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THE ANTITRUST MARATHON

Part I: The Role of Monopolization and Abuse of Dominance in Competition Law

SPENCER WALLER: I'm delighted to welcome you to the fall 2007 portion of the Antitrust Marathon. For those of you who don't know me, I'm Spencer Waller with Loyola and our Institute for Consumer Antitrust Studies. Our co-host is Philip Marsden of the Competition Law Forum at the British Institute of International and Comparative Law, or BIICL, to make it short. We're gathering here today to address issues of monopolization law and the abuse of a dominant position from a comparative perspective. I'm really delighted to have participants from the EU, Canada, and Mexico, in addition to a wide variety of participants from the United States. It is an interesting and diverse group, both geographically and in terms of their experience and points of view. The structure of what we're doing today follows, and it's sort of loosely orchestrated and conducted.

The whole point of a roundtable discussion is the spontaneity and the improvisation of a few of our thoughts and reactions to all these different topics. Basically, Philip or I will introduce each subpart of our topic and act as a moderator, calling on the different participants, and as timekeeper. At the beginning of each topic, Philip or I will call on a designated commentator who will begin with some very brief remarks, just to get the ball rolling. If you wish to speak, all we ask is that you turn your name plaque on the side so the moderator can see it and the court reporters can be able to see. We'll call on you in order, and we'll just keep track of everyone around the table.

So it's my pleasure now to introduce our co-host for today, and for the London portion of the antitrust marathon, which will take place in April of 2008 on the Friday prior to the running of the London marathon, I wish Philip great success in his first Chicago marathon, despite our insanely hot and humid weather. So with that, Philip, welcome, and any remarks?

PHILIP MARSDEN: Thank you, Spencer. It's really fun to be here. I'm really glad that Spencer and the Institute are hosting this. I think that it's even more than just a gimmick that we're doing this in terms of a marathon theme. There's lots of running analogies in this area. The topics that we're going to be discussing are ones that, of course, have engaged us for many years and will for many years in the future. In the EU, as many of you will know, the European Commission has been making great strides towards a more economic effects based approach to many areas of competition law, including that of unilateral conduct. But on the other hand, the European institutions are carrying a degree of baggage, for good or bad either way, and we'll be discussing that, which handicaps it in a way, and its hopes for a much more economically rational form of policy. And that baggage is the case law that I think many of us in the room question but some of you probably favor, and it all focuses on disagreements about what competition is all about, what is competition law there for? The historical motivations, populism, structuralism, ordo liberalism, all of these -ism's I'm sure will come up today. But that's what the EU is trying to do. The European Commission is trying to advance and trying to work out a new role for the law on monopolization, trying to learn from other jurisdictions, but at the same time, the European courts, and particularly one court a couple weeks ago, are restraining it in some way. So it's a fascinating dynamic, and I'm sure we'll be able to talk about it and learn from each other very well.

SPENCER WALLER: Thank you, Philip. Our first session looks at the overall role of monopolization and abuse of dominance in competition law. I want to go to what Philip had said is that we do all this in the shadow of Microsoft. It's the 800 pound gorilla that is in virtually every jurisdiction, so it will be with us throughout our discussion today. It probably should not be the sole focus of our discussion, but it would be silly to ignore it because it's, in American terms, the Superbowl of antitrust litigation, and I suppose in European terms, the World Cup of competition law. The first issues paper, which I've drafted, posed a very simple question: Is monopolization or the abuse of dominance a matter of equal and important concern in competition law to conspiracy law? Or is there a consensus? Are there any in the United States or elsewhere, on a global basis, that somehow it's become the secondary stepchild to questions of conspiracy, particularly in the United States, to other kinds of hard-core offenses? I raise the issue only, in part, because

the Supreme Court, in the *Trinko*¹ decision, raised it by calling collusion the supreme evil of antitrust. Presumably, if that's the supreme evil, then everything else is less evil. I don't think that's right as a matter of history and policy, but that's the issue. I think unless we set the table with it, it's hard to discuss all the other things that we're going to be doing today. So I'd like to begin with our first commentator, who's graciously agreed to kind of just go first to give us time to gather our thoughts, and then turn our placards up so we can have a discussion. My colleague and mentor, David Gerber from IIT Chicago Kent.

