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Expansion and Contraction in Monopolization Law.

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SYMPOSIUM

INTRODUCTION: EXPANSION AND CONTRACTION IN MONOPOLIZATION LAW

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In the past decade, the question of what constitutes monopolizing conduct once again has gained center stage in antitrust discourse after a long period of relative dormancy. Enforcement agencies, courts, and scholars alike have all attempted to draw a clear line between conduct that a monopolist should be allowed to undertake and that which should be prohibited.¹ This task is by no means an easy one. The confer-

* Professor and Co-Director of the Forum for Law and Markets, University of Haifa Faculty of Law. We would like to thank the *Antitrust Law Journal* for making this Symposium possible and, in particular, would like to thank Andreas Reindl and Bruce Hoffman, the *Journal's* Symposium editors, for their hard work and excellent editing of the contributions to this Symposium issue.

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¹ See, for instance, the extensive U.S. Dep't of Justice & Fed. Trade Comm'n Joint Hearings on Section 2 of the Sherman Act, *Single-Firm Conduct as Related to Competition* (June 20, 2006–May 8, 2007), available at http://www.justice.gov/atr/public/hearings/single_firm/sfhearing.htm; European Comm'n, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* (2005), available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> [hereinafter *Commission Discussion Paper*]; European Comm'n, DG Competition, *Communication from the Commission—Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C 45) 7 (Dec. 3, 2008) [hereinafter *Commission Guidance*]; ECON. ADVISORY GROUP ON COMPETITION POLICY, REPORT ON AN ECONOMIC APPROACH TO ARTICLE 82 EC (July 2005), available at http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf [hereinafter *EAGCP REPORT*]. For some of the recent scholarly literature on this subject, see, e.g., ROBERT O'DONOGHUE & A. JORGE PADILLA, *THE LAW AND ECONOMICS OF ARTICLE 82 EC* (2006); Thomas Eilmansberger, *How to Distinguish Good from Bad Competition Under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses*, 42 COMMON MARKET L. REV. 129

ence held at the University of Haifa on May 24–25, 2009, sought to address this monopolization debate.

Indeed, the varied themes developed in the present Symposium's essays and articles clearly illustrate the challenges presently facing monopolization law. Yet this brief commentary focuses on one particular facet of current monopolization law that is manifested in a number of the symposium articles—namely, its concomitant expansion and contraction processes. Monopolization prohibitions are proliferating worldwide, leading to the expansion of both enforcement activity and scholarship examining this area of antitrust. However, this expansion has been accompanied by a contraction of the scope of such prohibitions and the limits they impose on monopolists and dominant firms, most notably in the United States and to a lesser degree in the European Union and elsewhere.² We suggest these seemingly contradictory trends are at least partly complementary, resulting from the confluence of global and domestic factors.

Until recently, the leading antitrust enforcers of the United States and the European Union, as well as international institutions, such as the OECD, the World Bank, and the International Competition Network (ICN), mostly focused on cartels, both international and domestic, and merger enforcement.³ The focus on cartels was driven, among other fac-

(2005); Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 255 (2003); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73 (2005); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147 (2005); Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L.J. 1623, 1624 (2005); Giorgio Monti, *The Concept of Dominance in Article 82*, 2 EUR. COMPETITION J. 31 (2006); Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTI-TRUST L.J. 311 (2006); John Vickers, *Concepts of Competition*, 47 OXFORD ECON. PAPERS 1, 16–17 (1995).

As of December 1, 2009, the Treaty of Lisbon became effective and introduced a renumbering of the articles in the Treaty Establishing the European Community. Relevant to the discussion here, Article 82 is now Article 102. However, for ease of reference, we will continue to use the prior numbering in our discussion. Treaty on the Functioning of the European Union, art. 102, May 9, 2008, 2008 O.J. (C 115) 47 (effective Dec. 1, 2009) [hereinafter EU Functioning Treaty].

² See, e.g., *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109 (2009); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Illinois Tool Works Inc., v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); Peter Carstensen, *False Positives in Identifying Liability for Exclusionary Conduct: Conceptual Error, Business Reality, and Aspen*, 2008 WIS. L. REV. 295; *Commission Guidance*, *supra* note 1, ¶ 5 (stating that the Commission is moving towards a more economic (or effects-based) approach in the Article 82 area).

