**For Official Use** **DAF/COMP/WP3/WD(2006)35**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **29-May-2006**

**English - Or. English**

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**
**COMPETITION COMMITTEE**

**DAF/COMP/WP3/WD(2006)35**
**For Official Use**

## Working Party No. 3 on Co-operation and Enforcement

# ROUNDTABLE DISCUSSION ON TECHNIQUES AND EVIDENTIARY ISSUES IN PROVING DOMINANCE/MONOPOLY POWER

**-- United States of America --**

**7 June 2006**

*This note is submitted by the delegation of the United States of America to WP3 FOR DISCUSSION at its forthcoming meeting to be held 7 June 2006.*

**JT03209605**



**English - Or. English**

1. In the United States, single-firm conduct is governed by section 2 of the Sherman Act, which encompasses the distinct offenses of unlawful acquisition of monopoly power, unlawful maintenance of monopoly power, and unlawful attempt to acquire monopoly power. An element of the first two offenses is the possession of monopoly power,[1] and an element of the third is a "dangerous probability" of obtaining monopoly power.[2]

## 1. The Meaning and Proof of Monopoly Power

2. The concept of "monopoly power" in U.S. antitrust law is closely related to the economic concept of "market power," but monopoly power entails both greater and more durable power over price than mere market power.[3] Monopoly power, in particular, has been defined as "the ability (1) to price substantially above the competitive level *and* (2) to persist in doing so for a significant period without erosion by new entry or expansion."[4]

3. Courts in the United States traditionally took the view that monopoly power "ordinarily may be inferred from the predominant share of the market."[5] Modern jurisprudence, however, recognizes that "market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share."[6] A dominant market share is now viewed as necessary for monopoly power, but far from sufficient. Courts in the United States have held that a market share below 50% precludes finding monopoly power,[7] and the leading treatise suggests that a share of over 70–75% for at least five years is required.[8]

4. "Monopoly power must be shown to be persistent in order to warrant judicial intervention, which is always costly."[9] As one court explained: "In evaluating monopoly power, it is not market share that counts but the ability to *maintain* market share."[10] Because "anticompetitive exclusionary practices would be unprofitable and presumably would not occur" if "entry would deny firms monopoly profits,"[11] U.S.

---

1 Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

2 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

3 *See, e.g.*, Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481 (1992) ("Monopoly power . . . requires, of course, something greater than market power . . . ."); Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 899 F.2d 951, 967 (10th Cir. 1990) ("Market and monopoly power only differ in degree—monopoly power is commonly thought of as 'substantial' market power."); Deauville Corp. v. Federated Department Stores Inc., 756 F.2d 1183, 1192 n.6 (5th Cir. 1985) (Monopoly power is an "extreme degree of market power.").

4 AD/SAT v. Associated Press, 181 F.3d 216, 227 (2d Cir. 1999) (quoting 2A PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW ¶ 501, at 86 (1995)).

5 United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

6 American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, Inc., 185 F.3d 606, 623 (6th Cir. 1999). *See* Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 98 (2d Cir. 1998) ("A court will draw an inference of monopoly power only after full consideration of the relationship between market share and other relevant characteristics.").

7 *See, e.g.*, Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1411 (7th Cir. 1995) (Posner, J.) ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share . . . .").

8 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 801a, at 319 (2d ed. 2002). *See also* Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America, 885 F.2d 683, 694 n.18 (10th Cir. 1989) (To establish "monopoly power, lower courts generally require a minimum market share of between 70% and 80%."); Exxon Corp. v. Berwick Bay Real Estate Partners, 748 F.2d 937, 940 (5th Cir. 1984) ("monopolization is rarely found when the defendant's share of the relevant market is below 70%").

9 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 801d, at 323 (2d ed. 2002).

10 United States v. Syufy Enterprises, 903 F.2d 659, 665–66 (9th Cir. 1990).

11 2A PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW ¶ 420, at 58 (2d ed. 2002).

courts require proof that entry would not effectively discipline a competitor alleged to possess monopoly power. Firms with market shares well in excess of 50% have been found not to possess monopoly power because their power over price was not sufficiently durable.[12]

5. The plaintiff has the burden of proving monopoly power in U.S. courts. "Plaintiffs relying on market share as a proxy for monopoly power must plead and produce evidence of a relevant product market, of the alleged monopolist's dominant share of that market, and of high barriers to entry."[13] Such evidence may give rise to a presumption of monopoly power, which may be overcome by "evidence of a defendant's inability to control prices or exclude competitors."[14]

## 2. The Rationale of the Monopoly Power Requirement

6. The monopoly power requirement reflects the fact that conduct "that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist," so the actions of a dominant firm are properly "examined through a special lens."[15] Application of a special lens is appropriate, however, only with truly dominant firms, and there are additional reasons for making the monopoly power requirement rigorous.