DAVID GERBER: Thanks, Spencer. It's a pleasure to be here, and to be referred to as your mentor is quite an honor. My thought is just to throw out a couple of hopefully somewhat provocative ideas in order to get the discussion started. Two basic points: One of them has to do with what I call the anchoring of competition law issues, in particular, unilateral conduct issues. The other involves economics. The first point is that unilateral conduct norms are better anchored, more deeply anchored, in Europe than they are in the United States. Now one can, of course, ask, well, what do I mean by "anchoring," but here's what I want to note. In the US, if we look at the situation with regard to Section 2, there's limited theoretical and political anchoring. Historically, except in the first decades, there wasn't much political influence that could be transferred into antitrust law. People have talked about it sometimes since then, but we didn't have much of a mechanism compared to Europe because everything was done in the courts, and there was not much political discussion of it. We didn't develop a mechanism that would transfer whatever political energy there might have been into the law itself. So that's a sort of starting point. And then there was relatively minimal theoretical support. An article by Einer Elhauge in *Stanford Law Review* in 2003 showed just how weak the theoretical structuring of unilateral conduct norms in the United States is. And when one tries to find some theory in all this, one doesn't get very far.

Think about Europe in contrast. We find there a lot of political and intellectual anchoring. Political weight still gets into issues of unilateral conduct. People pay attention to it in the newspapers, as they have throughout the development of the law in the area. In many countries, especially before 2004, it represented a very central set of

¹ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

concerns. Legislative involvement has always been important. And important here is also that the system has needed and still needs, to some extent, political legitimation, which you really don't have to say about the US antitrust law system. This tends to make political factors more important.

Conceptual anchoring: the concept of competitive distortion, which essentially has ruled, until very recently, the way people think about unilateral conduct in Europe, provides a conceptual framework within which unilateral conduct principles make sense. It fits together with fairness issues in some sense and it fits together with certain kinds of other issues that have supported European integration. So if we think about it in terms of what the concepts around it are, it's got a basis, it's got a kind of theoretical anchoring. This was especially true during the first decades of development after the second world war. Right now we have issues with the use of economic theory. But certainly at the beginning, and for many decades, classical liberal ideas of freedom and law were keys. They are often misunderstood today. The focus on power issues and on the role of economic constitutions to constrain power were very important theoretical anchors for that area of law. So those are what I call my anchoring issues.

Now a couple of other brief thoughts on the role of economics. The role of economics differs between the United States and Europe as a result of differences not only in anchoring, as we've just seen, but in institutional structures. And I want to distinguish between two roles of economics that I don't think are often distinguished. One is the fact-interpretive role. Here the economist answers the questions—what has actually happened and what will happen under certain circumstances. The other is actually what I call a normative role in which economics actually provide the content of legal norms. In the United States, that distinction has never had to be made, because judges, like Judge Cudahy to my left, have been able to make the decision, by and large, without too much constraint from the outside. The court system has been able to do this without paying too much attention to that distinction because it wasn't necessary to make it.

In Europe, that's not the case. The "more economic approach" has come in against a backdrop of relatively well-developed theories. And the institutional structure has required justification for giving a normative role to economics. We see that in the Commission's efforts to reform Article 82. I think Philip's comments here were very good.

There's a kind of tension, and even the Commission is never quite sure in making its statements. Are we talking about economics here just as a tool for understanding what's happening, what might happen under certain circumstances, or is it actually providing the norms? In Europe, it becomes important because neither the courts nor the Commission are authorized to actually set norms. The Commission has to be very careful about what it says and what it does, which leads to some uncertainty, sometimes intentional and sometimes not. And that distinguishes the role of economics in the context of unilateral conduct in Europe from the situation in the United States. Those are a couple of ideas to throw out there.

BERT FOER: I wanted to comment on two recent conversations that I've had that related to monopolization, and also to relay a quick advertisement for some stuff that we're doing at the American Antitrust Institute. One is, we conducted a conference on monopoly and monopolization in June, and we are about to conduct it again at the University of Wisconsin, where the University of Wisconsin Law Review will publish the papers. So a number of interesting papers will get published soon on this topic. The other thing is, we're working on a transition report project, and we now have a committee on monopoly and monopolization chaired by Bonny Sweeney a plaintiffs' class action lawyer in California.