³ See, e.g., International Competition Network, <http://www.internationalcompetitionnetwork.org>; Organization for Economic Co-operation and Development (OECD), <http://www.oecd.org>.

tors, by broad consensus regarding the harm they generate;⁴ the possibility of relying on simple legal tests, rather than complex economic analyses, to condemn cartelizing behaviors;⁵ their significant negative economic effects;⁶ and the common interest of different jurisdictions in enforcement against international cartels, with its positive spillover effects.⁷ The focus on mergers, on the other hand, has been driven by the requirement of most merger regimes that enforcement agencies react once a merger has been notified;⁸ by the expansion of trade, which led to several significant international mergers and acquisitions waves;⁹ and by the growing need to reduce the high, duplicative costs of international merger review.¹⁰

⁴ The Supreme Court noted in *Trinko* that cartels are “the supreme evil of antitrust.” *Trinko*, 540 U.S. at 408. See, e.g., OECD, REPORT ON THE NATURE AND IMPACT OF HARD CORE CARTELS AND SANCTIONS AGAINST CARTELS UNDER NATIONAL COMPETITION LAWS, DAF/COMP(2002)7 (Apr. 9, 2002) (on the harm created by cartels and the importance of appropriate sanctions) [hereinafter OECD REPORT].

⁵ See, e.g., *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (reiterating that “[p]rice-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are *per se* unlawful”). But see Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 63 (2007) (arguing that “signs abound that the law of collaborative restraints of trade is collapsing from both of its rule-bound poles—per se legality and per se illegality—toward a flexible center”).

⁶ See, e.g., Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801 (2004); John Connor & Gustav Helmers, *Statistics on Modern Private International Cartels: 1990–2005* (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944039.

⁷ See, e.g., OECD REPORT, *supra* note 4; Michal S. Gal, *Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance*, 51 VA. L. REV. (forthcoming 2010).

⁸ See, e.g., ICN Merger Working Group, <http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx>.

⁹ Eileen Fumagalli & Helder Vasconcelos, *Cross-Border Merger Waves* (Centre for Economic Policy Research, Discussion Paper Series No. 5601, Apr. 2006), http://www.ifn.se/Wfiles/Vaxholm-06/fumagalli_vasconcelos.pdf; Bernard S. Black, *The First International Merger Wave (and the Fifth and Last U.S. Wave)*, 54 U. MIAMI L. REV. 799 (2000); Ajit Singh & Rahul Dhumale, *The Global Merger Wave: Transnational Corporations*, Global Policy Forum (Nov. 1999), <http://globalpolicy.org/component/content/article/221-transnational-corporations/47146.html>.

¹⁰ See, e.g., Notification and Procedures Subgroup of the Merger Working Group, ICN, *Report on the Costs and Burdens of Multijurisdictional Merger Review* (Nov. 2004), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc332.pdf>; Bus. & Indus. Advisory Comm. to the OECD & Int’l Chamber of Com., *Recommended Framework for Best Practices in International Merger Control Procedures* (Oct. 2001), available at <http://www.biac.org/statements/comp/BIAC-ICCMergerPaper.pdf>; William J. Rowley & A. Neil Campbell, *A Comment on the Estimated Costs of Multi-Jurisdictional Merger Reviews*, ANTITRUST SOURCE, Sept. 2003, at 1, <http://www.abanet.org/antitrust/at-source/03/09/comment.pdf>.

Many of the factors that facilitated interest and expanded enforcement in the cartel and merger areas, however, have had the opposite effect where monopolization was concerned. There has been little consensus, for instance, regarding which unilateral conduct of monopolies and dominant firms is anticompetitive¹¹ and which, if any, remedies were appropriate.¹² Moreover, the simpler legal tests that were once applied in this area have fallen from favor, first in U.S. antitrust and later in EU competition law, after having been criticized for their over-inclusiveness and lack of clear guiding foundations.¹³ Consequently, enforcement in the unilateral conduct area became all the more difficult and contentious. These difficulties were exacerbated, moreover, by the conflicting interests of different jurisdictions in the monopolization context due to the potential for negative effects of foreign enforcement actions against one's domestic firms.¹⁴

