

Federal Trade Commission/ Antitrust Division

Hearings on Single-Firm Conduct

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Overview – Business Perspective on Single-Firm Conduct

- Clear, administrable and objective rules are very important
 - Agree with Assistant Attorney General Barnett that “both consumers and the business community benefit from clear, administrable and objective rules that both allow business to assess the legality of a practice before acting and enable enforcers and courts to judge challenged conduct predictably and correctly.” (Testimony, June 20, 2006 at 16-17.)
 - Agree with Chairman Majoras that “much of the value of sound competition policies come from the promulgation of practical and straightforward standards that enable firms to avoid engaging in unlawful conduct, with minimal transaction costs.” (Testimony, June 20, 2006 at 10.)
- Hearings are important not only for furthering the development of a clear, administrable U.S. approach but also for fostering sound global approaches to single-firm conduct

Counseling Perspective – Some Key Questions

- What rule governs – Is this single-firm conduct?
- Is the “threshold test” of “monopoly power” satisfied?
- Is the proposed conduct “exclusionary?” What “safe harbors” or “clear rules” exist to guide counseling?
- What are the potential risks and related costs?
 - Government investigations and enforcement actions; private treble damage actions
 - Injunctive relief; fines; treble damage awards; legal fees; diversion of management resources; negative press; potential adverse commercial consequences

Jury Instructions Are Often Problematic

- Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Company, Inc., No. 05-381, Brief for the United States as Amicus Curiae at 5:

“The court defined ‘anticompetitive conduct’ generally as ‘conduct that has the effect of wrongly preventing or excluding competition.’” Pet. App. 14a n.30.

“With reference to respondent’s ‘predatory bidding’ and ‘overbuying’ claims, the court instructed the jury as follows: One of [respondent’s] contentions in this case is that [petitioner] purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price. If you find this to be true you may regard it as an anti-competitive act.” Pet. App. 7a n.8, 14a n.30.
- 3M v. LePage’s Inc., No. 01-1865, Brief for the United States as Amicus Curia at 6:

“The district court instructed the jury that exclusionary or predatory conduct ‘either does not further competition on the merits, or does so in an unnecessarily restrictive way. If 3M has been attempting to exclude rivals on some basis other than efficiency, you may characterize that behavior as predatory.’” Pet. App. at 151a.
- The ABA’s Model Jury Instructions in Civil Antitrust Cases also fail to provide coherent guidance. See Testimony of Mark D. Whitener, July 18, 2006 at 8-9 & n. 13.

Single Firm Conduct – Complex Business Structures

- Copperweld -- Parent and wholly-owned subsidiary are one entity; §2 (single-firm conduct) rather than §1 (agreements in restraint of trade) (1984)
- Treatment of less than wholly-owned subsidiaries should be clarified. Lower court decisions fail to provide coherent guidance. See Antitrust Law Developments (Fifth) at 28-30.
applies
- Reinstate guidance from 1988 DOJ Antitrust Enforcement Guidelines for International Operations (Case 9 – A Multinational Operation):
“In the Department’s view, however, the policies underlying the Sherman Act (as discussed in *Copperweld*) support the conclusion that a parent corporation and any subsidiary corporation of which the parent owns more than 50 percent of the voting stock are a single economic unit under common control and are thus legally incapable of conspiring with one another within the meaning of Section 1.”

Monopoly Power – A Helpful U.S. Threshold Element

- Monopolization – Two elements: (1) monopoly power (the power to control prices or exclude competition) and (2) willful acquisition or maintenance of that power (exclusionary conduct)
- Monopoly Power – A helpful screen in the U.S.
 - Does the business have “the power to control market prices?”
 - “Bidding markets” – other credible competitors prevent ability to control market prices
 - Market share guidance: >70% (likely); <50% (virtually never)
 - Attempt requires a dangerous probability of achieving monopoly power [Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993)]
 - Most very successful firms do not meet the “monopoly power” test
- However, important issues remain:
 - Treatment of “aftermarkets”
 - Non-U.S. issues: Lower “dominance” thresholds; Collective Dominance

Aftermarkets

- Kodak – Potential for “single-brand” parts and service markets
 - Only small share (<25%) of interbrand photocopier market
 - But 100% of intrabrand parts market; 80-95% of intrabrand service market
- Post-Kodak Limiting Interpretations
 - “A number of courts have limited Eastman Kodak to test situations in which the supplier changed its policy regarding aftermarket sales, and accordingly have held proof that an assertively restrictive aftermarket sales policy was generally known and thus presumed to be part of the buyer’s decision calculus will defeat a claim confined to an aftermarket.” Antitrust Law Developments (Fifth) at 245.
- Kodak should be reversed – All capital goods suppliers exposed today
 - Chills potentially procompetitive conduct – creates an incentive to adopt/maintain restrictive parts and service policies
 - Customers can protect themselves both via contract and interbrand competition (repeat customers; reputation)
 - U.S. amicus position in Kodak remains correct: “Because it is not disputed that Kodak lacks market power in the market for equipment (Pet. App. A8 n.3), however, the suggestion that it nonetheless would exercise market power in a market for replacement parts or service for Kodak equipment is inherently implausible.” See also ICC Comments on the European Commission’s Article 82 Discussion Paper, §10 (available on the DG Competition website).

