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The Antitrust Marathon.

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ISSUE PAPER

The Role of Monopolization and Abuse of Dominance in Competition Law

By Spencer Weber Waller*

We begin our roundtable discussion with a very simple question. Is Monopolization or the Abuse of Dominance a matter of equal concern in competition law to collusion and other agreements by two or more persons which harm competition?

The history of competition law suggests that these are matters of equal concern, although modern practice suggests that cartels may have replaced monopolies as “public enemy number 1.” As a textual matter, Section 1 and 2 of the Sherman Act are treated equally in terms of importance, remedies, and private rights of action. In the United States, monopoly and trusts were used largely interchangeably in the debates leading up to the enactment of the Sherman Act. The two sections of the Sherman Act were further used largely interchangeably in the early cases brought by the United States government and decided by the Supreme Court. To a large extent, it was assumed that violations of Section 1 were the means by which monopolization was achieved.

The same is true in the European Union with Articles 81 and 82 of the Treaty. The two competition offenses have equal textual importance, equal remedies, and similar non-exclusive lists of violations laid out in the Treaty itself. In the broader history of the *ordo-liberal* tradition that informs EU competition law, both conspiracy and abuse offenses would seemingly threaten the envisioned democratic market economy and political order.

From one perspective, monopolization may be even more pernicious than cartelization. To the extent that cartels are merely an

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imperfect group's attempt to achieve the output restrictions and price increases of a true monopolist, but prone to defections and cheating, we may well have less to fear from conspiracies to harm competition than full blown individual monopolization of a particular market. Moreover, the Sherman Act prohibits even attempted monopolization, an approach absent from Section 1 jurisprudence. From the European perspective, there is the additional "special responsibility" of dominant firms to avoid the abuse of their power not found in the analysis of Article 81 offenses. The EU also has the provisions of Article 86 to prohibit the misuse of governmental and governmentally conferred monopolies, also suggesting a higher priority for the abuse of a dominant position.

However, I am unaware of any lasting view of monopolies as more pernicious than their conspiracy cousins. At common law, conspiracies were always viewed as more dangerous than individual conduct and treated more harshly by penalizing the agreement itself rather than the completed act.

In more modern terms, this greater suspicious of conspiracies to harm competition is reinforced with competition law's greater emphasis on efficiencies and other theories which tend to view monopolies in more benign terms. Cartels are deemed to be horizontal agreements between competitors to set price or production levels or to allocate territories or customers. They lack any significant integrative features, or the potential for the generation of any significant efficiencies, or they would not be treated as per se unlawful in the first place. In contrast, a successful monopolist is often deemed to be the source of considerable efficiencies and/or the driver of significant innovation, as in Schumpeter's world of waves of creative destruction. At the extreme, one with such views might consider even enduring market power as either a sign of initial mismeasurement or satisfaction of consumer needs warranting no further action until new or existing market actors supplant the incumbent. Few view cartels in such similar complacent terms.

In the United States, at least, it seems the balance has tipped solidly in favor of viewing monopolies as less problematic than cartels and similar anticompetitive agreements. First, cartels are vigorously prosecuted as criminal offenses, while at the same time there has been no criminal prosecution of monopolization or attempted monopolization since the mid-1960s. There have always been far more greater number of Section 1 than Section 2 cases, although many cases combine elements of both offenses and pure Section 2 are significantly larger and more complex in scope than the average conspiracy case.

Since the U.S. *Microsoft* case has been settled, the focus of government monopolization efforts has been centered in the FTC around the notion of “cheap predation,” where there is broad ideological consensus that the misuse of governmental and standard setting processes is a legitimate cause of concern and that an easily administered behavioral remedy is available. There also have been few recent government monopolization cases which have been tried to a verdict. Most have been resolved through consent decrees. This has important ramifications for the private enforcement of the US antitrust laws since private cases frequently track government enforcement efforts, both for practical reasons and in order to take advantage of the preclusive effects of a government court victory.

All these developments seemed to have come to a head in the United States in the *Trinko* decision where the Court referred to collusion as the “supreme evil” and noted in contrast:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth.¹

In contrast, the D.C. Circuit in its 2001 *Microsoft* opinion seemed to assume quite the opposite in treating monopolization and anticompetitive agreements as equivalent harms to the competitive harms and fashioned tests for unlawful monopolization almost identical to the test for rule of reason cases under Section 1 of the Sherman Act.²

The European Union is wrestling with these same issues of priority in law and enforcement between Articles 81 and 82. The European Commission is in the seemingly final stages of issuing guidelines for the application of Article 82 and its prohibition of the abuse of a dominant position. The Court of First Instance has now further weighed in with its September 17th decision in the EU *Microsoft* litigation.

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

² Spencer Weber Waller, *Microsoft and Trinko: A Tale of Two Courts*, 2006 UTAH L. REV. 741 (2006).

The basic notion of whether monopolization or an abuse of dominance should be viewed more suspiciously, equally, or as a matter of less concern than other parts of competition law is a fundamental one that influences all the key questions that follow of defining power and harm, what constitutes an offense, and what remedies should be applied.