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***The Market Power Element of Abuse of Dominance
Parallels and Differences in Attitudes
US and EU***

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The Market Power Element of Abuse of Dominance –
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Introduction

US law prohibits monopolization and attempts and conspiracies to monopolize. EU law prohibits the abuse of a dominant position. In the 21st Century, these concepts are largely substitutes for one another. Both are meant to proscribe anticompetitive conduct by firms with dominance or monopoly power. On both sides of the ocean, mere possession of monopoly power is not in itself an abuse or violation, although in earlier times US courts and agencies flirted with the notion that possession of monopoly power was an actionable offense, and in the famous *Alcoa* case¹ the Second Circuit came close to so holding.

This essay reflects principally on contemporary parallels and differences between US and EC law. On both sides of the ocean, certain threads have long since been woven into the law, and therefore the essay begins with history. Second, the essay reflects on issues of proof, thresholds and presumptions. Third, the essay describes and assesses a draft document by an ICN working group concerning suggested best practices for identifying dominance/substantial market power. Finally, it concludes with a note on the integral nature of the market power/market effect analysis.

I. History: What threads of history inform contemporary thinking?

Whether a firm has substantial market power would seem to be an empirical question, and therefore technical and not normative. However, there are several factors at play that give the inquiry a normative gloss. These may be enumerated as follows.

- 1) Law must be workable and enforceable; therefore, economics must be generalized.² Generalization requires proxies and presumptions. They move the law in one direction or another, and that direction is informed by objectives and values.

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¹ *United States v. Aluminum Corp. of America*, 148 F.2d 416 (2d Cir. 1945).

² See Justice Breyer, dissenting in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007). Law is not economics, and even the views among economists differ, although economics greatly influences the law.

- 2) The US law was passed and the EC Treaty provisions were adopted each in response to perceived problems, and each in a particular socio-political-economic context which may be the source of those objectives and values.
- 3) Competition law may be more or less aggressive, given its specific goals (e.g., consumer welfare or efficiency). The law may aspire to move society closer to the goal when the market falls short, or it may reflect a preference against intervention. Therefore, the degree of trust that antitrust intervention will do better than an imperfect market is a variable that matters.

In this section I will briefly consider history and trust as background factors that may explain certain differences between the EU and US approaches to identifying market power.³

For the United States, the history may be merely that, for we have moved away from and rejected paradigms that held sway for 90 years. The US antitrust laws were a response to concentrated economic power which, Americans feared, would deliver the country to communism or fascism, destroy its democracy, and undermine personal autonomy. With such a perception underlying our laws (particularly influencing the law in the years of World War II), the courts easily *presumed* market power and monopoly from large relative size and from other possible proxies such as patents, as documented in *Alcoa*⁴ and *International Salt*.⁵ Beginning in the late 1970s, however, the US antitrust jurisprudence embraced a more technical microeconomic perspective.⁶ In the 1980s, the jurisprudence began to dismantle the pro-diversity, anti-power decisions of earlier times,⁷ and in the last few years Supreme Court case law introduced the notion that antitrust intervention against conduct other than cartels is usually an evil to be avoided.⁸ In 2007, the Supreme Court virtually completed the project of dismantling anti-power antitrust.⁹ The contemporary impulse of US jurists and enforcers is to help make American business strong and competitive in the new world economy by withdrawing the “heavy hand” of government. The older structural analysis has not died; but it has become heavily elaborated by facts, hypotheses, and free-market presumptions.¹⁰

In Europe in 1957, the driving force behind the Treaty of Rome was the quest for peace among hostile post-war countries through the vehicle of market integration. Market dominance was not seen by the Treaty negotiators as a problem in itself. But it was anticipated that dominant firms would seek to abuse their power, to the detriment of all market players, be it competitors, customers, or suppliers. There was concern that dominant firms would tilt the playing field in their own direction, disadvantaging other market

³ There is much more commonality than divergence, but this paper concerns divergence.

⁴ *Supra* note 1.

⁵ *International Salt Co. v. United States*, 332 U.S. 392 (1947).

⁶ See Eleanor Fox, “The Modernization of Antitrust – A New Equilibrium”, 66 *Cornell Law Review* 1140 (1981).

⁷ *Ibid.*

⁸ See, as to refusals to deal, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

⁹ See, e.g., *Leegin*, *supra* note 2. Compare the majority opinion with Justice Breyer’s dissent.