Two comments: One is, I had a conversation with John Conyers, the Judiciary Committee Chairman in the House, and he was looking for arguments to present at an oversight hearing. It turned out that he didn't show up for the oversight hearing last week, so no real questions were asked of the FTC or the Justice Department, but he was preparing. And he seems to be very committed to trying to get antitrust back on the table, at least for the future. An argument that I made to him was this: I thought there was a very strange disconnect between—and Maurice Stucke will read into this because it relates to some of the things he's been writing—a disconnect between cartel theory, which the Justice Department avidly supports, and properly so, and monopoly theory. DOJ seems to understand that it's important to go after cartels, but they seem to ignore the basic reason for going after cartels, which is that cartels allow companies to act in a coordinated way, as if they were monopolists. So why wouldn't you be trying hard to stop monopolists from abusive conduct and why wouldn't you be trying to stop highly concentrating mergers from occurring if you really do care about cartels? I consider that to be a logical disconnect and a basic criticism of the present

environment. The other thing I wanted to mention is something that I'm coming to see for the first time in conversations with corporations. Some large corporations are beginning to come to a new recognition that if they face a dominant firm in the absence of an antitrust regime, they've got a big problem in terms of their strategic future.

Unless antitrust is active and unless Section 2, and also Article 82, are enforced positively, this has a huge impact on their future ability to achieve their business objectives. They are beginning to formulate a larger concept. That is, AAI used to have corporations come to us, Oracle was one, in situations where they had a big antitrust problem, and they wanted help from an organization that would likely be on the same side for ideological kinds of reasons, but they were only focused on this one problem in front of them. Today we're beginning to see some very, very large corporations that are focused beyond that and recognizing that their whole future lies not in this case or that case, but in Section 2 being taken seriously. I just want to put that on the table, because I think we have a prospect now of maybe changing the political economic environment if we can get substantial companies to take the side of antitrust.

STEVE CALKINS: Thank you. During the dominant firm hearings held by DOJ and the FTC, there was a session where there was a debate about whether persistent monopoly is a bad thing, with one person saying, yes, it's a bad thing and the other saying, well, I'd want to know whether it's an efficient firm that's making a quality product. And these folks disagreed. In that light, it was striking to me, in connection with the Microsoft adventures over in Europe, to see Neelie Kroes come forward and in her statements so overtly say that she is unhappy to see high market shares persist and hopes that they will go down. And I cannot remember a time when somebody at the US Enforcement Agency, especially the Justice Department, so overtly called for the day when market shares will recede. And, indeed, if you look at the *Trinko* case that Spencer referenced, you have the Supreme Court saying that monopoly pricing, quote, is an important element of the premarket system positively rejoicing in monopoly pricing, and then emphasizing that Section 2, quote, seeks merely to prevent unlawful monopolization, close quote, emphasizing that monopoly is not a bad thing. So in that sort of very fundamental way, we may have quite a different couple of approaches on the different sides of the Atlantic on the basic question on whether when

we get up in the morning we should be sad that a monopoly exists or not.

JEFFERY CROSS: In reading Spencer's paper, I couldn't help thinking about the *Copperweld*² case, which I had just finished teaching last week in my antitrust class, so it was on my mind. In addition to dealing with the intra-enterprise issue, *Copperweld* also laid out a framework to consider the differences between Section 1 and Section 2 and why we should treat cartel behavior under Section 1 as being a more problematic issue than single firm behavior under Section 2. The statements by the Court in *Copperweld* reflect why in the US legal system we have somewhat of an ambivalence about Section 2.

