider range of outcomes than short-term profitability for the corporation. They worry about the limits of prediction, but believe the government is no less capable of reasonable prediction than businesses. Moreover, they tend to believe that there is such a thing as a "public interest" and that government, well-run, is capable of acting effectively to foster the public interest. Politically, they find positive reverberations of constitutional doctrines of checks and balances and separation of powers in an economic sector whose largest and most powerful units are constrained by competitors and by a degree of government oversight. And their view of international competition favors the observation that success in a very competitive home market is often the leading indicator of international success.

Although the debate within the antitrust community is carried on in the jargon of economics, what is at stake in the way governments approach the question of monopoly is ultimately highly political in the non-partisan sense, reflecting ideological and cultural differences that go to the heart of how a polity thinks about its private sector, its government, and the proper relationship between the two.