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A White Paper from the Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law

Use of Dominance, Unlawful Conduct, and Causation under Section 36 of the New Zealand Commerce Act: A US Perspective

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The proper interpretation of the abuse of dominance provisions in Section 36 of the New Zealand Commerce Act has been a matter of controversy. The courts of New Zealand have taken a view of the requirements of this important provision of competition law in a narrow and formal manner that makes it very difficult to take enforcement action against conduct which has a net anticompetitive effect, but which has no, or at best minimal, business or procompetitive justification. We offer this white paper to provide a United States perspective to suggest that the current counterfactual test applied by the courts of New Zealand is not an effective enforcement tool and significantly out of step with the interpretation of unilateral conduct by dominant firms in the United States.

I. About Us

The Institute for Consumer Antitrust Studies (“Institute”) is a non-partisan, independent academic center at Loyola University Chicago School of Law designed to explore the impact of antitrust enforcement on the individual consumer and the public, and to shape policy issues. The Institute promotes a more competitive, consumer friendly

economy through a comprehensive, inclusive view of the benefits of competition law and policy that includes, yet goes beyond, narrow notions of economic efficiency.¹

The Institute does not take positions on individual cases, but does comment on issues of interest and importance in the competition law and consumer protection field. Over the years, the Institute has submitted views and testimony on various competition and consumer issues to state and federal agencies and legislatures throughout the United States as well as competition authorities in Canada, the European Union, and other jurisdictions.

We write entirely from a United States perspective. The authors of this white paper are all United States professors or practitioners of antitrust law.² Professor Waller is the director of the Institute and the other authors are all active members of the Institute Advisory Board. At the request of Mark Berry, chairman of the New Zealand Commerce Commission, we have familiarized ourselves with the current New Zealand jurisprudence on Section 36,³ but do not hold ourselves out as experts on New Zealand or Australian competition law. We also recognize the important substantive differences between United States law based on monopolization and the New Zealand statute prohibiting the use of a dominant position for certain prohibited purposes. We write to inform the New Zealand competition community of the U.S. experience on these issues and to suggest potential improvements in the interpretation or revision of the New Zealand Commerce Act to better implement the common goals of unilateral conduct provisions to prohibit the harm to markets, consumers, and competition by the unilateral misuse of market power by dominant enterprises.

¹ Full information on the Institute for Consumer Antitrust Studies is available at <http://www.luc.edu/antitrust>.

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³ Among the materials we have reviewed include the decision in *Commerce Commission v. Telecom Corp. of New Zealand Ltd*, SC 76/2009, [2010] NZSC 111 and the cases cited therein, and commentary on the *Telecom* decision, including IAN EAGLES & LOUISE LONGDIN, *REFUSALS TO LICENSE INTELLECTUAL PROPERTY: TESTING THE LIMITS OF LAW AND ECONOMICS* 181-195 (2011); Paul G. Scott, *Taking a Wrong Turn? The Supreme Court and Section 36 of the Commerce Act*, 17 N.Z. BUS. L.Q. 260 (September 2011).

II. The *Telecom* Decision

The 2001 version Section 36(2) of the New Zealand Commerce Act states:

A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of—

- (a) restricting the entry of a person into that or any other market; or
- (b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or
- (c) eliminating a person from that or any other market.⁴

It is our understanding that the New Zealand Supreme Court in its 2010 decision of *Commerce Commission v. Telecom Corp. of New Zealand Ltd.* (hereinafter *Telecom*)⁵ interpreted this provision that a defendant only “uses” or “takes advantage” of its market power to achieve the prohibited purposes if it would not have engaged in the same conduct had it lacked market power.⁶ This “counterfactual” or “comparative” test was the principal basis for concluding that Telecom Corp. of New Zealand did not violate Section 36. As the court stated:

All the relevant reasoning involves, either expressly or implicitly, consideration of what the dominant firm would have done in a competitive market; that is, in a market in which hypothetically it is not dominant. The essential point is that if the dominant firm would, as a matter of commercial judgment, have acted in the same way in a hypothetically competitive market, it cannot logically be said that its dominance has given it the advantage that is implied in the concepts of using or taking advantage of dominance or a substantial degree of market power. Conversely, if the dominant firm would not have acted in the same way in a hypothetically competitive market, it can logically be said that its dominance did give it the necessary advantage. This is because it can then reasonably be concluded that it was its dominance or substantial degree of

⁴ Section 36 Commerce Act, Public Act No 5, as amended, available at <http://www.legislation.govt.nz/act/public/1986/0005/latest/DLM87623.html>.

