



SCHOOL of LAW

March 30, 2020

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

Thank you for the invitation to submit my views in connection with the Subcommittee's pending investigations of the state of competition in digital markets. I submit these views in my personal capacity, but offer the following information by way of background. I currently hold the John Paul Stevens Chair in Competition Law at Loyola University Chicago School of Law where I also direct the Institute for Consumer Antitrust Studies. I teach and write about U.S. antitrust law and policy issues as well as comparative and international competition law and policy. I have published eight books and over one hundred articles on topics in these areas including the treatise *Antitrust and American Business Abroad*.

Neither I, nor the Institute, receive any support from any firm that would be affected by this investigation. To the extent it is relevant, I served as an expert witness in a past private damage litigation adverse to Microsoft Corporation.

My comments are limited to questions one and three set forth in the letter of introduction. I do not believe that existing U.S. monopolization law is adequate to address potentially anti-competitive conduct by digital platforms or other dominant firms. I also do not believe that the U.S. institutional structures are sufficient to robustly enforce the antitrust laws. I do believe that the United States can benefit from learning from the evolving international consensus on these issues as outlined below.

As I discuss in my forthcoming article, *The Omega Man or The Isolation of U.S. Antitrust Law*, 52 Conn. L. Rev. (2020), the United States is an outlier in the world competition law community in its approach to the behavior of dominant firms. We currently have different, and often more limited, definitions of dominance, causes of actions, remedies, market study capabilities, and other necessary aspects of competition policy that are common in the European Union and much of the rest of the world competition community. I summarize these differences below. The full text of my article is available upon request and is also available in draft form online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295988.

The General Legal Framework

Dominant firms in the area of digital platforms and other areas of the modern global economy pose an unprecedented challenge from an antitrust perspective. While once the world's leader in the formulation of sound competition policy, the United States agencies have been unduly deferential to the modern-day monopolies at precisely the same time the Supreme Court has adopted highly restrictive interpretations of our existing legal tools for dealing with the abuse of market power. In contrast, the rest of the world has adopted more innovative legal tools and a greater appetite for challenging the

abuse of a dominant position where it causes or threatens harm to competition and consumers. It behooves this Subcommittee, and the broader antitrust community, to recognize that the United States has become a laggard, and not a leader, in the formulation of global competition policy. This has in part exacerbated the problem of how address the misuse of market power in the national and global economy. We can learn from the growing worldwide consensus on these issues and adjust our statutes and enforcement to the realities of the current modern high-tech economy.

The principal U.S. tool for dealing with single firm anticompetitive behavior is Section 2 of the Sherman Act which prohibits monopolization, attempted monopolization, and conspiracies to monopolize. This open-ended language prohibiting monopolization has been interpreted by the courts to require the possession of monopoly power and the acquisition of that monopoly power by exclusionary or anticompetitive means. The Courts have not adopted any single standard for determining what is an exclusionary act. Exclusionary conduct generally means something other than competition on the merits and can include conduct that serves little, or no, business purpose other than to harm competition through the elimination or marginalization of competing firms. Other courts have defined unlawful monopolization to require an analysis similar to the rule of reason under Section 1 of the Sherman Act in requiring proof a significant harm to competition but allowing the defendant to offer legitimate and non-pretextual procompetitive justifications for its conduct.

Section 2 of the Sherman Act also prohibits attempted monopolization. Attempted monopolization requires proof of specific intent to monopolize, one or more exclusionary or anticompetitive acts, and a dangerous probability of success. In recent years, there has been limited use of these provisions in U.S. antitrust litigation with most of the focus on the acquisition or maintenance of actual monopoly power. Conspiracies to monopolize are difficult to prove, rarely used, and largely dealt with through other parts of the antitrust laws.

In contrast, most jurisdictions outside the United States prohibit the abuse of a dominant position using language similar or identical to that in Article 102 of the Treaty on the Functioning of the European Union (TFEU) which states:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The EU and related jurisdictions generally impose a special responsibility on dominant firms not to harm competition but also permit such firms to offer an objective justification for their conduct.