7. First, a rigorous monopoly power requirement recognizes that it is often "difficult to distinguish robust competition from conduct with long-term anticompetitive effects."[16] Errors in the administration of competition policy toward single-firm conduct are easily made, and the monopoly power requirement reduces the possibility of erroneously condemning much conduct that merely disadvantages rivals. Such "false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect."[17]

8. Second, a rigorous monopoly power requirement acts as a useful screen. It avoids difficult issues in the evaluation of conduct that may or may not be exclusionary. This screening process makes the

---

12 *E.g.*, Western Parcel Express v. United Parcel Service of America, Inc., 190 F.3d 974, 975 (9th Cir. 1999) (A firm with a "dominant share" was found not to possess monopoly power because of a failure to "demonstrate that there are significant barriers to entry."); Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 99 (2d Cir. 1998) (Successful entry refuted "any inference of the existence of monopoly power that might be drawn" from the defendant's market share of over 70%.); Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America, 885 F.2d 683, 695–96 (10th Cir. 1989) (A firm was found not to possess monopoly power because its "ability to charge monopoly prices will necessarily be temporary.").

13 Harrison Aire, Inc. v. Aerostar International, Inc., 423 F.3d 374, 381 (3d Cir. 2005). *See* Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) (A plaintiff must "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry . . . .").

14 Oahu Gas Service, Inc. v. Pacific Resources Inc., 838 F.2d 360, 366 (9th Cir. 1988). *See also* Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc., 386 F.3d 485, 501 (2d Cir. 2004) (Only "after considering market share in conjunction with other characteristics of the market" may a court conclude that a defendant possesses monopoly power.).

15 Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 488 (1992) (Scalia, J., dissenting). *See also* United States v. Dentsply International, Inc., 399 F.3d 181, 187 (3d Cir. 2005) ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist.").

16 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

17 Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (internal quotations omitted). *See also* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775 (1984) ("Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.").

administration of section 2 of the Sherman Act far less costly by keeping many meritless cases out of court and allowing others to be resolved without a trial. This screen also provides certainty to the vast majority of competitors confident they would not be found to possess monopoly power.

### 3. Four Recent Cases in the United States

9. Four recent cases illustrate the application of the monopoly power requirement in the United States. The U.S. Department of Justice successfully challenged maintenance of monopoly in two cases—*Microsoft* and *Dentsply*, and the Federal Trade Commission (FTC) successfully negotiated settlements in two cases involving misuse of government processes to acquire or maintain monopoly power—*Unocal* and *Bristol-Meyers Squibb*.[18]

10. *Microsoft*.[19] Microsoft Corp.'s share of the PC operating systems market had exceeded 90% for over a decade and had risen to 95% at the time of trial, causing the court to find that it had a "dominant, persistent, and increasing share of the relevant market."[20] Microsoft's enormous market share, however, was insufficient by itself to establish monopoly power. The trial court went on to find that "the applications barrier to entry protects Microsoft's dominant market share"[21] and held that "proof of a dominant market share and the existence of a substantial barrier to entry create the presumption that Microsoft enjoys monopoly power."[22] The court elaborated at great length the workings of the "applications barrier to entry."[23] In brief, that barrier arose from "an intractable 'chicken-and-egg' problem": "Users do not want to invest in an operating system until it is clear that the system will support generations of applications that will meet their needs, and developers do not want to invest in writing or quickly porting applications for an operating system until it is clear that there will be a sizeable and stable market for it."[24]

11. *Dentsply*.[25] Dentsply International, Inc.'s share of the market for artificial teeth in the United States was "between 75% and 80%" for "at least the past 10 years," but the trial court held that the monopoly power "inquiry does not end with proof of high market share."[26] Indeed, the trial court held that

---

18 The FTC in recent years has pursued various investigations of anticompetitive unilateral as well as joint conduct that might be characterized as "cheap exclusion." *See* Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST LAW JOURNAL 975 (2005).