⁵ SC 76/2009, [2010] NZSC 111.

⁶ *Telecom*, at ¶ 31. This case involved the older language of Section 36(2) but the same interpretive principles as currently in effect.

market power that caused, enabled or facilitated its acting as it did in the actual market.⁷

The Court reasoned that:

The comparative exercise is designed to pose and answer the question whether the presence of competition in the hypothetical market would have restrained the alleged contravener from acting in that market in the same way as it acted in the actual market. If the answer is yes, the alleged contravener has taken advantage of its market power. If the answer is no, it has not done so, because the presence of that power gave it no material advantage. The need to make this comparison is inherent in the idea of “use” of dominance or substantial market power under s 36 whatever the conduct in issue may be, albeit the comparison may be more easily made in some cases than others. And the need to make this comparison is also supported by the concepts of dominance and market power themselves. It is helpful to bear in mind what those concepts involve when considering what s 36 envisages by its reference to their use.⁸

The counterfactual test is derived from the assumption that a firm with monopoly power behaves differently than a firm in a competitive market. “A firm has market power when it is not constrained in the way in which it would be constrained in a competitive market.”⁹ So the issue of whether defendant has monopoly power relates to the issue of whether defendant used its monopoly power:

The question whether dominance or substantial market power exists implies a comparison between the position of the firm in the actual market and a firm in the same general circumstances but otherwise in a workably competitive market. The contrast inherent in the concepts of dominance or substantial degree of market power is the contrast between the actual market and a hypothetically competitive market. That same contrast is inherent in the inquiry into whether market power has been “used” within the meaning of s 36.¹⁰

Accordingly an antitrust plaintiff must prove “on the balance of probabilities” that the defendant “would not have acted as it did in a workably competitive market; that is, if it had not been dominant.”¹¹

⁷ *Telecom*, at ¶ 31.

⁸ *Id.* at ¶ 32.

⁹ *Id.* at ¶ 33.

¹⁰ *Id.*

¹¹ *Id.* at ¶ 34.

III. United States Law

The contours of Section 2 of the Sherman Act have evolved over more than a century of jurisprudence.¹² Aspects of its interpretation, however, are not without controversy. Nevertheless, some well-accepted principles have been established.

To prevail under section 2, the antitrust plaintiff must prove that the defendant monopolized or attempted to monopolize a market. For the monopoly maintenance claim, plaintiff must show that defendant possesses monopoly (or monopsony) power, and second, “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”¹³ For an attempted monopolization claim, plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.¹⁴

A leading case on U.S. monopolization law is *United States v. Microsoft Corp.*¹⁵ The en banc United States Court of Appeals for the D.C. Circuit outlined the key principles from a century of case law on monopolization under § 2:

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 conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.” . . .

¹² Section 2 of the Sherman Act, 15 U.S.C. § 2, states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

¹³ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966); *see also* *In re Se. Milk Antitrust Litig.*, 801 F. Supp. 2d 705, 724 (E.D. Tenn. 2011) (setting out same elements for monopsony claim under § 2 of the Sherman Act).

¹⁴ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

¹⁵ 253 F.3d 34 (D.C. Cir. 2001). While there have been subsequent United Supreme Court cases addressing narrow aspects of the application of Section 2 of the Sherman Act to specific business practices, these cases did not set forth a general framework for the application of U.S. monopolization law. *See e.g.*, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004)(refusals to deal in highly regulated telecommunications market); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. (2007)(alleged predatory buying); *Pacific Bell Tel. v. Linkline Communications, Inc.*, 555 U.S. 438 (2009)(alleged price squeeze). *See generally* Spencer Weber Waller, *Microsoft and Trinko: A Tale of Two Courts*, 2006 UTAH L. REV. 741 (arguing for authoritative status of Microsoft opinion).