I highlight below the important differences between US monopolization standards and the more widely applied abuse of dominance framework in the EU and numerous other jurisdictions. The broader substantive reach of the abuse of dominance framework is critical in dealing with the realities of the modern economy including the types of digital platforms that the Subcommittee is investigating. I offer no conclusions regarding the legality of the conduct of any individual firm other than to discuss the outcome of past competition proceedings in the United States and abroad.

Thresholds for Dominance

The first step in any single firm conduct case is determining whether the firm in question has monopoly power or a dominant position. This generally requires proof of a relevant product and geographic market as well as a durable high market share. Most jurisdictions also require proof of how the high market share is an accurate indication of the power to raise price, exclude competition, or act independently of competition. This can include consideration of the existence (or not) of meaningful entry barriers or any other factor that would reinforce or rebut whether the high market share was indicative of true market power or dominance.

Section 2 monopolization cases typically have required a market share of 70% or more. For the example the D.C. Circuit opinion in the *Microsoft* litigation found the defendant had monopoly power in the relevant market for computer operating systems by possessing a market share of in excess of 90% and rejected the defendant's arguments why that market share was not indicative of the ability to exclude competition.

The EU and those jurisdictions following its lead usually define a dominant position as the ability to act independently from competition, consumers, or competitors. Very large market shares, absent unusual circumstances, are in themselves usually evidence of dominance. EU and member-states law have a rebuttable presumption of dominance for firms holding at least 50% of a well-defined relevant market with occasional cases finding dominance with market shares of as low as 40% depending on the circumstances of the case.

Outside the EU, a number of jurisdictions have similar presumptions based on market shares set forth in their statutes, regulations, guidelines, and case law. For example, China, South Africa, and Israel all have presumptions of market power or dominance in the range of 35 to 50% market shares. Other countries such as Canada have guidelines generally requiring further investigation where market shares exceed 50% and have recognized the existence of market power where the market shares were as low as 33.3%.

Recent research has indicated that market power for buyers (monopsony power) can adversely affect competition at even lower levels. This research indicates that buyer market power of as low as 25% can adversely affect competition with suppliers and employees.

Excessive Pricing

An important difference between Section 2 and most competition law systems outside the U.S. lies in the treatment of high or excessive prices. While price increases may be evidence of the existence of

monopoly power, they cannot be the basis for a finding of the unlawful or exclusionary conduct that is the second requirement for a Section 2.

One reason is textual. Section 2's prohibition of "monopolization" rather than "monopoly" requires something more than the possession of monopoly power. Section 2 thus requires some conduct that tends to exclude competition on some basis beyond superior skill, industry and foresight. By definition, this does not include merely charging high or even excessive prices. Everything else being equal, charging high prices (without more) tends to allow current competition to flourish and invite new entry rather than exclude existing forms of competition.

In addition, the Supreme Court in *Trinko* identified the possibility of monopoly profits as an important incentive and reward for new entry and innovative new forms of competition. This alone provides a profound source of divergence with international practice, where in many key jurisdictions the unilateral excessive pricing of dominant firms may be an abuse of a dominant position often specifically referenced in the express text of the competition law or regulation.

More example, Article 102 of the TFEU prohibits excessive prices as a form of abuse of dominance. Article 102 states in relevant part:

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions....

Excessive pricing cases have been part of the Article 102 jurisprudence since the earliest days of the EU. A price is found to be excessive where the price poses "no reasonable relation to the economic value of the product supplied."

There are two lines of cases involving excessive pricing. In the first line of cases, the European Commission and the Courts approach the case in the same manner as a price discrimination claim (also a violation of a different sub-part of Article 102), utilizing a comparison between time periods or comparable markets to determine whether prices are excessive.