¹⁰ See *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

players.¹¹ In familiar Treaty language, it was held that dominant firms have the special responsibility “not to distort competition”.¹²

Just as the US had done, Europe adopted many formalistic rules. Much later, in the wake of growing global competitive pressures, DG Competition embarked on a bold and courageous program of “modernization,” which entails among other things the adoption of a realistic economic approach. The substantive reforms associated with modernization pervade the work of the European Commission. Moreover, the Court of First Instance has at times in fact been out in front of the Commission, demanding careful economic analysis and sufficient evidence of facts to fit the theories.¹³ However, the reforms have not necessarily reached the European Court of Justice, which has thus far adhered to a jurisprudence based on a combination of legal formalism and the rights of excluded actors.¹⁴

Apart from the tension between the virtues of legal formalism and those of economic analysis, there are two cross-Atlantic differences that may be lasting. First, values. Article 82 was designed to protect market actors from abuses. A dominant firm’s use of power to secure market advantages (e.g., its use of leverage to shift market share to itself), even if it does not thereby gain more economic power, may continue to violate Article 82.¹⁵ Moreover, concern with preserving forces of rivalry (the competitive structure of the market), avoiding exclusion, and facilitating easier access to markets is likely to continue to be a part of the European *economic* model, “in line with Europe’s Lisbon agenda”,¹⁶ even if another economic model may be equally consistent with efficiency.¹⁷

Second, European competition law seems to be endowed with a more aggressive stance than its US counterpart. Americans often claim that US antitrust law is meant to maximize consumer welfare or efficiency; but that is a euphemism. US law is not so interventionist. The antitrust agencies do not proclaim – even when it is true – “I know how to increase consumer welfare”, and then set about to (try to) do so. The European Commission is more likely than the United States to take opportunities to open closed markets (as it did in when approving cross-border telecoms alliances) and to apply EC principles imposing affirmative duties on

¹¹ Article 82 (along with Article 86) was seen as especially important as a means to rein in state-owned and state-privileged enterprises. Furthermore, *relational* market power has played a role in certain European cases, as it has in the antitrust law of a number of other countries, including Germany and Japan. For an example in the European jurisprudence, see Case 22/78, *Hugin Kassaregister AB v Commission* [1979] ECR 1869.

¹² Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v Commission* [1983] ECR 3461; Case T-203/01, *Manufacture Française des Pneumatiques Michelin v Commission* [2003] ECR II-4071.

¹³ See, e.g., Case T-342/99, *Airtours v Commission* [2002] ECR II-2585; Cases T-5/02 and T-80/02, *Tetra Laval BV v Commission* [2002] ECR II-4381, *affirmed*, Cases C-12/03 P and C-13/03 P, *Commission v Tetra Laval* [2005] ECR I-987; Cases T-310/01 and T-77/02, *Schneider Electric SA v Commission* [2002] ECR II-4201.

¹⁴ See Case C-95/04 P, *British Airways v Commission*, judgment of the ECJ of 15 March 2007, not yet reported; Case T-340/03, *France Télécom SA v Commission (Wanadoo)*, judgment of the CFI of 30 January 2007, not yet reported. However, the *British Airways* and *Wanadoo* judgments upheld Commission decisions that were adopted before the “economics revolution”.

¹⁵ See Case C-333/94 P, *Tetra Pak International SA v. Commission* [1996] ECR I-5951.

¹⁶ Report of the Economic Advisory Group for Competition Policy, advising DG Competition (“EAGCP Report”), p. 17, available at: <http://ec.europa.eu/dgs/competition/eagcp.htm>.

¹⁷ See *Trinko*, *supra* note 8. See also Eleanor Fox, “What is Harm to Competition? – Exclusionary Practices and Anticompetitive Effect”, 70 *Antitrust Law Journal* 371 (2002); Eleanor Fox, “Is There Life in *Aspen* After *Trinko*? The Silent Revolution of Section 2 of the Sherman Act”, 73 *Antitrust Law Journal* 153 (2005).

dominant firms, especially multi-functional dominant firms that have incentives to suppress the competitive forces that challenge them.¹⁸

II. Proof, thresholds and presumptions

1. Substantiality: What is substantial market power?

For dominance or monopoly power to exist, the undertaking must at least have – according to the law of most nations – “substantial market power”. But what is “substantial market power”? Market power is usually defined as the power to increase price significantly over competitive price and to hold it at the high level for a significant period of time. DG Competition’s Article 82 Discussion Paper¹⁹ states: “Market power is the power to influence market prices, output, innovation, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time.” It states further that the power to “increase prices” is often used as shorthand for all of the foregoing.²⁰ The United States tends to focus more narrowly on price and output than on variety.

Both EU and US authorities draw inferences of power over price from structural conditions, and sometimes from behavior that would otherwise not make sense. However, European administrative decisions and court judgments might more readily draw inferences from structural conditions, especially large market shares.