The Court in *Copperweld* made a couple of key points. First, it is sometimes very hard to distinguish aggressive, single-firm conduct from unlawful conduct, because the effect may be the same thing. The effect may be that an inefficient firm is driven from the market and that a company may be very well achieving a monopoly through innovation or business acumen. As Steve just pointed out, Justice Scalia in *Trinko*, espoused the idea that monopoly is a part of the American capitalist market scheme. To Justice Scalia, society should encourage firms to innovate with the goal of achieving a monopoly and the reward is to obtain for a limited period of time monopoly profits.³

Second, the court in *Copperweld* raised a concern about false positives. This is a lesson that we have seen developing over the last 30 or so years from the influence of the Chicago School on the Court, and that is the concern about false positives and that false positives could very well chill pro-competitive conduct such as innovation and the exercise of business acumen. The result is that, under Section 2, the US courts focus on whether there is bad conduct, the predatory or anti-competitive conduct that is the second element under Section 2. The first element being the requirement of having a monopoly. The focus, then, has become on bad conduct. Of course, it's sort of hard to say what bad conduct is beyond the blowing up of the competitor's trucks, as in the *Empire Gas* case.⁴ The issue of what is bad conduct

² *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

³ *Verizon Commc 'ns*, 540 U.S. at 398.

⁴ *United States v. Empire Gas Corp.*, 393 F. Supp. 903 (W.D.Mo. 1975), *aff'd*,

is facilitated by a shifting of the burden of proof. The plaintiff has the burden of suggesting the existence of predatory conduct. The burden then shifts to the defendant to propose a plausible pro-competitive purpose for the conduct. If the defendant does present such a plausible pro-competitive conduct, the burden then shifts back to the plaintiff to show an overall anti-competitive effect. So my thought is that we need to go back and look at *Copperweld* and the features of Section 1 and Section 2 that the Supreme Court laid out in *Copperweld*. One result of the differences between Section 1 and Section 2 as articulated in the *Copperweld* case is that we have a “gap” if you will in enforcement – what might be called a “*Copperweld* gap.” This gap occurs because we will condemn cartel activity between actors that have much lower market shares than we would for a would-be monopolist whose unilateral conduct may have the same effect.

CHRISTOPHER LESLIE: In reading your paper, Spencer, it seemed that you were concerned that Section 1 gets more respect in the United States than Section 2 does. I agree with your premise that cartels and monopolies impose similar bad economic effects. Both of them will reduce output and increase price. But that assumes that the violation has been proven. If you’ve got a violation, they’ve got similar problems. One major reason for the difference in emphasis – and perhaps respect – between Section 1 and Section 2 is the problem of proving a violation and the fear of false positives. Many commentators in America are more concerned with false positives in monopolization cases than in Section 1 cases. When we see a price-fixing cartel, we’re more likely to have the consensus of people that agree that’s a price-fixing cartel; we don’t think there’s a significant risk of a false positive. Whereas, reasonable people seem to disagree a lot on unilateral conduct cases and whether or not the positive is false or proper. So it seems to me that the tact that we should be taking if we want Section 2 to be taken as seriously as Section 1 is to have more precise tests that we can agree on where we can convince

537 F. 2d 296 (8th. Cir. 1976). The government had brought criminal charges against defendant Empire Gas under Section 2 of the Sherman Act, introducing evidence that an agent of defendant had procured others to destroy a newly purchased LP gas bulk delivery truck. *Empire Gas Corp.*, 393 F. Supp. at 912. The defendant in the criminal case was apparently acquitted.

A case where otherwise tortious conduct was considered to be the predatory or anti-competitive conduct under Section 2 is *Conwood Co. v. United States Tobacco Co.*, 290 F. 3d 768 (6th Cir. 2002). There, the defendant monopolist ripped out plaintiff’s chewing tobacco racks at retail stores.

people that we filtered out false positives better than the current legal regime does. And once you can do a better job of filtering out the false positives, then you can, I think, attack Section 2 violations at the same level of intensity that we attack Section 1.

MAURICE STUCKE: Thank you. I wanted to touch on three points. First, the Department of Justice under the current administration has an antitrust hierarchy that resembles what you had mentioned, Spencer. Under this hierarchy, antitrust enforcers should focus primarily on cartel behavior, followed by mergers, and lastly monopolies. This third priority's focus is not necessarily prosecuting anticompetitive conduct by monopolists. Rather it is developing and promoting objective standards to judge monopoly behavior, so as not to chill pro-competitive behavior and prevent monopolists from reaping the rewards of their success.⁵ The language of Sections 2 and 1 of the Sherman Act, however, does not support this hierarchy. So I looked at the legislative history of the Sherman Act to see if there was any basis for this hierarchy. There is none.