The more complex cases are so-called "pure" excessive pricing cases where there are no ready comparable time periods or other markets to compare prices with those of the dominant firm. Recently, the UK Competition and Markets Authority (CMA) has challenged such excessive pricing in the pharmaceutical industry in connection with sales to the National Health Service.

Excessive pricing cases also exist outside the EU and its member states. Jurisdictions as diverse as Israel, South Africa, and China all have different approaches allowing such claims under different circumstances in their statutes, guidelines, and caselaw.

Price Discrimination

The forgotten provision of U.S. antitrust law is the Robinson-Patman Act which bars various forms of price discrimination. The act's principal provision forbids persons engaged in commerce "to discriminate in price between different purchasers of commodities of like grade and quality" ... "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to inure, destroy, prevent competition with any person who

either grants or knowingly receives the benefit of such discrimination.” The Act provides certain limited defenses for cost justified discounts and for meeting competition. It also contains anti-circumvention provisions.

The Robinson-Patman Act largely has become a dead letter. Neither the Federal Trade Commission nor the Justice Department have enforced its provisions in decades. Private civil enforcement has waned with the courts interpreting the language of the Act largely the same as the more restrictive provisions of the Sherman Act and imposing a variety of technical hurdles. Numerous critics have called for the abolition of some, or all, of the Robinson-Patman Act as against competitive norms and incompatible with the general tenor of the antitrust laws.

In contrast, price discrimination remains part of the competition tool kit outside the United States, particularly as a form of abuse of dominance. As previously discussed, Article 102 of the Treaty on the Functioning of the European Union states that any abuse by a firm with a dominant position will be prohibited. Article 102(c) of the Treaty specifically lists one example of such an abuse as “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.”

This provision can apply to price discrimination claims as well as the tying, bundling, and excessive pricing claims discussed elsewhere in this submission. Three conditions must be present for a finding of unlawful price discrimination under EU law: (1) the firm imposing the differential pricing must have market power, (2) the firm has some ability to sort customers based on their willingness to pay, and (3) the firm must be able to prevent or limit the resale of the goods or services.

The use of price discrimination as an abuse of dominance can be found in other jurisdictions outside the EU, its member states, and jurisdiction otherwise following the EU approach. Russia, Peru, and Singapore are just some of the countries where price discrimination can constitute an abuse of a dominant position.

Predatory Pricing

Predatory pricing is defined as the temporary cutting of price below some measure of cost to eliminate or discipline one or more competitors. Predatory pricing is virtually a dead letter in the United States despite being alive and well in many other jurisdictions, particularly those following an abuse of dominance model. In 1993, the Supreme Court established a daunting standard for predatory pricing in the *Brooke Group* case. The Court held that a claim for unlawful predatory pricing required proof that the defendant’s prices fell below some economically relevant measure of cost and that the defendant was likely to recoup any losses suffered during the period of predation. In the aftermath of *Brooke Group*, there are no reported verdicts in favor of either the government or private plaintiffs in U.S. predatory pricing cases.

In contrast, the seminal case establishing the test for predatory pricing in the EU is *Azko Chemie BV*. *Azko* established that prices set below average variable cost (AVC) will be deemed a per se violation. Where a firm sets price above AVC, but below average total cost (ATC), a violation will be found where it is established that the price was set as a plan to eliminate a competitor. The European Commission established that recoupment is not an element of predatory pricing cases in the European Union. Most recently, the European Court of Justice upheld the standard from *Azko* and emphasized that where a

firm sets price above AVC, but below ATC, a violation can be found if an intent to harm a competitor is found. Predatory pricing claims outside the United States require a high burden of proof in most jurisdictions. However, in not requiring recoupment, they remain part of the canon of abuse of dominance law in most jurisdictions outside the United States.

Margin Squeezes

Closely related is the international divergence on the question of price squeeze or margin squeeze claims. A price squeeze arises when a vertically integrated dominant firm also acts as a supplier to competitors in some upstream market. The notion of a price squeeze is that the dominant firm sets input prices so high that no competitor can then successfully enter or compete with the dominant firm in the downstream market.

