CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
January 2013 (1)

U.S. Antitrust Enforcement in 2013: Where Are We Going, and Why?

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I. INTRODUCTION

U.S. antitrust law is like a huge cargo ship in at least two respects: It takes time to change direction, and you don't want to be in its way when it does. When we lift our eyes from the day-to-day cases and developments, certain trends come into sharper focus. Bigness is suspect again, but in some new and different ways than it was in the past.

II. A BRIEF MEDITATION ON THE HISTORY & GOALS OF U.S. ANTITRUST

The Sherman Act was passed as a response to concentrations of private economic power: the Oil Trust, the Sugar Trust, and the like controlled entire industries, which led to higher prices, fewer choices, and (on a more modern take) less innovation. The language advocating the Act was the language of populism. Terms describing what the trusts had done included "robbery," extortion, and impoverishing the people.[2] The antitrust laws were passed to facilitate the public control of private economic power.[3] However, this does not mean that they were passed solely to enhance economic efficiency, and this is a major point.

There is an old folk saying that "to a man with a hammer, everything looks like a nail." It sometimes appears that to economists, everything in antitrust must be limited to concepts that work in economic theories. Hence Judge Bork famously stated that the only permissible objective of antitrust was to enhance economic efficiency.[4]

Professor Schumpeter made the counter-argument that such economic or market power was temporary and would be eroded over time by innovation (the "creative destruction" that people keep talking about).[5] He also argued that profits from the powerful would fund research, and that the benefits from innovation would outweigh the short-term harm to consumers caused by monopolies or quasi-monopolies.[6]

But let us go back to when the Sherman Act came to be. Post-Civil War America was a demonstration of the worst aspects of uncontrolled capitalism. Businesses operated outside of any legal constraints to an extent that seem inconceivable today. Bribery, coercion, and good old-fashioned fraud were acceptable business practices, and the spotlighted offenders were those Great Trusts that we mentioned earlier. The sins were identified in the legislative history

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[2] *See* generally, Kirkwood & Lande, *The Fundamental Goal of Antitrust: Protecting consumer, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 201-203 (2008) (hereinafter "Kirkwood & Lande").

[3] *See*, e.g., P. AREEDA, ANTITRUST ANALYSIS, at 3 (1967) (hereinafter "Areeda".)

[4] R. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L & ECON. 7, 44 (1966).

[5] J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY, Ch. VII-VIII (1942).

[6] This is nicely summarized at Areeda, *supra* note 3, at p.13.

("robbery," extortion" and the like), and, as Kirkwood & Lande have pointed out, these were not economic concepts or constructs.

The Sherman Act has been described as nothing less than "the Magna Carta of free enterprise."[7] Recognizing that there is this non-economic current underlying the Act (and, indeed, all U.S. antitrust laws) gives us a vantage point to observe developments in that law over time.

For example, almost everyone now agrees that horizontal cartels are evil. In fact, a well-run cartel very much resembles one of the Trusts that prompted the laws in the first place. Whatever evils such cartels may have, however, surely we don't attack them because we believe that they are inefficient. The problem is that they can be very efficient—at raising prices and making profits at the expense of consumers. Indeed, the Law attacks cartels for the same underlying reason that it attacks monopolies. Monopolies represent private, uncontrolled concentrations of power that harm society as a whole, and we feel a need now, just as we felt a need back when the Sherman Act was passed, to check them.

The end result of the passage of the Act was the assertion of public power over private interests. Cases were brought that led to the breaking up the Oil Trust[8] and the Tobacco Trust.[9]

III. THE SHIP TURNS

Over time, this view of antitrust eased off and, indeed, there were definitely signs during the latter part of the twentieth century that this view of antitrust enforcement had changed (we will discuss the *AT&T* case below). But is it changing back? Perhaps the U.S. action against Microsoft at the end of the century gives us the best vantage point to review these arguments.[10] While in one sense Microsoft clearly had a monopoly at the computer operating system level,[11] the case ended up being argued on the idea that Microsoft had choked off a competing internet browser maker (Netscape).

