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The Monopolization/Abuse Offense

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ISSUE PAPERS

The Monopolization/Abuse Offense

By Spencer Weber Waller*

The search for the Holy Grail in competition law has been the search for a single unified theory of harm in unilateral conduct cases. That search appears to be ongoing in both the US and the EU. In the early years of the Sherman Act, the United States Supreme Court seemed to require either an outright violation of Section 1 or an unambiguously immoral act by a firm with market power in order to find unlawful monopolization or attempted monopolization under Section 2 of the Sherman Act.[1]

Later, the Second Circuit in *Alcoa*, with subsequent approval by the Supreme Court, found a rebuttable presumption of unlawful behavior upon proof of monopoly power alone, unless the defendant could show that its monopoly was the product of superior skill, foresight, or industry.[2] Even this slim escape hatch proved illusory in practice since in the words of *Alcoa*, "no monopolist monopolizes unconscious of what he is doing."[3]

The Supreme Court created its most enduring verbal formulation in the *Grinell* case where it required proof by the plaintiff of both monopoly power and some exclusionary or illegal act on the part of the defendant.[4] However, this too largely has

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[1] *Compare* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) *and* United States v. United States Steel Corp., 251 U.S. 417 (1920).

[2] United States v. Aluminum Co. of Am., 148 F. 2d 416 (2d Cir. 1945). *See generally* Spencer Weber Waller, *The Story of Alcoa: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases*, in ANTITRUST STORIES 121 (2007).

[3] *Aluminum Co. of Am.*, 148 F.2d at 432.

[4] United States v. Grinell Corp., 384 U.S. 563 (1966).

proved to be an empty formulation, leaving the lower courts with little guidance as what exactly is an unlawful or exclusionary act.

By the 1980s, the Supreme Court was ready to try again. In the *Aspen Skiing* case, the Supreme Court affirmed a jury verdict in favor of a plaintiff where the defendant was shown to have sacrificed present revenues and profits in a long term effort to exclude a rival and where the defendant had no business justification for its behavior.[5] Since then lower courts have struggled with whether the "sacrifice" or the "no business justification" rationales are necessary or merely sufficient conditions for the imposition of liability under Section 2.

The most recent words in this struggle appear to be the very differing approaches set forth by the Supreme Court in the 2004 *Trinko* decision[6] and by the D.C. Court in the 2001 *Microsoft* decision.[7] In *Trinko*, the Supreme Court issued a narrow holding that certain regulated behavior by local telephone companies was not subject to Section 2 of the Sherman Act at all, but went on to offer certain dicta about the general parameters of Section 2. The *Trinko* court began with the truism that in order to: "*safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.*" [8] While it did not offer a general theory of liability under Section 2, it did caution about applying Section 2 to either unilateral refusals to deal with rivals or the essential facilities doctrine.

The *Microsoft* decision offered a broader framework for all violations of Section 2 and applied that framework seriatim to a sweeping variety of alleged misdeeds by the defendant. The *Microsoft* framework is a variation on the rule of reason used in Section 1 cases and asks the following series of questions:

> First, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice. "The [Sherman Act] directs itself not against

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[5] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

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

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

[8] *Verizon Commc'ns Inc.*, 540 U.S. at 407.

> conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."
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> Second, the plaintiff, on whom the burden of proof of course rests, must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. In a case brought by a private plaintiff, the plaintiff must show that its injury is "of 'the type that the statute was intended to forestall,' "no less in a case brought by the Government, it must demonstrate that the monopolist's conduct harmed competition, not just a competitor.
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> Third, if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a "procompetitive justification" for its conduct. If the monopolist asserts a procompetitive justification—a non-pretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claimFalse
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> Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefitFalse
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> Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.[9]

In the European Union, the analysis of the abuse of a dominant position begins with the text of Article 82 which offers several illustrative examples of violations, but no over arching principles. It reaches both exclusionary abuses as well as exploitive abuses of a kind left untouched by Section 2. Although rarely used in this fashion, Article 82 can thus be used to attack monopoly pricing or discriminatorily *high* pricing by a dominant firm.

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[9] *Microsoft*, 253 F. 3d at 58-59 (Citations omitted).

General definitions and analytical frameworks are equally hard to find in EU competition law. The lack of this kind of deep analysis tends to be exacerbated by the civil law style decisions of the EU courts in which they render unanimous and anonymous decisions in the civil law tradition.

The most general definition of "abuse" goes all the way back to the 1979 *Hoffman-La Roche* decision of the European Court of Justice where it stated:

> The concept of abuse is an objective concept relating to the behavior of an undertaking in dominant position which is such as to influence the structure of market where, as result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[10]

We currently await both the final results of the European Commission's Article 82 reform project and the eventual rulings of the CFI and then the ECJ itself in the *Microsoft* litigation. In the meantime, the two systems have proceeded in a largely unsystematic way to develop a body of case law dealing with different practices undertaken under different circumstances. In so doing, both the US and the EU have created a laundry list of rules dealing with such topics as monopoly pricing, price discrimination, predatory pricing, tying, bundling, exclusive dealing, refusals to deals, access to essential facilities, etc. In individual cases, the US and the EU sometimes have reached similar results and sometimes diverged substantially. So far there has been neither a unified field theory of unilateral conduct nor any reason to think the two systems will strongly harmonize their overall approach or the legality of specific practices by dominant firms.

For our discussion we will focus on whether there is the meaningful possibility of a single theory of liability for unlawful monopolization or the abuse of a dominant position and whether any such theory can unite two important systems of competition law with different histories, texts, and enforcement traditions. We will use approaches to specific types of violations as examples of whether

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[10] Hoffman-La Roche, ECJ Feb. 13, 1979, 1979 E.C.R. 461 at ¶ 91.

such harmonization of theory and practice is desirable and/or achievable and use the *Microsoft* litigation in each jurisdiction to predict the future of this vital but undertheorized area of competition law.