In the past United States courts accepted such claims. In 2008, the United States Supreme Court reached precisely the opposite conclusion in *Linkline*. *Linkline* concerned allegations that an incumbent telephone company had overcharged competing internet access providers for access to its telephone lines. Relying on *Trinko*, the Court held that since the defendant had no antitrust duty to provide access, it could not incur liability for providing access at allegedly too high a price. The Court further held that the only potential cause of action for the plaintiff would be if the dominant firm engaged in predatory pricing of its broadband services in the downstream market, including both proof of price below some economically relevant measure of cost and the likelihood of recoupment as set forth in *Brooke Group*.

Since the EU diverges significantly from the results of both *Trinko* and *Brooke Group*, it is not surprising it also follows a different path as to price squeeze cases, which by their nature incorporate aspects of both access and pricing claims. For example, the European Court of Justice upheld liability in the 2010 *Deutsche Telekom* (DT) margin squeeze decision. The court affirmed liability where the dominant telephone firm charged excessive prices for access to telephone lines necessary to compete with DT for selling broadband service to consumers. The ECJ reached a similar result in the 2014 *Telefonica* decision involving the dominant Spanish telephone provider's pricing of phone lines to its broadband competitors.

A 2009 OECD roundtable on margin squeezes states:

Margin squeeze cases are relatively common. Many competition authorities have examined at least a few complaints involving a potentially illegal margin squeeze. Many of these cases arise in newly liberalised sectors – particular [sic] telecommunications, but also in the water sector, railways, postal services, pharmaceuticals, pay television, gasoline, and funeral services (amongst others).

The executive summary of the OECD roundtable also notes that almost all margin squeeze cases arise under the general prohibition of abuse of dominance provisions in national competition laws.

Tying

Tying is the practice where a seller uses its market power over one good or service to coerce a buyer into taking a second good or service it may not want or may wish to purchase from a different seller. Examples include requiring buyers to purchase machine tools and the ingredients for the products made with the machines; contracts requiring use of a designated anesthesia group in all hospital operating

rooms; forcing buyers to purchase both spare parts and service from the manufacturer of the copying equipment, and rather than from independent service provider.

In *Jefferson Parish*, the United States Supreme Court set forth a quasi per se rule for tying under the Sherman and Clayton Act. This per se standard for tying requires proof of four elements: (1) that the tying and tied items entail separate products or services in the sense that there is separate demand for each of them without the other; (2) that the availability of the tying item has been conditioned upon purchase, rental, or license of the tied item; (3) that the party imposing the tie has sufficient market power for the tying item to “appreciably restrain free competition” in the tied market; and (4) that a “not insubstantial amount of commerce” in the tied item is affected by the tying arrangement.

While *Jefferson Parrish* was unanimous in its result that the plaintiff that failed to prove the market power requirement over the tying product, the decision also included a concurrence by Justice O’Connor joined by three other judges. The O’Connor concurrence argued for the adoption of the full rule of reason test for all tying claims and argued that complementary products should not be viewed as a tie of separate products even if there was some demand for different sources of the complementary good or services.

The D.C. Circuit in the 2001 *Microsoft* decision believed that a full rule of reason test should apply to claims of technological tying and sought to distinguish this result from the more general quasi per se rule set forth by the United States Supreme Court in *Jefferson Parish*. Additional lower courts have from time to time applied a rule of reason analysis on various rationales, rather than apply the prevailing quasi per se test from *Jefferson Parish*.

The EU approaches these issues very differently. Article 101(d) specifically states that an agreement unlawfully can restrict competition where it “makes the conclusion of contracts subject to acceptance by the parties of supplementary obligations which... have no connection with the subject of such contract.” Article 102 (d) also states that an unlawful abuse of dominance can include: “making the conclusion of contracts subject to acceptance by the parties of supplementary obligations which...have no connection with the subject of such contract.” As a result, tying agreements can be both an abuse of dominance and an illegal agreement under EU law. In the EU and other jurisdictions, tying was a basis for liability in a number of digital platform cases.