In fact, Senator Gray⁶ proposed an amendment to Section 2 that would have limited Section 2 violations to only concerted actions, namely, combining or conspiring to monopolize. The Senate Judiciary Committee, however, rejected this amendment since if one company acted anti-competitively, "it was just as offensive and injurious to the public interest as if two had combined to do it."⁷ So there isn't any basis in either the statute or the legislative history to deem coordinated conduct as more evil than anticompetitive unilateral conduct.

My second point is that under neoclassical economic theory the anticompetitive harm from monopolists can be as great or greater than that of a cartel, so this does not justify any such hierarchy. Now, third, going to my colleague's point about false positives, that's true

⁵ See, e.g., R. Hewitt Pate, Assistant Attorney General, Securing the Benefits of Global Competition, Keynote Speech presented at Tokyo American Center (Sept. 10, 2004), *available at* <http://www.usdoj.gov/atr/public/speeches/205389.htm>; R. Hewitt Pate, International Anti-Cartel Enforcement, Speech presented at 2004 ICN Cartels Workshop, Sydney, Australia (Nov. 21, 2004), *available at* <http://www.usdoj.gov/atr/public/speeches/206428.htm>; U.S. Dept. Of Justice, Antitrust Div., Update: Protecting And Promoting Competition (Spring 2005), *available at* <http://www.usdoj.gov/atr/public/216254.htm>.

⁶ 21 CONG. REC. 3152.

⁷ 21 CONG. REC. 3152.

if it is questionable whether the company is, indeed, a monopolist. But if the company has significant market power, then presumably there is little, if any, competition left to chill. You also have to consider the risk of false negatives. From an evolutionary economic perspective, one wonders to what extent did the monopolist's anticompetitive conduct chill innovation. To what extent did the monopolist's conduct retard the introduction of variation, consumers' ability to select among the variation, and mechanisms that propagated the selected variation with more variation? With cartels of short duration involving homogenous goods, you can more readily envision the "but for" world, namely, before and after the companies colluded. But with the monopolist, it's harder to imagine the "but for" world, including what the world would have resembled, absent the monopolist's anticompetitive behavior, in terms of consumer choice, variation and innovation.

PETER CARSTENSEN: I want to start by expressing a concern with a definition that is being begged here, which is, what is a monopolist? Because once we're past Ed Chamberlain's monopolistic competition,⁸ we're all monopolists. And I think that that's one of the issues that lurks in terms of Christopher's concern for false positives. Hang Bill Gates, for all I care. For those of you who are into antitrust history, there's the famous *Klearflax Linen Looms*⁹ case, the only manufacturer of linen carpeting in the United States which sold primarily to the government. The government was mad, so it brought a monopoly case.

Well, there are very different issues here in terms of creating conduct norms. I am a little bit concerned about false positives when it comes to *Klearflax Linen Looms* if that is the kind of monopoly that the law cares about as opposed to mere market power. It seems to me that I don't much care if I lop off a hand or two by mistake, because I'm concerned with market dynamics—this is very much the suggestion that was made a minute ago—and that our concern should be maintaining those market dynamics in terms of the famous language out of *Standard Oil*¹⁰, concerning the centripetal and centrifugal forces of the market, as opposed to a long-term, incumbent

⁸ EDWARD CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION; A RE-ORIENTATION OF THE THEORY OF VALUE* (7th ed., Harvard University 1960).

⁹ *United States v. Klearflax Linen Looms*, 63 F. Supp. 32 (D.C. MINN. 1945).

¹⁰ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

monopolist. So that I think that some of the focus should be on how you preserve market dynamics. Things that may even raise short-term efficiency concerns that also significantly interfere with monopoly—with the durability of monopoly, should be supported. And so the Clayton Act section 3, in many respects does represent a kind of focus on single-firm conduct, that I think reflects a recognition, historically, that we want to limit the kinds of things that create barriers to entry.

