

ADDRESSING DOMINANCE UNDER CHINA'S ANTI-MONOPOLY LAW

**Remarks before the
Competition Law Center of the University of International Business and Economics
and the State Administration for Industry and Commerce**

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As China moves towards enactment of its Anti-Monopoly Law, the Competition Law Center of the University of International Business and Economics and the Fair Trade Bureau of the State Administration for Industry and Commerce deserve our appreciation for organizing this afternoon's seminar on the difficult issues arising from "abuse of dominance."

As most participants at this seminar already know, I have traveled to China many times over the past two years. During those trips, I have given many talks that have included discussions of the activity addressed through prohibitions on monopolization in some jurisdictions and abuse of dominance in others – basically, policy responses to single-firm conduct. A number of those talks are available on my agency's Web site.¹ I

* The views expressed in this presentation are those of the author and do not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner.

¹ See, e.g., Government Policy for Fostering Innovation, before the China Council for the Promotion of International Trade and U.S. Chamber of Commerce, Global Forum on Intellectual Property Rights Protection and Innovation (Mar. 28, 2007), available at <http://www.ftc.gov/speeches/blumenthal/070328CCPITFinal.pdf>; The Relationship between Competition Agencies and Other Units of Government, before the Ministry of Commerce, Asian Development Bank, and Organisation for Economic Cooperation and Development, International Seminar: Review of Anti-Monopoly Law (May 19, 2006), available at <http://www.ftc.gov/speeches/blumenthal/20060519Mofcom-ADBFinal.pdf>; Abuse of Dominant Market Position, Control of Concentration, and the Anti-Monopoly Enforcement Agency, before the Legislative Affairs Office of the State Council, International Symposium on the Draft Anti-Monopoly Law of the People's Republic of China (May 23 and 24, 2005), available at <http://www.ftc.gov/speeches/blumenthal/20050523SCLAOFinal.pdf>; see also Reducing Governmental Impediments to Capital Mobility, before the ASEAN Consultative Forum on Competition, Conference on Competition Law and Policy: How to Make Competition Law and Policy Play a Greater Role in ASEAN Economies (Aug. 17, 2005), available at <http://www.ftc.gov/speeches/blumenthal/050817asean.pdf>;

will draw from those today, but I do not want merely to repeat them. All of you already know the essential elements of a monopolization violation in the United States – (1) the possession of monopoly power in a relevant market and (2) the willful acquisition or maintenance of the monopoly power through improper means, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Today’s organizers sent a number of questions that they thought deserved focus at this seminar, and I want to touch mainly on those.

I want to start with a discussion of the central policy problem in the dominance/monopolization area. It doesn’t depend on legal system. It’s true in the United States; it’s true in Europe; it’s true everywhere the basic laws of economics apply. Solutions to the problem vary across systems, but the problem remains the same.

The problem is this: the practices that provide the basis for a finding of abuse are usually identical to practices that, in most contexts, are efficiency-enhancing and beneficial to the public. The market context shifts, but the practices themselves are the same. That is, depending on market context, a particular practice can be anticompetitive or neutral or procompetitive. Most often, the practice will be neutral or procompetitive. In a small percentage of cases, the practice will be anticompetitive. Because the practice itself is ambiguous, policy makers face great difficulty in framing sensible legal rules. We can’t simply prohibit certain practices, because we’ll be prohibiting things that we generally want to encourage. Policy makers have recognized this problem for a long time.²

Let me give some typical examples. Very low prices can be predatory in special circumstances, but they most often reflect vigorous competition and benefit consumers. Loyalty and bundled discounts can be used strategically to exclude small rivals, but they most often are simply a form of low price. Tying arrangements can discourage entry or innovation, but they more often are a means for achieving manufacturing or distribution

Merger and Acquisition Control: Conforming Procedures to ICN Recommendations, before the State Administration for Industry and Commerce of China, International Symposium on Competition Policy and Legislation (June 27, 2005), *available at* <http://www.ftc.gov/speeches/blumenthal/20050628SAIC%20Final.pdf>.