A 2009 ICN survey on tying practices around the world indicates a high degree of diversity as to the requirements of tying offenses with many jurisdictions within the EU and elsewhere actively enforcing such provisions. For example, the German Bundeskartellamt indicated that it is not necessary for tying conduct to cause direct consumer harm. It is sufficient that “the conduct is detrimental to competition and to effective market structure and this harms consumers indirectly.”

Essential Facilities and Refusals to Deal

One of the most striking illustrations of the retreat of the United States from a traditional theory of monopolization comes in the area of the essential facilities doctrine and other forms of unilateral refusals to deal. From the earliest days of U.S. antitrust law, the courts have imposed liability under both Section 1 and Section 2 of the Sherman Act on a firm or firms controlling an essential facility, often in form of infrastructure such as bridges, electrical grids, joint newsgathering operations, and

occasionally intellectual property, where the owner/operator refused access to a competitor and the other elements of an antitrust violation were present.

Although the United States Supreme Court has never specifically endorsed liability under this rubric, the 7th Circuit in *MCI*, and other lower courts, have often used the “essential facilities doctrine” to impose liability for monopolization upon proof of:

- 1) Control by a monopolist of an essential facility or resource serving the monopolist’s market;
- 2) A competitor’s inability practically or reasonably to duplicate the essential facility;
- 3) The unjustified denial of the use of the facility to a competitor; and
- 4) The feasibility of providing access to the facility.

Liability on this theory is difficult to establish factually and numerous cases failed because either the defendant lacked market power, the facility controlled by the monopolist was not “essential” in any normal sense of the term, or the excluded competitor could reasonably create or duplicate the facility in question. In addition, liability was sometimes imposed on a general refusal to deal or general monopolization theory blurring the lines of the acceptability of the essential facilities doctrine as a separate theory of liability.

The Supreme Court in *Trinko* limited the essential facilities doctrine in the context of regulated industries and contained dicta questioning its overall viability. As commentators described the decision: “The case primarily concerned the issue of whether it was an act of monopolization for a regulated telephone company to fail to comply with special network sharing obligations imposed on it by the Federal Telecommunications Act.” The Court held that the alleged violations of regulatory duties by themselves did not further provide a cause of action under Section 2 of the Sherman Act. The Court found no additional support for the complaint in the plaintiff’s alternative theory based on the essential facilities theory.

The court stated that it had never recognized such a doctrine and found no need in *Trinko* itself to either recognize or repudiate it. But assuming the doctrine applied, the Court stated in dicta that the claim would fail on the question of denied access. The Court stated:

It suffices to present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the “essential facilities”; where access exists, the doctrine serves no purpose. Thus, it is said that “essential facility claims should ...be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.”

Current U.S. law makes the pursuit of cases based on the refusal to license intellectual property rights even more unlikely. While one prominent case has imposed liability for refusal to license certain IP rights, even that court held that a monopolist's “desire to exclude others from its [protected] work is a presumptively valid business justification.” Other decisions have come closer to a rule of per se legality.

The treatment of refusals to deal for both physical infrastructure and intellectual property is very different in the European Union, its member states, and other numerous jurisdictions which have considered similar situations of a dominant firm controlling a resource necessary for competition in its

own market or an adjacent one. Early in the jurisprudence of the ECJ, the Court held that the refusal by a dominant firm to supply raw ingredients to a competitor that prevented competition in the downstream market for the finished compound was an abuse of dominance. Failure to grant access to infrastructure such as ports, rail lines, and electrical grids have been condemned in terms strikingly similar to the U.S. essential facilities doctrine. As in the United States, liability was rejected where the facility or resource controlled by the dominant firm was not truly essential or where the resource practically could be duplicated by the competitor. Many of the national competition authorities of the EU member states and elsewhere have applied these principles to require access by competitors or new entrants to more local essential infrastructure such as transportation and burial grounds.