The last point comes back to a broader kind of historical perspective that I think is important to understand the case law, its evolution, and alternatives for your remedy discussion this afternoon. Historically, Section 2 was used to break up monopoly power. That is, indeed, what the *Standard Oil* opinion says: When you're a monopolist, we execute you, we don't bother to regulate you. And the early doctrines about monopoly had to do with facilitating structural remedies where you had a substantial, durable, and remediable monopoly. I think that that part of the law has been ignored. The discussion here so far has all been about conduct, none of it has been about structure. And I would predict that's the way it's going to remain, because we've morphed over to that focus entirely. And it is something that I think needs to be reflected on. The occasional execution of the monopolist may be good. What is it, Jefferson's line about there's blood of patriots every 20 years. Again, I've advocated capital punishment for Bill Gates, but I can't get my students to go along.

SPENCER WALLER: So the tree of competition needs to be watered with the blood of knowledge from time to time. Fair enough.

STEVE CALKINS: And we're all monopolists, so be careful.

D. DANIEL SOKOL: Thanks. Even though we will talk about remedies this afternoon, it strikes me that when thinking about Section 1 versus Section 2, we have to be thinking about remedies up front. Why? Because I think that it implicitly explains a lot of why we push for enforcement in favor of cartels rather than monopolization cases. It is fairly straightforward what we do in a cartel case, some combination of civil and criminal. Now, we probably still debate what's the correct amount of enforcement for optimal deterrence, but at least there is agreement, I would think, to the extent there would ever be agreement between Spencer and, say, the Chicago School that cartels are a problem.

I think that, we would be mistaken if we said there was agreement philosophically in monopolization, in terms of what the appropriate remedy is —behavioral or structural— and what should enforcers be doing. I think this is guiding a lot of the hesitation to bring on monopolization cases, because we're not quite sure what the appropriate remedy is. I would also suggest that we look at the rest of the world, particularly beyond the EU.

With young agencies, where are their priorities? Because I think this is very indicative of sort of global thought, and the move is nearly always to cartel enforcement. Cartel cases are easier in terms of detection and because you do not have the problem, as Christopher Leslie mentioned, of false positives. In cartel cases, you don't have some problems that we have in monopolization cases. You don't have the potential manipulation by competitors of agencies to bring cases that, in fact, do not affect consumer welfare as much they would competitor welfare. We also don't have the fear of agencies being captured by special interests and bringing or not bringing cases which involve the promotion of national champions with certain types of monopolization cases. In the world of cartels it is far simpler- if you are guilty, you are price fixing. There is no national champion that the agency may be protecting. You are just guilty. I think those kinds of malfunctions are less likely in the US context than elsewhere in the world, but it is something that we should always keep in mind.

SPENCER WALLER: I have in the queue, and I suspect this will come close to exhausting this part of the panel, obviously this was to set up all the other issues we were going to be talking about today, but I have Simon Baker, David Gerber, Philip Marsden, Ken Davidson, and David Braun. And the shorter you can keep it, the better, and we'll have plenty of chance to return to all these things. And we're going to be cycling through the issues of what is a monopolist and what is the bad conduct and what is the remedy throughout the day, despite however we slice and dice the topic?

SIMON BAKER: Thanks. Just to Bert Foer's point about the equivalency of the cartel and monopoly, my only observation on that is that I see that it's entirely correct. It's a static perspective. I think fundamentally, once you adopt a dynamic perspective, I think that analog breaks down. The second point I'd like to make is about this chilling effect. As a practitioner in Europe, which is the perspective I bring, some of the saddest days of my professional life are sitting in

meetings with a corporation being advised by respective competition counsel who are tabling a discount scheme or a change to their distribution network, who are being advised, well, you may on this reading of market definition be dominant; you may on this reading of European case law be subject to an abuse case. I am then asked, do you think somebody could build a theory, a fact specific theory of harm? And I normally have to concede, yes, you could build a fact specific theory of harm, at which point, the general counsel of the firm involved says, well, we'll pull this discount scheme, and the commercial guys in the room jaws hit the floor. And on more than one occasion, I've subsequently spoken to those commercial guys, and they've said, well, we lost some business to a smaller competitor at a price above that which we would have charged had we implemented this discount scheme, but that was the consequence of what we're doing. And I've sat in more than one meeting like that. And those consumer harms are highly intransparent, and they never come to light. So the enforcement authorities don't get any—there's no press release from that. There's no bang for their buck, there's no lobby pushing for that. But I've sat in plenty of meetings like that. And I'm 31. I've sat in on, I'm sure, there must be a dozen. And this chilling effect, when you raise it with the European Commission staff, for example, they say, yes, I see it in British law, and then they completely ignore you. And I think this is a fundamental tragedy that's oscillated to the amount of pro-competitive conduct which does not occur by firms who simply don't understand the legal position they're in and cannot get clear guidance from it.