Monopoly Power – Global Considerations

- Lower Thresholds in Other Jurisdictions
 - ICN Unilateral Conduct Working Group Draft Report: “Those responding jurisdictions which have done so, have generally set their dominance/SMP presumption at **33-50%** (except Brazil) and their safe harbor at 20-40% (except Korea).”
 - But trend to use of a “behavioral definition” (ability to price independently) rather than a “structural definition” (large market share) offers potential for convergence
- Collective Dominance – How to counsel re unilateral conduct?
 - EC Article 82 Discussion Paper: “[T]he existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position. . . . Undertakings in oligopolistic markets may sometimes be able to raise prices substantially above the competitive level without having recourse to any explicit agreement or concerted practice.” (paragraphs 46 & 47)
 - Article 14 of June 22, 2006 Draft Anti-Monopoly Law of the People’s Republic of China (2 firms >67%; 3 firms >75% but excludes firms with <10% share) [Will each firm be treated as dominant even with modest shares and #2 or #3 position?]

Refusals to Deal/Essential Facilities Doctrine

- Promote clarity by adopting the position that unconditional, unilateral refusals to deal with a competitor do not constitute “exclusionary conduct” and therefore do not provide a basis for a §2 claim (See Testimony of Mark D. Whitener, July 18, 2006).
- Aspen Skiing “qualification” in Trinko of right to refuse to deal is unsound – deters dealing in the first place if §2 exposure can be based on a “refusal to continue to deal”
- Essential Facilities Doctrine has been appropriately criticized by the Antitrust Division and the FTC. See Brief for the United States and the Federal Trade Commission as Amicus Curiae Supporting Petitioner in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, No. 02-682.
- Suggested approach avoids the problem posed by the inherent limitations on the ability of courts to design workable remedies for unilateral refusals to deal

Bundled Discounts/Mixed Bundling

Threshold Considerations

- Are there situations in which there is little or no potential for harm to competition?
 - For example, Professor Nalebuff has concluded that mixed bundling does not pose a risk to competition in markets in which sellers do not offer a single price to all customers. This would exclude numerous markets where prices are set through bidding or customer-specific negotiations. See Nalebuff and Majerus, Bundling, Tying and Portfolio Effects, Part II – Case Studies at 30, DTI Economics Paper No. 1 (2003)
- Do most cases involve alleged leveraging from “monopoly market” to a separate “competitive market?” If so, a §2 bundled discount claim should be required to meet the “attempt to monopolize” test.
 - See Testimony of Professor Thomas A Lambert, November 29, 2006; Testimony of Professor Robert Willig, November 1, 2006 (both stressing the need to show harm to competition from bundling and tying).

Bundled Discounts/Mixed Bundling

Can these claims be addressed as either involving tying or predatory pricing?

- **Tying** – A means to address Professor Nalebuff’s “No-cost Predation” case (Testimony, November 29, 2006)?
 - Raising price of the “monopoly market” to well above the monopoly price so that no one is willing to buy it separately can be viewed as the legal equivalent of tying since the “monopoly product” is only (economically) available with the purchase of the “competitive product.”
 - A §2 violation based on tying involving a second product market should require a showing that the tie presents a dangerous probability of creating monopoly power in that market. Cf. DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property, §5.3 (1995) (“The Agencies would be likely to challenge a tying arrangement if . . . (2) the arrangement has an adverse effect on competition in the relevant market for the tied product. . .”).

Bundled Discounts/Mixed Bundling

Can these claims be addressed as either involving tying or predatory pricing?

- **Predatory Pricing** – Applies to discounting of the “monopoly product” to promote purchase of the “competitive product”
 - Cost-based screens: Is price of the bundle > cost of the bundle? Is the net price of the “competitive product” > cost of the competitive product? (Ortho)
 - Key considerations: Are there “fringe sellers” of the “monopoly product?” See Testimony of Professor Muris, November 29, 2006. Ability of multiple firms to discount one or more of the various “competitive products” in a multi-product bundle. See Brief of United States as Amicus Curiae in 3M v. LePage’s, No. 02-2865 at fn. 13 (2004).
 - Recoupment: Recoupment must also be established since this scenario involves losses on the “monopoly product.” In order to show likelihood of recoupment, one must provide evidence of likely exit of rivals and barriers to re-entry as well as likelihood that bundling would be profitable on a NPV basis.

3M/LePage's – Some Questions

Does it depend on treatment of transparent tape as one product market?

- If separate markets, LePage's would have had >65% of generic tape market – could it show attempted monopolization/“dangerous probability of success” by 3M in that market?
- If one “transparent tape market,” why not look at whether price of the bundle as a whole is > cost of bundle as a whole?
- Wouldn't reduced but above-cost pricing of 3M's branded tape have had a similar impact on LePage's if one product market?

What is the result – less discounting by 3M?

Exclusive Dealing

- Enhance clarity by establishing that customer-driven exclusive arrangements are presumptively legal
 - ABA Comments on the EC Article 82 Discussion Paper at 41-42, available at <http://www.abanet.org/antitrust/at-comments/2006/06-06/com-article-82.pdf>
 - Steuer, “Customer -- Instigated Exclusive Dealing,” 68 Antitrust L.J. 239 (2000), available at www.mayerbrownrowe.com

Conclusion

- Clear, administrable, and objective rules are very important
- A few modest suggestions to improve §2 guidance
 - A company and all >50% owned entities are “a single economic unit”
 - Eliminate the “aftermarket” exception to the “monopoly power” threshold element for §2 liability
 - Treat all unconditional unilateral refusals to deal (or refusals to continue to deal) as per se lawful
 - Clarify the treatment of bundled discounts
 - Treat customer-initiated exclusive dealing arrangements as presumptively lawful
- Redouble efforts to promote international convergence on sound principles for assessing single-firm conduct