The EU has extended this doctrine to require access to intellectual property as well as physical resources. In *Magill*, the ECJ required Irish television stations to license their individual copyrighted program schedules to a new competitor seeking to aggregate the listings to create a multichannel viewer's guide. In *IMS*, this right of access was extended to require licensing of a copyrighted data structure to a competitor in order to directly compete with the dominant firm in the sale of health care information to pharmaceutical companies. In *Microsoft*, the General Court applied perhaps the most expansive version of the EU essential facilities doctrine to require the respondent to license interoperability information for its server operating system to competitors. A similarly expansive view was present in an English Court of Appeals decision that the failure to license certain patents could constitute an unlawful abuse of dominance under Article 102.

Other jurisdictions have adopted some version of the essential facilities doctrine for both physical resources as well as intellectual property rights. Within the EU, the UK, Germany, Czech Republic, Austria, Cyprus, Estonia, Greece, Italy, Luxembourg, and Lithuania have all applied versions of the doctrine to impose liability and/or require access or interconnection. Elsewhere, countries as diverse as Argentina, Australia, Brazil, Canada, Chile, Israel, Japan, Guatemala, Mexico, New Zealand, the People's Republic of China, Peru, Turkey, Russia, South Africa have used statutes, regulations, case law, and guidelines to penalize unilateral refusals to deal and require access and interconnection. For example, Pakistan explicitly referred to the U.S. essential facilities doctrine in requiring access to a stock exchange.

The *Microsoft* browser litigation also produced decisions outside the US and the EU requiring the granting of access to intellectual property rights. In Korea, the Korean Fair Trade Commission imposed a fine and 1) ordered Microsoft to sell in Korea a version of its Windows operating system that includes neither Windows Media Player nor Windows Messenger functionality, 2) required that Microsoft facilitate consumer downloads of third party media player and messenger products selected by the Commission, and 3) prohibited Microsoft from selling in Korea a version of its server software that includes Windows Media Services. In a case involving Qualcomm, China has required licensing of intellectual property rights and changes in royalty amounts in both merger and conduct cases. It is also worth noting that Article 40 of the TRIPs agreement of the World Trade Organization expressly permits the licensing of intellectual property rights as a remedy for violations of competition law.

Market Studies

Competition law in many jurisdictions also includes provisions for more general market studies in addition to specific enforcement actions. As noted by the OECD:

Market studies assess whether competition in a market is working efficiently, and identify measures to address any issues that are identified. These measures can include recommendations such as proposals for regulatory reform or improving information dissemination amongst consumers. They can also include the opening of antitrust investigations.

These analyses are used to identify restraints to competitions which are not limited to outright violations of existing competition laws and are used for competition advocacy, pre-enforcement information gathering, ex-post assessments, law reform, and the creation of new legal regimes on an industry specific basis.

A 2016 OECD survey indicated that 68% of jurisdictions surveyed had specific powers to undertake such surveys and another 26% relied on more general competition powers to do so. 87% of the respondents reported that recommendations to the government for changes in laws, regulations, or public policies were one of the potential outcomes for such inquiries. In some jurisdictions, the sectoral regulators have such powers, either alone or in conjunction with the competition authority.

On several occasions, the result has been the creation of a sectoral specific code of competition fine-tuned for industry characteristics and the nature of the competitive issues. One example is the United Kingdom which, after an extensive market investigation of the supermarket industry, created an industry code of conduct with specific rules for supplier-supermarket relations, a dispute resolution procedure, and an ombudsman. Similarly, Australia has specific industry codes for competition for franchising, horticulture, groceries, wheat, and oil. Australia also has a separate statutory provision permitting the creation of access provisions to designated infrastructure.