19 United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999) (findings of fact), 87 F. Supp. 2d 30 (D.D.C. 2000) (conclusions of law), *affirmed*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

20 84 F. Supp. 2d at 19; 87 F. Supp. 2d at 36.

21 87 F. Supp. 2d at 36–37. *See* Gregory J. Werden, *Network Effects and Conditions of Entry: Lessons from the* Microsoft *Case*, 69 ANTITRUST LAW JOURNAL 87 (2001).

22 87 F. Supp. 2d at 36. The court also held that the presumption was not overcome by other evidence. *Id.* at 37. Microsoft argued that its pricing and innovation proved that it did not possess monopoly power. Affirming the trial court, the court of appeals, found that Microsoft's pricing and innovation were consistent with monopoly power and that "some aspects of Microsoft's behavior are difficult to explain unless Windows is a monopoly." 253 F.3d at 56–58.

23 84 F. Supp. 2d at 19–24.

24 *Id.* at 18.

25 United States v. Dentsply International, Inc., 277 F. Supp. 2d 387 (D. Del. 2003), *reversed*, 399 F.3d 181 (3d Cir. 2005).

26 277 F. Supp. 2d at 423.

the Justice Department had failed to prove that Dentsply possessed monopoly power because the challenged exclusive arrangements with dealers had not be shown to act as a "barrier to entry in the artificial tooth market."[27] The appeals court reversed, however, concluding that by "blocking . . . access to the key dealers" Dentsply had maintained "monopoly power over the market for artificial teeth."[28] The appeals court found that using dealers provided customers with many advantages and that it was "impracticable for a manufacturer to rely on direct distribution to the [customers] in any significant amount."[29]

12. *Unocal.*[30] A 2003 FTC administrative complaint charged that Unocal Corp. illegally acquired monopoly power in the market for the technology used in producing reformulated gasoline that met certain standards set by the California Air Resources Board (CARB), a state environmental regulatory agency. According to the complaint, Unocal acquired this power by misrepresenting that certain research was non-proprietary and in the public domain, while at the same time pursuing patents that would enable it to charge substantial royalties once the research was incorporated by CARB in its reformulated gasoline regulations. The combination of the patent received and CARB regulations ultimately gave Unocal a monopoly. Under the terms of a 2005 settlement, reached in connection with the Chevron Corp.'s acquisition of Unocal,[31] Unocal agreed to stop enforcing the patents in question and to release them to the public by the merger's effective date.

13. *Bristol-Myers Squibb.*[32] Bristol-Myers Squibb Co. held patents on three important pharmaceuticals—two anti-cancer drugs, Taxol and Platinol, and the anti-anxiety agent BuSpar. Because of the distinctive characteristics of these pharmaceuticals, the FTC found that each (and its generic equivalent) was a separate antitrust market in which the manufacturer had a total monopoly as a result of its patents. Further, the FTC found that the manufacturer wrongfully maintained that power by conduct designed to delay the eventual entry of generic competition. As these patents for these products grew close to expiration, and as generic entry was planned, Bristol-Myers listed additional patents on them with the Food and Drug Administration. Under the FDA regulatory process, these new listings made it possible to retard generic entry by several years. According to the FTC complaint, however, the alleged new patents had not been properly eligible for listing, and Bristol-Myers could not have reasonably believed that they were. The company was therefore charged with illegally maintaining its monopoly power. Among other terms of the negotiated settlement, Bristol-Myers agreed to give up its ability to obtain entry stays on the basis of later-listed patents, thus helping return the pace of cost-lowering generic entry to normal.

---

27 *Id.* at 451–52.

28 399 F.3d at 189–91.

29 *Id.* at 192–93.

30 In the Matter of Union Oil Co. of California, Docket No. 9305 (FTC complaint issued March 4, 2003), *available at* http://www.ftc.gov/os/adjpro/d9305/index.htm.

31 *See* In the Matter of Union Oil Co. of California, Docket No. 9305, Agreement Containing Consent Order (June 10, 2005), *available at* http://www.ftc.gov/os/adjpro/d9305/050610agreement9305.pdf.

32 In the Matter of Bristol-Myers Squibb Co., File Nos. 001-0221, 011-0046, and 021-0181 (March 7, 2003), *available at* http://www.ftc.gov/opa/2003/03/bms.htm.