Nevertheless, over time, other global and domestic factors—including increased levels of international trade and the growth and strengthening of dominant international firms, the worldwide proliferation of antitrust regimes with their attendant spillover effects, liberalization of markets which brought to the forefront dominant firms that were formerly state-controlled or otherwise highly regulated, and the growing economic importance of dynamically competitive industries—combined to make monopolization again a focal point of scholarly interest and enforcement activity.¹⁵

Monopolization law gained importance due to increased levels of trade and the opening of borders, which helped large multinational firms become key players in many jurisdictions.¹⁶ Because multinational firms sometimes dominate and exploit markets in developing jurisdictions, such jurisdictions seek tools to reduce their exploitation, also turning to monopolization prohibitions that may even become the cor-

¹¹ See, e.g., *supra* note 1.

¹² Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 *ANTI-TRUST L.J.* 11 (2008).

¹³ See, e.g., *supra* note 1.

¹⁴ WILLIAM H. PAGE & JOHN E. LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE* (2007); Nicholas Economides & Ioannis Lianos, *The Elusive Antitrust Standard on Bundling in Europe and in the United States in the Aftermath of the Microsoft Cases*, 76 *ANTITRUST L.J.* 483 (2009).

¹⁵ The role monopolization prohibitions plays in convincing the public in newer antitrust jurisdictions to adopt antitrust laws is another contributing force, although many of these jurisdictions do not apply their laws in practice against dominant international firms. See Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and by Developing Jurisdictions*, 33 *FORDHAM INT'L L.J.* 1 (2009).

¹⁶ ELEANOR M. FOX, LAWRENCE A. SULLIVAN & RUDOLPH J.R. PERITZ, *CASES AND MATERIALS ON U.S. ANTITRUST IN GLOBAL CONTEXT* 278 (2d ed. 2004).

nerstone of their new antitrust law.¹⁷ This dynamic also motivated developing jurisdictions to request that the subject be put on the ICN agenda.¹⁸

A related concern is reflected in the statement of Christine Varney, the Assistant Attorney General for Antitrust at the U.S. Department of Justice, that “unless we . . . can sit at the table and jointly continue to pursue the evolution of . . . Section 2, I think we are going to cede this territory to the Europeans entirely and we’re not [going to] have a whole lot to say about what abuse of dominance looks like for a global firm.”¹⁹ This statement acknowledges the limits of national governance. The jurisdiction with the strictest regulation that can also create a credible threat of enforcement may impact both the worldwide conduct of international firms and domestic consumer welfare.

Another important factor involves the liberalization of previously highly regulated industries, many of which involve dominant firms. Such a liberalization process has occurred in the past two decades, for instance, in Eastern Europe, as well as in some countries in South America and Asia, which experienced a transition from centrally planned regimes to more market-oriented ones.²⁰ Indeed, studies of these jurisdictions often indicate that the most important issue they face in the introduction of competition into their markets involves the regulation of previously state-controlled or closely regulated industries, and much greater effort is directed towards regulating such firms than towards cartels or merger enforcement.²¹

¹⁷ Most jurisdictions that adopted an antitrust regime have prohibitions against monopolization. See, e.g., Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects*, 74 ANTITRUST L.J. 271 (2007); Keith N. Hylton, *Antitrust World Reports*, http://antitrustworldwiki.com/antitrustwiki/index.php/Main_Page; ICN Unilateral Conduct Working Group, <http://www.internationalcompetitionnetwork.org/working-groups/current/unilateral.aspx>.

¹⁸ The subject was added to the ICN agenda in 2006.

¹⁹ Christine A. Varney, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks at the American Antitrust Institute Annual Conference, Panel on Re-energizing Section 2 of the Sherman Act (June 19, 2008), available at http://www.antitrustinstitute.org/archives/files/20080619_pv_aai061908holemanbreakout_020320091323.mp3.

²⁰ See, e.g., MARJO OJALA, *THE COMPETITION LAW OF CENTRAL AND EASTERN EUROPE* (1999) (providing a summary of Central and Eastern European countries’ transition to competition laws that are closely aligned with EU competition law); OECD, *COMPETITION LAW AND POLICY IN BALTIC COUNTRIES* (1999).