Substantiality is a fact-based inquiry. It means, at least, *significant*; not trivial and not fleeting. Sometimes, especially in the case of a firm that has a very high share in a well-defined, high-barrier market, you may (think you) know it when you see it.

Other times, the question is one of fair debate. This was the case in *Eastman Kodak Co. v. Image Technical Services*.²¹ Kodak made micrographic equipment. Plaintiffs were independent service organizations (ISOs) dedicated to servicing Kodak equipment. On entering the original equipment market, Kodak had encouraged entry of ISOs dedicated to servicing its equipment. It supplied them with the parts necessary to do so. When the service and repair business proved lucrative, Kodak decided to do the servicing itself, then cut off the ISOs from the parts they needed, and raised the price of service to its equipment customers. Kodak’s service at the higher price was sometimes inferior to the ISOs’ service at the lower price. The ISOs sued Kodak for tying and monopolization of the Kodak equipment service aftermarket. They did not allege that the *equipment* market was non-competitive. When the case came before the Supreme Court, the sole question to be decided was whether the case could go to trial or whether it was fatally deficient because Kodak did not have market power in a Kodak service aftermarket. (The case did go to trial, and plaintiffs won.)

¹⁸ *Microsoft*, Case Comp/C-3/37.792, Commission decision of 24 March 2004, judgment of the CFI due Sept. 2007. The 2004 decision is available at:

<http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/en.pdf>

¹⁹ *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* (Dec. 2005), available at: <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

²⁰ *Ibid.*, para. 24.

²¹ 504 U.S. 451 (1992).

The Supreme Court, in an opinion by Justice Blackmun, held that summary dismissal was improper because the facts (taken in the best light for plaintiffs at this stage) showed that Kodak had the market power to exploit its locked-in customers. Justice Scalia, joined by Justices O'Connor and Thomas, dissented, arguing that competition in the original equipment market would prevent supra-competitive pricing in the aftermarket, and that a manufacturer's power over its own brand equipment is not "the sort of 'monopoly power' sufficient to bring the sledgehammer of § 2 into play". Given the recent changes in the constituency of the U.S. Supreme Court, one can expect that the dissenters' assessment of the substantiality factor would command a majority of the justices today. The result depended on one's perspective.

The US *Microsoft* case also presented a substantiality problem. Microsoft occupied more than 90% of the market for Intel-based PC operating systems. Microsoft argued that market forces constantly constrained it to behave competitively, lest it be destroyed by a new technology that would effect a paradigm change. Microsoft lost this battle.

In both cases, the market power issue was linked with the market definition issue; in addition, the question of market power was argued *arguendo*, separately from the market definition issue. In *Kodak*, if the market had been drawn to include original equipment sales and thus interbrand competitors, the market would have been broader and the market power claim would have been foreclosed. So too in *Microsoft*, if the market had been drawn to include Apple, UNIX, and hand-held devices. But even with the market narrowly defined, the defendant had, as it were, a second bite at the Apple. In each case the defendant highlighted all of the constraints that could limit its power: in *Kodak*, the possibility of switching to other original equipment providers, and concern that it would lose original equipment sales; in *Microsoft* (also), concern that dissatisfied customers would shift (not much of a concern in view of network effects), and its paranoid fear of paradigm change in this new-economy, fast moving market.

As these examples illustrate, substantiality and insubstantiality come in many forms: the firmness or contestability of the market definition, the size of market share, the probable durability of the share, the options of customers, the distance of the next nearest price constraint, and the immediacy of the threat of paradigm change.

2. What is the role of market share in assessment of dominance/market power, and should thresholds be specified for presumptions and safe harbors?

"Market share" assumes a market definition. If the market is well defined and barriers to entry and expansion are high, a persistently high share is a useful proxy for market power. It would normally support a shift of the burden of proof/disproof of market power to the putative dominant firm.

But market definition comes first. If it is flawed, or if it simply reflects a reasonable but hard choice, the foundation for using a high market share as a proxy for substantial market power has not been built.

Nonetheless, and even assuming a solid, uncontroversial market definition, should market shares of a certain large size presumptively indicate a dominant position and should market shares of a certain small dimension place the firm in a safe harbor?

The Article 82 Discussion Paper²² states:

“It is very likely that very high markets shares, which have been held for some time, indicate a dominant position. This would be the case where an undertaking holds 50%

or more of the market, provided that rivals hold a much smaller share of the market. In the case of lower market shares, dominance is more likely to be found in the market share range of 40% to 50% than below 40%, although also undertakings with market shares below 40% could be considered to be in a dominant position. However, undertakings with market shares of no more than 25% are not likely to enjoy a (single) dominant position on the market concerned.”²³

United States law is more likely to use two-thirds of the market (or more) as a rule of thumb for presuming monopoly power. Further, a market share under 40% to 50% is likely to fall with a safe harbor.