In contrast, the United States competition agencies have more limited powers and appetite to conduct such studies and no current ability to consider whether an industry specific code would be an appropriate response. The Justice Department has no statutory powers to require the production of business information outside of a specific enforcement action. This is extremely rare. In the 2016 OECD survey of sixty competition authorities, only the U.S. Justice Department and Hong Kong lacked the power to request such information.

The Federal Trade Commission has some of these powers, but normally chooses to use them in a more limited fashion. Section 6(b) of the FTC Act provides that the Commission may:

gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, [exempting certain industries]... and its relation to other persons, partnerships, and corporations.

Section 46 can be used to conduct broader market studies of concentrated or uncompetitive industries although the FTC only occasionally has done so. Since 2006, the FTC has used Section 46 more in the consumer protection area to produce thoughtful reports to analyze such issues as: E-cigarettes, cigarette and smokeless tobacco data collection; merger divestiture remedies, food and beverage marketing to children; homeowners insurance, automobile insurance, alcoholic beverage advertising; patent assertion entities; generic drugs; consumer fraud; and data sharing practices among corporate affiliates.

This list includes numerous important consumer protection matters and certain competition issues that cut across industry lines (patent trolls and merger remedies) but only one recent specific competition related study of a particular industry (generic drugs). This valuable study included proposals for legislative reform for vexing problems with the gaming of the system for the introduction and approval of generic drugs. Recently, FTC Chair Simons acknowledged the Commission's plan to use its authority under Section 6(b) of the FTC Act to examine the data practices of large technology companies.

In addition, it is important to specifically authorize the Antitrust Division of the Department of Justice to have similar powers. Currently, the two enforcement agencies informally split up the industries they investigate and litigate against. As a result, each agency has deep expertise over different segments of the economy. It would be wasteful for the FTC to be forced to develop expertise in industries it does not currently study or investigate on a day to day basis. Similarly, it would be suboptimal for the FTC to only undertake market studies in half of the economy because of an informal historic allocation of jurisdiction and expertise with the Antitrust Division. This issue does not arise outside of the United States where typically one competition enforcement agency exists at the national level.

Remedies

The United States has an almost unique systems of competition remedies with its heavy reliance on criminal cartel enforcement, government merger enforcement, and private treble damage litigation. In the United States, fines are only available in criminal antitrust cases, which are limited to per se violations of Section 1 of the Sherman Act such as price fixing and bid rigging. As a practical matter, this means that neither the enforcement agencies nor the courts can impose a fine in connection with a successful civil Section 2 or Section 5 FTC proceeding.

Most other jurisdictions rely instead on civil or administrative fines or penalties to enforce against hard core cartel and related behaviors in addition to injunctive remedies. The EU competition regulations allows for fines up to 10% of the worldwide annual turnover of the undertakings found liable. This is combined with a rebuttable presumption that parent corporations are responsible for the violations of their subsidiaries. The result are fines that often exceed those in the United States and have included fines as high as 4.34 billion euros in the pending Google proceeding. Fines in excess of one billion euros have been imposed in connection with violations of Article 102 by Intel, Microsoft, and Google on more than one occasion.

This is the accepted type of remedy for most competition agencies throughout the world. Civil or administrative fines typically are available up to a statutory maximum or a percentage of the annual turnover of the respondent (often ten percent).

Neither the Antitrust Division nor the FTC can seek fines in civil antitrust matters. In civil section 2 and section 5 cases, the agencies are limited to civil injunctive relief, which can include under certain limited circumstances restitution or disgorgement of unlawful overcharges. Such creative injunctive remedies are helpful to consumers, but these are the exception and these powers currently are under challenge in the courts.

Private plaintiffs can recover treble damages plus attorneys fees and costs for injury to their business or property by reasons of an antitrust violation, but such proceedings are relatively rare in Section 2 litigation. There were over 200 hundred individual or class action cases in the wake of the *Microsoft*

decision; all of which were settled or in some cases dismissed. While these settlements were collectively in the billions of dollars, this is an unusual situation and unlikely to be replicated, unless and until, the government prevails in a subsequent Section 2 case on a scale of the *Microsoft* litigation.