²¹ On the problem of pre-existing monopolies and central state regulation of their economic power in Central and Eastern European countries, see, e.g., Tibor Varady, *The Emergence of Competition Law in (Former) Socialist Countries*, 47 AM. J. COMP. L. 229, 252–56, 261–62 (1999). On such problems in Latin America, see, e.g., *COMPETITION POLICY, DEREGULATION, AND MODERNIZATION IN LATIN AMERICA* (Moisés Naim & Joseph S. Tulchin eds., 1999).

These developments in the international arena also have coincided with the increased economic significance of dynamically competitive, new economy industries.²² The common characteristics of these industries—such as high rates of innovation, network effects, and the centrality of IP rights—sometimes lead to concentrated market structures with dominant firms. Thus, high rates of innovation may be an advantage for large firms that are able to make continued investments in research and development. Network effects, which reflect economies of scale in consumption, similarly benefit large networks over small ones and may lead to competition among platforms for an unavoidable dominant position in the market.²³ Furthermore, new economy industries also typically rely on IP protection to facilitate investment in innovation-related activities, which in turn increases the likelihood of dominance.²⁴ In these markets, therefore, the need to address the monopolization challenge is all the greater. Hence, it is not surprising that the same high-profile cases that helped re-ignite the international interest in abuse of dominance, such as *Microsoft* and *Intel*, as well as the recent European Commission investigation involving Google,²⁵ also concerned those dynamically competitive industries.

These multiple factors have combined to increase both the international reach of monopolization law and its economic significance. However, the increased role of economic analysis in antitrust generally and monopolization specifically has led to both a rationalization of monopoly law and a contraction of its scope.²⁶ This contraction has taken place, most notably, in both the United States and the European Union, albeit

²² See, e.g., Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, 68 ANTITRUST L.J. 913 (2001) (examining the high-tech sector); Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925 (2001) (considering the software, Internet, and communications industries); Christian Ahlborn et al., DG Comp's Discussion Paper on Article 82: Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries (Mar. 2006) (referring to the high-tech and innovation industries), available at <http://ec.europa.eu/competition/antitrust/art82/057.pdf>.

²³ See, e.g., Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP., Spring 1994, at 93, 105–06 (describing the phenomenon of “tipping”—that is, “the tendency of one system to pull away from its rivals in popularity once it has gained an initial edge.”); see generally Joseph Farrell & Michael L. Katz, *The Effects of Antitrust and Intellectual Property Law on Compatibility and Innovation*, 43 ANTITRUST BULL. 609 (1998); Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998).

²⁴ E.g., Ahlborn et al., *supra* note 22.

²⁵ See James Kanter, *New Complaints Filed Against Google in Europe*, Feb. 24, 2010, N.Y. TIMES, Feb. 24, 2010, available at <http://www.nytimes.com/2010/02/25/technology/companies/25antitrust.html>.

²⁶ See *supra* note 1.

to different extents that reflect these regimes' different values, beliefs, and relevant legal frameworks.

The contraction of the scope of unilateral conduct regulation in U.S. antitrust law has been spearheaded by scholarly critique that revealed how common legal formulae in this area had little clear meaning and scope and were lacking a rational foundation.²⁷ These criticisms were then incorporated into Supreme Court jurisprudence that posed increasingly stringent hurdles for antitrust plaintiffs alleging monopolization.²⁸ Moreover, a contraction has also been manifested in the significant reduction of enforcement activity in this area in recent decades, despite a small number of highly visible cases that were still pursued by the agencies.²⁹

In Europe, the contraction of unilateral conduct regulation has been more recent, more equivocal, and less dramatic than its U.S. counterpart. The Member States engaged in a debate, led by the Commission, seeking to review the basis and the content of the abuse of dominance prohibition.³⁰ The resultant guidance indicated a more economically oriented approach, which gives less weight to legal presumptions of abuse and emphasizes an analysis of the effects of specific conduct in a given case.³¹ This European debate also has led to the understanding that at least some past legal rules must be contracted in order to ensure that the Treaty of Rome meets its goals.³² Furthermore, many of the abuse of dominance prohibitions adopted around the world are based on the Treaty,³³ and small, transition, or less developed jurisdictions

²⁷ *Id.*

²⁸ *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109 (2009); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Illinois Tool Works Inc., v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

²⁹ Such cases include, inter alia, *Microsoft* and *Intel*. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam); Case COMP/C-3/37.990—Advanced Micro Devices, Inc. v. Intel, Comm'n Decision (May 13, 2009), available at http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf.