Professor Janusz Ordover has reflected as follows on the use of market share proxies and thresholds:

- “• Both with respect to L[erner] and market share proxy, [there is] no clear prescription from *economics* at what *levels* market power converts into DP [dominant position] or SMP [significant market power].
- EU market share thresholds seem unreasonably low but there is no empirical evidence behind the various *dicta* by the US courts promulgating much higher thresholds.”²⁴

Nonetheless, even in the face of factual ambiguity, agencies have an interest in administrative rules that allow them to act with reasonable expedition and without unreasonable expense, and businesses have an interest in clear guidance.²⁵ The problem is not with thresholds as such but with “excessive reliance on mechanistic criteria”.²⁶

²² Cited *supra* note 19.

²³ *Ibid.*, para. 31 (footnotes omitted).

²⁴ Janusz Ordover, “Dominant Position and Monopoly Power: A View from the Cathedral of Economics”, ABA Antitrust Section Spring Meeting (19 April 2007), slide 10.

²⁵ *Ibid.*; John Vickers, “Market Power in Competition Cases”, 2 *European Competition Journal* 3, special issue (2006).

²⁶ Ordover, *supra* note 24. See also Vickers, cited in previous footnote.

III. The ICN Working Group's draft best practices on the meaning of dominance and substantial market power

The ICN formed a Working Group on Unilateral Conduct at the annual meeting in Cape Town in 2006. The Working Group project includes a segment on "Dominance/Substantial Market Power Analysis". In 2006/07, the Working Group produced a Discussion Draft for possible suggested best practices. The draft includes the following preliminary ideas:

"1. As to the legal definition of dominance or significant market power (SMP) [the definition] should take into consideration the complexity of dominance/SMP assessment. Therefore, it should not be based exclusively on a market share threshold, as this may misguide the assessment. The definition should rather focus on a firm's relative freedom from competitive constraints or ability to act in ways that a competitive firm could not. . . .

2. As to the assessment of dominance/SMP [the assessment] should entail a comprehensive consideration of factors that may be relevant for the competitive conditions in the market under investigation.

- At a minimum, market shares and barriers to entry and expansion/durability of market power should be assessed:
 - Market share analysis (market shares of the company under investigation and position of its existing competitors including their development over the past years) can be used as an initial indicator or starting point for the market power analysis. However, an assessment of dominance/substantial market power based exclusively on a market share threshold is not appropriate.
 - Many competition authorities find it beneficial to use market share thresholds as dominance/substantial market power presumptions and/or safe harbor presumptions, which in practice provide some form of relief of the agency's or the plaintiff's burden of proof. In designing and using such thresholds, the benefits, in particular increased enforcement efficiency and legal certainty especially for businesses, should be weighed against the risks, in particular potential overemphasis on market shares. To address this risk dominance/SMP presumptions and safe harbor presumptions should usually be rebuttable, i.e., that the presumption can be disproved by other evidence.
 - Entry analysis provides information on the significance of potential competitors for the market concerned and thus about the durability of market power, the constraints faced by the company under investigation and its likely incentives (to compete or engage in anti-competitive conduct).

- Beyond these factors, the relevance of further factors such as behavior of competitors as well as buyer power and other aspects should at least be considered.
- Competition authorities should make their dominance/substantial market power assessment principles transparent by e.g. publishing their enforcement decisions and/or market power assessment guidelines.”

My reflections in the foregoing pages accord generally with the ICN Working Group’s draft suggested practices. Such an approach would leave to the agency the decision regarding what presumptions to use; it would place emphasis on the assessment of factors such as entry conditions likely to constrain any anticompetitive conduct, and it would encourage the formulation and publication of a framework for analysis that allows the putative dominant firm to tell its story.

IV. A note in conclusion

In the usual course of analysis, one proceeds from identifying dominance to identifying anticompetitive acts. However, the two inquiries may be part of an integrated assessment. As both the EAGCP Report²⁷ and the FTC/DOJ Commentary on the US Merger Guidelines²⁸ suggest, the enforcer should ask an initial question: What is the story of anticompetitive harm? If there is no credible story, the investigation should be closed. If there is a credible story that the undertaking is using exclusionary strategies to obtain or preserve market power, that observation may imply that market constraints are insufficient to discipline the firm so that it behaves competitively. In short, it may imply that the putative violator has significant market power.

²⁷ See *supra* note 16.

²⁸ Available at: <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>. The Commentary applies only to mergers. The observation would be applicable to dominance only if the conduct identified could not occur without significant market power. See also Vickers, *supra* note 25, p. 14.