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.

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 nonpretextual 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 claim.

Fourth, if the monopolist's procompetitive justification stands un rebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. In cases arising under § 1 of the Sherman Act, the courts routinely apply a similar balancing approach under the rubric of the “rule of reason.” . . .

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.¹⁶

Two things are notable from the court’s discussion of U.S. monopolization law. First is its focus on actual or likely anticompetitive effects on the competitive process. Second is the role of intent.

One issue that arose was the necessary causal link between Microsoft's conduct, in particular its foreclosure of its potential rivals’ distribution channels, and the maintenance of its operating system monopoly. The court said,

Microsoft points to no case, and we can find none, standing for the proposition that, as to § 2 liability in an equitable enforcement action, plaintiffs must present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct.¹⁷

¹⁶ United States v. Microsoft Corp., 253 F.3d 54, 58-59 (D.C. Cir. 2001) (en banc) (per curiam) (internal citations and quotations omitted).

¹⁷ *Id.* at 79.

The D.C. Circuit was also wary about hinging § 2 liability on a “plaintiff’s ability or inability to reconstruct the hypothetical marketplace absent a defendant’s anticompetitive conduct.”¹⁸ This “would only encourage monopolists to take more and earlier anticompetitive action.”¹⁹ The court instead said it would infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes:

Admittedly, in the former case there is added uncertainty, inasmuch as nascent threats are merely potential substitutes. But the underlying proof problem is the same—neither plaintiffs nor the court can confidently reconstruct a product’s hypothetical technological development in a world absent the defendant’s exclusionary conduct. To some degree, “the defendant is made to suffer the uncertain consequences of its own undesirable conduct.”²⁰

As a general principle, the more harmful the challenged conduct is to societal welfare, the less probative is the defendant’s intent. When the behavior is predictably anticompetitive, the U.S. courts typically infer improper intent from the conduct itself.²¹ So the more anticompetitive the conduct, the more likely the court infers the requisite anticompetitive intent, the more skeptical the court will be over defendant’s proffered good intentions, and the less need there is for discovery on defendant’s good or bad intentions (or what the defendant would have done if it lacked monopoly power). The enquiry can be said to stop with clear anticompetitive effects, as intent evidence’s incremental value is slight.

IV. The Problems with Counterfactual Analysis

The “counterfactual test” adopted by the New Zealand Supreme Court in *Commerce Commission v. Telecom* -- requiring that the dominant firm “would not have acted as it did” had it “not been dominant” -- is at odds with the structure and purpose of the United States law of monopolization in several fundamental ways.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651c, at 78 (1996)).

²¹ *Aspen Skiing Co. v. Aspen Highlands Corp.*, 472 U.S. 585, 603 (1985).

Most basically, defendant's liability depends on what it may or may not have done in a counterfactual world. We share the New Zealand Supreme Court's concern of the rule of law, namely the importance "when addressing the statutory concept of use of market power to take an approach which gives firms and their advisers a reasonable basis for predicting in advance whether their proposed conduct falls foul of s 36 and risks a substantial financial penalty."²² But this counterfactual standard requires the antitrust plaintiffs and courts to reconstruct with confidence what a hypothetical firm in a world absent the defendant's exclusionary conduct would have done. Although the New Zealand Court instructs that the enforcers' and lower courts' "judgment must be made objectively and should be informed by all those factors that would influence rational business people in the hypothetical circumstances which the inquiry envisages,"²³ the U.S. courts believe that neither plaintiffs nor they can confidently, accurately, and predictably do so with the available economic tools.²⁴ Moreover, the U.S. courts believe that this but-for analysis would be too deferential to the monopolist.²⁵ Consequently, it is highly unlikely that enforcers, courts, and economists can consistent with the rule of law objectively reconstruct a hypothetically competitive market, never tainted by defendant's anticompetitive conduct.

Second, the focus under U.S. law is the likely or actual competitive effects of the defendant's conduct. The disjunction between these two regimes is illustrated, for example, by the fact that United States monopolization law recognizes that firms can act for multiple purposes. A firm can acquire its competitor for efficiencies and/or to

²² *Telecom*, at ¶ 30.