³⁰ See EAGCP REPORT, *supra* note 1; *Commission Discussion Paper*, *supra* note 1; *Commission Guidance*, *supra* note 1.

³¹ *Id.*

³² Although, notably, Member States at the same time retained the right to have more stringent laws on the abuse of dominance under Article 82. At the EU level, the white paper met a complicated political response and, ultimately, was only partially reflected in the resulting enforcement guidelines. See, e.g., Ariel Ezrachi, *The European Commission Guidance on Article 82 EC—The Way in Which Institutional Realities Limit the Potential for Reform* (Oxford Legal Studies Research Paper No. 27/2009, Aug. 2009), available at <http://ssrn.com/abstract=1463854>.

³³ Many jurisdictions have transplanted Article 82 of the Treaty Establishing the European Community (consolidated text), art. 82, Dec. 29, 2006, 2006 O.J. (321E) 37. A re-

sometimes rely on the case law and academic studies from large, developed jurisdictions for their decisions.³⁴ The contraction in the scope of liability under monopolization prohibitions in the United States and the European Union may therefore generate some spillover effects in other jurisdictions as well.

Yet the overall contraction of monopolization law in these leading jurisdictions might serve to facilitate, rather than inhibit, its expansion and increased importance worldwide, providing other antitrust regimes with more focused and effective tools to address the challenges involved in regulating dominant firms. Moreover, monopolization law's increased reach also has made its refinement and rationalization all the more important for jurisdictions seeking to avoid the harmful chilling effects associated with excessive enforcement in this area.

Contraction also might be motivated by external pressures, resulting from spillover effects.³⁵ Most importantly, foreign monopolization prohibitions may affect the conduct of international firms in other markets in which they operate, due to linkages among their activities in different jurisdictions. Such linkages exist, for example, when the production, design, or marketing of differentiated products in different jurisdictions are too costly due to scale economies.³⁶ Linkages also may result from the need to realize network effects that require that consumers use similar products.³⁷ In such cases, a prohibition that prevents firms from engaging in certain conduct (e.g., quality-increasing technological integration) in one jurisdiction might affect consumers in other jurisdictions as well. Notably, concerns over spillover effects on the production and worldwide sale of products with similar quality garnered much international attention following such high-profile cases as *Microsoft* and *Intel*.³⁸ These spillover effects create external pressures to

view by the authors reveals that these include, inter alia, the twenty-seven EU Member States and Bosnia-Herzegovina, Croatia, Greenland, Iceland, Israel, Norway, Serbia-Montenegro, and Namibia. Eight additional jurisdictions followed the EU provisions, with minor changes: Albania, Armenia, Jersey, Macedonia, Mauritius, Singapore, Uruguay, Venezuela. See, e.g., Hylton & Deng, *supra* note 17 (which includes references to the text of the antitrust laws of most jurisdictions).

³⁴ Michal S. Gal & Jorge Padilla, *The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy*, *infra* this issue, 76 ANTITRUST L.J. 899 (2010); see also Michal S. Gal, *The "Cut and Paste" of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant*, 9 EUR. J.L. REFORM 467 (2007).

³⁵ Gal & Padilla, *supra* note 34.

³⁶ *Id.*

³⁷ *Id.*; see also *supra* notes 23–24 and accompanying text (briefly discussing network effects).

³⁸ At least until the recent announcement by Microsoft that it will sell differentiated products in different markets.

apply monopolization prohibitions only where justified by efficiency concerns.

All in all, our analysis here suggests that the expansion and contraction of monopolization law may be at least partly complementary, rather than wholly contradictory. A better understanding and evaluation of these trends is therefore likely to necessitate their joint, rather than separate, evaluation in future antitrust scholarship of which this Symposium is merely the beginning.