DAVID GERBER: Very briefly, and I'd rather follow Simon's comments, because I think the critical issue, or one of the critical issues, is what the economists can bring to the table and how it gets translated into legal terms. One of the problems we fought with and wrestled with is how to make that—how to get the information. Referring to Christopher's point before, we, as lawyers, we're trying to make some distinctions and use economic knowledge, but we don't always use it very well. We certainly don't use it as well as the economists do. The other question is, can we find in the economics literature the kinds of distinctions that Christopher was talking about, that is to say, those that can really clarify what is likely to be agreed upon as a harm. I don't get much of a sense that we can yet, although there are some areas where we can do that. And so I think we can build on those, figure out how they fit into the legal framework and move forward to other areas.

PHILIP MARSDEN: I wanted say a couple things first about theory of harm. From the *Microsoft*¹¹ judgment a couple of weeks ago in Luxembourg, one of the main and interesting focuses on the main theory of harm in the case which relates to the fact that there was a ‘risk’, not a likelihood, but a risk of elimination of competition. And that would, thereby, impair or hinder the effective competition ‘structure’ and any consequent consumer harms are therefore assumed, and need not be proven by the Commission or the complainants. So it is because of statements like this that you see all of this rhetoric about Europe is protecting competitors and not consumer welfare. I don’t believe that rhetoric is correct. But what the EC is doing is that they’re assuming consumer harm, but they feel comfortable doing so because they’ve got a very advanced theory on foreclosure of competitors which focuses on whether or not the structure of the market is going to be harmed. So, when DG0Comp is going to try to introduce a kind of structured rule of reason is the discussion paper or in the policy guidance that might come forward from Brussels, it’s all the more difficult to do that with court judgments that undercut that. But even in the last draft of the discussion paper, there are areas which undermine the move forward.

The main mantra of the discussion paper is that the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and insuring an efficient allocation of resources. This is a huge step forward, and aligns the European approach on unilateral conduct with its modernized approach on mergers and vertical agreements. But then the rest of the discussion paper says, we’re interested in also protecting, “not yet as efficient competitors,” That is, rivals that aren’t yet as efficient as the dominant firm. So with such mixed aims there’s a real risk there that when you get to the remedial stage, you’re going to see things that Commissioner Neelie Kroes did suggest might happen, not just with respect to wanting to see one particular dominant firm’s market share reduced, but also, with respect to trying to discipline Microsoft, and ensure ongoing compliance, she said back in April that if periodic penalty payments of \$2 million a day were not enough to discipline Microsoft, then she’d need to look at structural remedies to really bang her message home.

¹¹ Case T-201/04, *Microsoft Corp. v. Comm’n*, 2007 WL 2693858 (Sept. 17 2007).

KEN DAVIDSON: I think it's amazing. Antitrust law is 120 years old in the United States. It's not exactly new in Europe, although it seems to me the EU is trying to find ways to make antitrust law useful. But think about how long it is that we've been active and how we have not made progress in getting a theory of what it is we are doing. I see this all the time, going to less developed countries, countries with new antitrust laws. The people who are administering them ask me, what are we supposed to be doing? Why are we doing what we're doing? Why did they make us sign this treaty that says that we would pass an antitrust law? I have my own answers to those questions. I think I agree with what Bert and what Maurice said and probably what Philip was saying, that the problem is a problem that we saw from the very beginning, that is, the power of dominant firms to not only charge higher prices, but also to prevent the development of alternatives. And whether that's through blowing up rail cars, as was alleged in the *Standard Oil* case, or whether that is activity where you put out a false product to screw up somebody else's test marketing of their products or whether it is something else that is—that goes to the ability of somebody to try and enter, to perform, I'm not sure that it makes a difference.