The Antitrust Division has another rarely used remedy. Section 4A of the Clayton Act allows the government to sue for treble damages for any overcharges the federal government paid as the buyer of products or services as a result of an antitrust violation. Despite the enormous size of government purchases and the obvious benefits of treble damages to taxpayers, this remedy has been used only sporadically over the years. More recently, the head of the Antitrust Division has stated that he intends to use such suits on a more regular basis, although only limited enforcement of this provision has taken place to date and none in a Section 2 context.

Fines and damages remedies by themselves are not an adequate remedy in a single firm monopolization or abuse of dominance case, but the global consensus again strongly suggests that the United States is the outlier. Such remedies should be available in addition to the divestiture and behavioral injunctive relief that condemn past violations, prevent future violations, and hopefully restore competition in the relevant markets.

Conclusions and Recommendations

In many ways, we have the worst of all possible worlds. The basic U.S. statutory framework for dealing with monopoly power has not been updated since the 19th century. The courts have restrictively interpreted existing law. The enforcement agencies have unilaterally abandoned certain of the theories that Congress has provided and only occasionally brought cases involving the more limited theories they approve of. More often they not, the enforcement agencies side with defendants when private plaintiffs seek to enforce Section 2 of the Sherman Act and related theories.

As a result, the cupboard is bare of legal theories, institutional structures, and remedies that are a routine and vital part of competition law outside the United States. We need to carefully study and learn from the international experience, harmonize our law toward the emerging consensus, and restock the full U.S. toolkit and political will to address the important issues of abuse of dominance that the rest of the global competition community is confronting with a superior set of legal tools and institutions.

I recognize that careful drafting will be necessary and much will depend on agency discretion and court interpretation. However, the single most powerful change Congress can adopt is to add the words “or the abuse of a dominant position” to the existing language of Section 2 of the Sherman Act.

As a result of all the factors set forth above, I would offer the following recommendations.

- 1) Add language to Section 2 of the Sherman Act and Section 5 of the FTC Act prohibiting the abuse of a dominant position;
- 2) Add statutory language that well-reasoned decisions outside the United States interpreting the existence of a dominant position or its abuse be given persuasive, but not binding, effect by courts and agencies interpreting this new statutory language;
- 3) Adopt a statutory presumption that a market share of 50% or more constitute a rebuttable presumption of dominance by a seller and that a market share of 25% constitute a rebuttable presumption of dominance by a buyer;

- 4) Adopt statutory language that an abuse of dominance can constitute either exploitive or exclusionary behavior by the dominant firm;
- 5) Adopt a statutory list of non-exclusive types of behavior by dominant firms constituting an abuse of dominance including excessive pricing, price discrimination, predatory pricing, margin squeezes, certain forms of tying, bundling, rebates, and refusals to deal involving essential facilities or access to infrastructure;
- 6) Revise the language of the Robinson-Patman Act to explicitly include the provision of services as well as commodities given the dual nature of many of the lines of business of digital platforms and other dominant firms in the global economy;
- 7) Revise Section 6 of the Federal Trade Commission Act to make clear that the FTC can conduct full market studies as that term is understood in the competition law community and propose recommendations to Congress for statutory change and industry codes of conduct;
- 8) Adopt new language allowing the Antitrust Division of the Justice Department to conduct full market studies as that term is understood in the competition law community and propose recommendations to Congress for statutory change and industry codes of conduct; and
- 9) Conduct vigorous oversight and hearings to ensure appropriate enforcement and interpretation of these new provisions through federal, state, and private investigation and litigation.

Thank you for the opportunity to submit my views and recommendations. Please let me know if the committee staff or members have any questions or would like any further materials in connection with this submission.

Sincerely,



Spencer Weber Waller
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