²³ *Id.* at ¶ 35.

²⁴ Indeed one growth area in the economic literature is behavioral economics, which from empirical lab and field studies, suggests that market participants are not rational profit-maximizers with perfect willpower. See, e.g., Hearing on Competition and Behavioural Economics, Organisation for Economic Co-operation and Development, Paris, France (June 2012), available at http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/discussionpaperfromrecentandforthcomingcompetitionmeetings.htm#Beh_Eco. Thus, constructing a hypothetical universe based on rational market participants would be an altogether different universe from the current marketplace.

²⁵ In *Microsoft*, for example, the court rejected a test that but for the monopolist's behavior, the competitors actually would have developed into viable substitutes. The court found it "inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will—particularly in industries marked by rapid technological advance and frequent paradigm shifts." *Microsoft*, 253 F.3d at 79.

monopolize the market. So whether firms with or without market power would have engaged in that conduct does not necessarily preclude anticompetitive purpose or effect. A person who lacks monopoly power can lawfully engage in the same conduct that can motivate a monopolist to unlawfully injure competition. As the court in *Berkey Photo, Inc. v. Eastman Kodak Co.* noted:

Such conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even ‘honestly industrial.’²⁶

For example, a firm may seek to merge with an important supplier to raise its rivals’ costs, to secure a monopoly, and to obtain productive efficiencies. Under either a consumer welfare or a total welfare standard, the competition authority would not likely challenge the merger if the firm lacked market power. The fact that the merger would likely have occurred in the “but for” world (for the purpose of obtaining the efficiencies) does not legalize the anticompetitive merger. Nor does the counterfactual prove what primarily motivated defendant in pursuing this merger.

Third, under United States law, a dominant and weak firm may engage in the same conduct, but the conduct’s competitive effects and legality differ. A monopolist in the United States could not immunize its anticompetitive conduct (such as exclusive dealing and tying) simply by showing that firms without monopoly power also engage in the same conduct.²⁷

As these examples show, the United States monopolization law does not exonerate a monopolist from liability merely for being able to show that it might have engaged in the same conduct when it lacked market power.

The larger problem with the counterfactual test is its assumption that a firm with monopoly power somehow behaves differently than firms in a competitive market. At

²⁶ 603 F.2d 263, 275 (2nd Cir. 1979).

²⁷ *Jefferson Parrish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) (per se unlawful tying requires market power over tying item); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) (unlawful exclusive dealing requires market power on the part of the defendant); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (unilateral refusal to deal unlawful only if part of scheme to monopolize).

times this is true. Courts in the United States, for example, do consider evidence that defendant acted in a way that it could not if defendant had not been dominant. Indeed such evidence may be relevant in proving defendant's monopoly. The lower court in *Microsoft* found that some aspects of Microsoft's behavior difficult to explain unless Windows was a monopoly product.²⁸ For example, Microsoft set the price of its Windows operating system without considering rivals' prices, "something a firm without a monopoly would have been unable to do."²⁹

But the fact that a monopolist sometimes act differently does not mean it always acts differently. Accordingly we do not claim that "counterfactual" evidence is necessarily irrelevant in U.S. cases. It simply is not dispositive. It is noteworthy that the U.S. courts do not require direct proof of monopoly. Microsoft argued that it was not a monopoly because it did not behave like a monopolist:

Claiming that software competition is uniquely "dynamic," the company suggests a new rule: that monopoly power in the software industry should be proven directly, that is, by examining a company's actual behavior to determine if it reveals the existence of monopoly power. According to Microsoft, not only does no such proof of its power exist, but record evidence demonstrates the absence of monopoly power. The company claims that it invests heavily in research and development, . . . (testifying that Microsoft invests approximately 17% of its revenue in R&D)), and charges a low price for Windows (a small percentage of the price of an Intel-compatible PC system and less than the price of its rivals.³⁰

The D.C. Circuit rejected this argument as contrary to U.S. case law: "Microsoft cites no case, nor are we aware of one, requiring direct evidence to show monopoly power in any market. We decline to adopt such a rule now."³¹ One reason is that rarely is there a line that clearly demarcates what a defendant would or would not do if it possessed (or lacked) monopoly power:

Microsoft's pricing behavior is similarly equivocal. The company claims only that it never charged the short-term profit-maximizing price for Windows. Faced with conflicting expert testimony, the District Court

²⁸ *Microsoft*, 253 F.3d at 58.