² An article from twenty-five years ago by a renowned former professor and US government official, for example, contains this observation:

The determination whether the conduct of a monopolist in a Section 2 case is lawful or not is one of the most difficult determinations in antitrust. Many courts and commentators have sought to develop simple answers to the questions that are raised by formulating specific rules of easy application with the valid objective of providing predictability of result in litigation and, more importantly, concrete guidelines for the businessmen who must make the competitive decisions. In the majority of monopolization cases, however, these . . . rules do not fit. The competitive implications of practices by firms with monopoly power are more often than not too ambiguous for conclusive presumptions to be drawn. Easy and predictable rules are of course desirable and, where appropriate, should be applied; but the search for specific rules should not override the primary need – ascertaining whether the effect of the conduct is to increase competition or to suppress it.

Gordon V. Spivack, *Monopolization Under Sherman Act Section 2*, 50 ANTITRUST L.J. 285, 303 (1981).

efficiencies. Exclusive dealing agreements can limit distribution channels available to small manufacturers, but they more often achieve efficiencies by aligning the incentives between a manufacturer and its distributors.

All of those examples involve so-called exclusionary practices. Some jurisdictions face similar issues with so-called exploitative practices – basically, where a monopolist exploits its power by charging exorbitant prices. We in the United States do not reach exploitative practices under our Section 2; but even in Europe, where Article 82 EC does reach exploitative abuses, enforcement officials recognize the difficulty of meaningfully intervening in such cases. Last month I attended a conference in Florence, Italy, where a number of officials presented papers discussing some of those difficulties.³ High prices can be an important market signal to induce entry or expansion. High prices provide an important incentive by rewarding innovation and success. High prices in one market are often offset by complementary products given away elsewhere. And those policy considerations are in addition to tremendous practical difficulties that must be confronted in attempting to regulate high prices. The Florence papers urged great care before intervening against exploitative abuses. In essence, the discussion there was whether the proper approach to intervention was “never” or “hardly ever.”

If you look beyond rhetoric and examine the actual enforcement practices, you will see that the US and EC are actually quite close. Neither jurisdiction brings many monopolization or dominance cases. Although the two jurisdictions continue to differ in the legal tests they apply to certain practices, there is now clear agreement on the objective of protecting competition, rather than competitors. Neither jurisdiction uses competition law any longer to attempt to protect small business (although some of the EC’s Member States may have some lingering tendencies).

One of the questions posed by today’s organizers was: The US doesn’t bring many monopolization cases – why not? There are several responses:

First, no major enforcement authority brings many monopolization or dominance cases. Every mature system sees a need to take great care for the policy reason with which I began – we do not want to discourage beneficial conduct.

Second, in evaluating the US, you have to consider the role of private litigation. We do not necessarily urge others to follow our lead, but private litigation is a characteristic of our system. More than 90% of antitrust cases filed in the US are private. That statistic applies to monopolization cases as well. Many are dismissed, and many are settled. The number that results in actual liability findings is small. But if you are making cross-system comparisons, you need to account for private litigation as a factor in the US.

³ See Emil Paulis, *Article 82 EC and Exploitative Conduct* (June 9, 2007) (manuscript on file), and Amelia Fletcher & Alina Jardine, *Towards an Appropriate Policy for Excessive Pricing* (June 9, 2007) (manuscript on file), both *forthcoming in* EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC (Claus-Dieter Ehlermann & Mel Marquis eds. forthcoming 2007).

Third, if you focus just on the role of government, the reality is that we do bring cases. A few are high-profile; most are not. You hear about high-profile cases in press coverage around the world. *Microsoft* and *American Airlines* would be examples.⁴ You probably don't hear about the majority of our cases, since they're not widely reported in major media. I doubt you have read about *Valassis* or *Bristol-Myers Squibb* or *Biovail*,⁵ for example.