I think that unless you can have some kind of agreed framework that allows people to compete and you don't close off the path-dependent choices. Beta-max ceased to be a competitive force pushing VHS. Had that competition lasted, would we now have a better designed digital solution, a design that is better than the DVD and CD formats CDs? I don't know. I don't know anybody here who knows that. But we do know that there was a tipping point. The VHS came in. It dominated the field. It's now gone. We know that vacuum tubes were the heart and soul of the computer industry, only to be replaced by transistors, only to be replaced by silicon chips. Tipping points are generally signs of Schumpeterian "creative destruction," but the disappearance of many firms is the result of intentional conduct by dominant firms that was designed to eliminate competitors. It is admittedly a difficult problem to separate out good conduct from bad conduct, but I don't think it's an impossible one. And I think that you have to recognize that the antitrust laws were passed to keep markets open, to prevent dominant firms or cartels exercising the power to control price and technological development. That was the problem posed in Congressional debates on antitrust laws in 1890, how to prevent businesses from becoming the kings of industry. You see it again in the Congressional debates that led to the passage of the

Celler-Kefauver Act in 1950¹². The problem is allowing one firm or a group of firms to dictate to the rest of an industry what the future shall be.

SPENCER WALLER: Isn't it both as simple and as hard as the fact that sometimes too much power is bad power?

KEN DAVIDSON: Yes.

DAVID BRAUN: I want to pick up on David Gerber's remarks for a moment, and I think back to when I served in the antitrust division under Bill Baxter, and he made a comment that I think typifies the Chicago School approach to monopolization. He was commenting on the old approach, and as if to swear at everyone, he said, "atomizers." I think, though, we need to keep the context that Dave Gerber provided to us in mind, and I would add one or two comments to them. We have a very large country, a leading innovator in the universe, perhaps, and an incredible faith that is assumed in the marketplace as a self-correcting mechanism. And it is only in the most rarest of circumstances where we trust government, the courts, or others to intervene to correct where a self-correcting mechanism seems to have gone awry. Europeans and others around the world do not make those assumptions. Their markets, in most instances, are much smaller than ours. Think of Sweden, 8 million people; think of Portugal; even think of Germany, 80 million people; and then think about a tradition that Dave referred to that I would call a government interventionist tradition and an expectation that government protect the consumer. Because, historically, consumers were exploited by government, by kings, by others. And a political consensus of that intervention, therefore, needs to come at an earlier point, and, perhaps, in a smaller market, that is not capable of being as self-correcting because it doesn't stand as completely on its own two feet as ours, does require a different approach sometimes. Whether the right approach is being taken in Europe, I think, is a very interesting question right now. I think the US and the UK attitude is much more in parallel than it is once you go to the continent and you have a different philosophy. And I just ask that we keep that in mind.

RICHARD CUDAHY: I just wanted to make this observation. I always learn something interesting at these sessions, and this business about monopoly is possibly being a good thing a good thing, or that it

¹² 15 U.S.C. §18 (2007).

can be a good thing, so let's not be against it in all cases. That proposition seems interesting to me. I had a case while sitting down in the Eleventh Circuit not too long ago, which involved—and I have forgotten all the details, but it involved a company that had 80 percent of the market, and the issue was whether they could bid on the abandoned machinery of a former competitor that went out of business, and if the 80 percent company succeeded at picking up that extra equipment, they would then have 90 percent of the market. And I thought that's an obvious violation of the antitrust law. You can't do that. Well, my fellow judges took issue with me, and they talked about standing and all kinds of similar stuff. I thought that the 90 percent market proposition was so fundamental it would overbear other aspects. My colleague here has been talking about, what are the fundamentals? If my Eleventh Circuit view was not correct, I really don't know what the fundamentals are anymore. This gentleman was talking about what are the fundamentals? I don't really know anymore.

SPENCER WALLER: Thank you, all. I think we're off to a flying start. Philip is going to be our moderator and timekeeper for the next part, which is a look at both defining and measuring power and trying to figure out how to assess the harms and what harms we care about.