²⁹ *Id.*

³⁰ *Id.* at 56-57 (citations omitted).

³¹ *Id.* at 57.

found that it could not accurately determine what this price would be. In any event, the court found, a price lower than the short-term profit-maximizing price is not inconsistent with possession or *improper use* of monopoly power. . . . Microsoft never claims that it did not charge the long-term monopoly price. Microsoft does argue that the price of Windows is a fraction of the price of an Intel-compatible PC system and lower than that of rival operating systems, but these facts are not inconsistent with the District Court's finding that Microsoft has monopoly power.³²

So U.S. courts recognize that monopolists at times can do some things that firms without market power cannot. But U.S. courts also recognize that monopolists and fringe firms can do the same things for different reasons and with different competitive consequences.

Thus New Zealand law is significantly more restrictive than U.S. law on whether the defendant used its position of dominance. On the related third issue--whether dominance has been used for a proscribed purpose—a different proceeding involving *Telecom* held that this “may be inferred from evidence that the conduct had an anticompetitive effect or shown by direct evidence of what the conduct was intended to achieve.”³³ While the U.S. antitrust community has debated the role of intent in monopoly law,³⁴ the U.S and New Zealand law here with respect to this third issue is not that far apart. Indeed considering the conduct's "purpose," perhaps justifying the Court's conclusion in *Commerce Commission v. Telecom*, can be helpful in determining whether the firm has monopoly power.

³² *Id.* (emphasis added)

³³ Judgment of Rodney Hansen J and Professor Martin Richardson, in *Commerce Commission v. Telecom Corporation of New Zealand Limited And Anor* HC AK CIV 2004-404-1333 [9 October 2009], at ¶ 12, available at <http://www.ictregulationtoolkit.org/en/Publication.3912.html>. Liability and penalties in this subsequent and unrelated case involving Telecom were upheld in *Telecom Corp. v. Commerce Commission*, [2012] NZCA 278, [2012] NZCA 344. While these decisions show that Section 36 is not entirely a dead letter, they do not address the counterfactual analysis at the heart of Section 36's weakness as an enforcement tool.

³⁴ Maurice E. Stucke, *Is Intent Relevant?*, *Journal of Law, Economics & Policy* (forthcoming 2012), available at <http://ssrn.com/abstract=1992761>.

Conclusion

Under both U.S. and New Zealand law, difficult fact issues may arise when the motives and effects of the challenged conduct are mixed. Both bodies of law resolve those issues by putting the ultimate burden of proof on the plaintiff. Thus, while complicating the analysis procedurally through various rules providing for the shifting of burdens of coming forward with more evidence, the United States antitrust law ultimately puts the burden on the plaintiff to show that anticompetitive effects of the challenged conduct outweigh any pro-competitive effects that it might have. Similarly, the Court in *Commerce Commission v. Telecom* found the defendant not liable because the government failed to carry its ultimate burden to show that the same conduct would not have been engaged in in the absence of market power.

But it appears to us that the "counterfactual test" – perhaps unintentionally – creates a significant exception for a monopolist's willfully anticompetitive behavior. The fact that a monopolist would have acted similarly in the counterfactual world does not necessarily mean it lacked an anticompetitive purpose: it simply means that the firm had mixed motives. So too, the counterfactual test appears to excuse behavior where actual anticompetitive effects are relatively clear.

The United States courts do not believe that it is fair or reasonable to inquire what would have happened in a hypothetical world not tainted by monopoly. The belief is that plaintiffs and courts cannot assess confidently, objectively, and with consistent accuracy what someone without market power would have done. Proving with confidence a firm's intent can be difficult. It becomes even more difficult to establish when one goes beyond defendant's actual motive in the real world (which courts can infer from the conduct's likely or actual competitive effects), to what a firm "would have done" in some counterfactual, hypothetical world. More importantly, it fails to accurately determine the key question in unilateral conduct cases of the net anticompetitive effect of the defendant's conduct.