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Hearing But Not Listening: Comparative Competition Law and the DOJ Monopoly Report

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The Department of Justice ("DOJ") monopoly report[1] is enormously disappointing for a number of reasons. The Federal Trade Commission ("FTC") was wise to participate in this important project, but equally wise to distance itself from the final work product. The final report represents a serious effort, but reads in too many places like a justification for a record of inaction by the DOJ and an attempt to lock in future administrations to a similar course. I suspect that the report will achieve neither of these goals and hope that the DOJ's Antitrust Division of the next administration rejoins the FTC in bringing both innovative and traditional monopolization investigations and cases where appropriate.[2]

Many critics (including the majority of the FTC commissioners) have pointed out the substantive shortcomings of the report. I would like to focus instead on the missed opportunity of the report to study, and take seriously, the substantive law on the abuse of a dominant position that exists in the many jurisdictions outside the United States. The hearing featured a number of witnesses from outside the United States, although the

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[1] U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 129 (2008).

[2] For a very different take on an appropriate monopolization policy for the United States going forward see AMERICAN ANTITRUST INSTITUTE, THE NEXT ANTITRUST AGENDA 55-94 (2008), *available at* http://antitrustinstitute.org/Archives/transitionreport.ashx.

majority of them participated only in the hearings on so-called "international issues." In addition, other witnesses from the United States made reference to developments from outside the United States. But the question remains whether anyone was listening, and how the DOJ could have taken advantage of these comparative perspectives from an increasingly multipolar competition world and incorporated them into the final report.

Outside the international perspectives chapter, there are few references to the laws or decisions of foreign jurisdictions, even though the DOJ acknowledges that global companies are subject to an increasing array of differing rules concerning the very conduct discussed in the report. Even the international chapter too often reflects the attitude that the U.S. approach is necessarily best and any jurisdiction that acts differently needs to harmonize their law more in accordance with the report's recommendations.

The reality is that the European Community, far more than the United States, has provided the model for the rest of the world for rules governing the behavior of dominant firms and the report fails to incorporate any of that learning. We are not exactly alone, but the highly lenient rules recommended by the report for predatory pricing, tying, bundling, technology licensing, and refusals to deal hardly reflects the majority position that most global companies have to deal with on a daily basis.

One example of this failing can be seen in the report's treatment of refusals to deal and the essential facilities doctrine. The report is unrelenting in its criticism of imposing any duty to deal on a dominant firm lest pro-competitive behavior and innovation be chilled by incumbents and other firms. The report concludes that "the

essential-facilities doctrine is a flawed means of deciding whether a unilateral, unconditional refusal to deal harms competition," and "that antitrust liability for unconditional refusals to deal with rivals should not play a meaningful part in Section 2 enforcement."[3] The same suspicion of the need for non-discriminatory access to infrastructure, networks, and platform technologies under certain carefully limited circumstances as a tool of competition policy is reiterated in the later chapter on remedies.[4]

A closer look at this issue reveals several significant problems which are a microcosm of the flaws of the report as a whole. The witnesses and literature discussed in this section are a small subset of the vast commentary on the essential facilities doctrine and refusals to deal which reflects a far greater diversity of views that the report acknowledges. The U.S. case law is quoted selectively and misleadingly, with two of the three quotes from the 1919 *Colgate* case omitting the crucial qualifier that there is no general duty to deal "in the absence of any purpose to create or maintain a monopoly."[5] Concerns about harm to efficiency and innovation are many, but are nothing more than vague and undocumented rhetoric. References to harm to competition through the denial of access to bottleneck monopolies and infrastructure are few and far between.

The chapter, like most of the rest of the report, would also have benefited from an analysis of what the rest of the world is doing with respect to this issue. No foreign witnesses were heard on this issue and comparative law does not appear to have been a

[3] *Supra* note 1 *at* 129.

[4] *Id.* at 143-59.

[5] United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

significant part of the testimony or literature considered in the report. A more comprehensive and cosmopolitan look at the essential facilities doctrine and related open access requirements would have revealed that these doctrines are alive and well throughout foreign competition law and for the most part have been applied in a sensible, limited, and pro-competitive fashion.[6]

In addition to the EC which has a substantial line of decisions and judgments in this area, such diverse jurisdictions as the U.K., Israel, Ireland, New Zealand, Germany, the World Trade Organization, and other national and regional competition bodies have recognized the obligation of dominant firms to provide non-discriminatory access to their facilities under different limiting principles. It is the United States, and not the rest of the world that is increasingly out of step on this issue and the report represents a missed opportunity to take advantage of a world of experience on this issue.

Current events suggest that continuing a position of parochialism and exceptionalism for the United States on issues of market fundamentalism is rapidly becoming a thing of the past. While there is much to admire in the hard work and serious research displayed in the DOJ monopolization report, it is ironic that it appeared just weeks before an unadulterated faith in unregulated markets as best serving the needs of consumers and society came crashing down on a much broader scale. Ultimately, however, the shortcomings of the report, and not just its timing, suggest a short shelf life and little impact regardless of the next administration in Washington.

[6] A more favorable economic view of the essential facilities doctrine based on the need for access to a narrowly defined notion of infrastructure is set forth in Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1 (2008); Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 WISC. L. REV. 360 (analyzing both US and EU developments).