A few years ago, we often heard non-US commentators say, "the US doesn't enforce its monopolization laws." We've tried to correct that misperception, and you don't hear it now, at least among people who understand actual enforcement patterns. The patterns have been consistent for a long time, with an average of one monopolization case brought by the government every year or two. If you look back over the past three or four decades, the period with the highest level of government activity has been the past five years, 2001-06.⁶ Most of those cases were low-profile, and the total number is still very small, for the reasons I have been describing this afternoon.

Another question posed by today's organizers was: What business practices are most commonly seen in monopolization cases? The answer may vary as between developed and developing jurisdictions, and it partially helps to illuminate the comments I just completed about the small number of cases.

In the United States, no business practice can properly be called a "most common" basis for liability for monopolization. In the small number of liability findings, we observe differing forms of conduct, and no particular practice stands out as recurring. The most consistent pattern – and this is true in both the US and the EC – is that adverse effects of the practices derived in part from governmental restraints. Examples include

⁴ *United States v. Microsoft Corp.*, Civ. Action No. 98-1232 (CKK) (D.D.C.); *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

⁵ See *Biovail Corp.*, No. C-4060 (F.T.C. Apr. 23, 2002) (complaint and consent order), available at <http://www.ftc.gov/os/caselist/c4060.shtm>; *Bristol-Myers Squibb Co.*, No. C-4076 (F.T.C. Apr. 18, 2003) (complaint and consent order), available at <http://www.ftc.gov/os/caselist/c4076.shtm>; *Valassis Commc'ns, Inc.*, No. C-4160 (F.T.C. Apr. 19, 2006) (complaint and consent order), available at <http://www.ftc.gov/os/caselist/0510008/0510008.shtm>.

⁶ See William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property Law*, 30 SEATTLE U. L. REV. 319 (2007), available at <http://www.ftc.gov/speeches/kovacic/2007intersection.pdf>. Kovacic collects statistics and concludes: (a) "Measured simply by the number of cases that allege the Sherman Act § 2 offenses of monopolization or attempted monopolization, the FTC's enforcement actions over the past five years constitute the agency's most ambitious program in roughly thirty years," *id.* at 324-25 (footnotes omitted), and (b) "When the number of cases and the observable outcomes are both taken into account, the FTC's program of monopolization and attempted monopolization cases since 2001 arguably has no parallel in the agency's history," *id.* at 326 (footnote omitted).

the *AT&T* case,⁷ probably the most prominent US case of the past fifty years, as well as the more recent *Unocal* case at my agency.⁸

The problem of governmental restraints may be more pronounced in developing economies, in which we are more likely to observe recent privatization, former state-owned enterprises, and significant licensing requirements and other governmental entry barriers. A too-common pattern is that former state-owned monopolies, now privatized and nominally open to competition, rely on their regulators to adopt rules that impede entry and discourage the emergence of new competitors. We have seen this in our technical assistance work around the globe. It's the reason we have spoken so often about the importance of addressing administrative monopolies and sectoral regulation in the Anti-Monopoly Law.

I know that there are many other questions you will want to take up at this afternoon's seminar. I look forward to addressing those. Let me close my prepared remarks here by again thanking UIBE and SAIC for organizing this event. As the time to implement the dominance provisions of the Anti-Monopoly Law draws near, it is valuable to examine the difficult issues that have confronted policy makers around the globe for many years.

⁷ See *United States v. AT&T Corp.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

⁸ See, e.g., *Union Oil Co. of Cal.*, No. 9305 (F.T.C. Mar. 4, 2003) (complaint), available at <http://www.ftc.gov/os/caselist/d9305.shtm>, and the related case in *Chevron Corp.*, File No. 051-0125 (Aug. 2, 2005) (complaint and consent order), available at <http://www.ftc.gov/os/caselist/0510125/0510125.shtm>.