The two theories of the case have been characterized as the "Bar Napkin" theory and the "Air Supply" theory.[12] The first approach looked to see whether Microsoft could monopolize future technology, and was most concerned with not impeding research (a rather Schumpeterian view). The second approach looked at the current impact of the behemoth, questioning whether it was crushing competition for current products and applications (by "cutting off their air supply").

This pivotal case pushed the debate back to the goals of antitrust that, as noted earlier, go far beyond any one school's version of correct economic theory. What we seem to be seeing now is the slow turn back towards the populist side of antitrust. We have seen that while economics

[7] U.S. v. Topco, 405 U.S. 596, 610 (1972).

[8] Standard Oil v. U.S., 221 U.S. 1 (1911).

[9] U.S. v. American Tobacco, 221 U.S. 106 (1911).

[10] The documents in the litigation are collected on the Department of Justice website, *available a*t http://www.justice.gov/atr/cases/ms_index.htm .

[11] The District Court found Microsoft's share to be above 90%; http://www.justice.gov/atr/cases/f3800/msjudgex.htm .

[12] Tim Brennan, *The Legacy of U.S. v. Microsoft*, REGULATION 22 (Winter 2003-2004).

can give us insights, every case has seemingly good economists arguing on both sides of every issue. We then go back to something deeper, and that is the springs from which antitrust flows. Whether such a move is good, or bad, is for another day.

IV. U.S. ANTITRUST IN 2013

So, what will be the focus of antitrust in 2013 in the United States? A tempting target would be the "too big to fail" banks, which achieved unprecedented size and power during the current economic recession the good old-fashioned way—buying out their rivals. But the problem with this target is that it was assembled in large part by the U.S. government, which pushed the banks to make the acquisitions, and which gave them a huge commercial advantage by designating them as "too big to fail."[13] Antitrust has been effectively ousted here, in favor of other forms of control. Whether that will work is yet to be seen.

We seem to be in an era where the U.S. Government is getting larger, and playing a more interventionist role in the economy. Love it or loathe it, The Affordable Care Act (a/k/a Obamacare) is a huge injection of Government into new areas, as were the bailouts of the car companies. Where there is such an assertion of government power, we are likely to see more challenges to the accumulation and/or exercise of private economic power—analogous to the idea in physics that two bodies cannot occupy the same place at the same time. And, when push comes to shove, the Government is bigger and stronger (hint: it has an army).

Indeed, we may, perhaps unintentionally, be moving towards the European concept that places the government "protection" of the economy first, and one that imposes on dominant companies a "special obligation" by virtue of their size and power (more on this below).

But we need to distinguish between two types of potential cases, because this historical context remains important in U.S. antitrust enforcement. We are seeing cases brought in markets that we know, and are comfortable in describing. And we are seeing cases being brought (or contemplated) in markets that no one has ever seen before.

A. Traditional Markets

First, we are likely to see cases involving companies in traditional markets, or which are seen as trying to recreate such markets after they have been broken up. This is the story of the telecommunications companies—Ma Bell and her daughters.

When the Government sued to break up AT&T in 1974, AT&T made an argument that Schumpeter would have recognized: that the integrated structure of AT&T made it possible for the company to provide the best services and rates. The court didn't buy it, and the parties settled in 1982.[14] But of the seven regional operating companies created out of the divestiture, three were eventually acquired by others. And in 2005, the original AT&T was acquired by one of the spinoffs (SBC, formerly Southwestern Bell Telephone Company), and in 2006 SBC, renamed

[13] *See* K. Bernard, U.S. *Antitrust 2025: How Have we Handled the Bulletproof Cartels*? CPI ANTITRUST J. (December 2010 (2)) for a fuller discussion on this point.

[14] An excellent overview of the setting and the litigation involved in the AT&T breakup can be found at F.M. SCHERER, TECHNOLOGICAL INNOVATION AND MONOPOLIZATION 12-22 (October 2007). The paper is *available at* http://ssrn.com/abstract=1019023 .

AT&T, acquired another of the spinoffs, BellSouth.[15] It is almost as if this was a market that was fated to be monopolized (or oligopolized), or perhaps the lure of the profit margins from the old AT&T was irresistible.[16]

Recently, the new AT&T tested the boundaries, and got slapped back, when it attempted to acquire T-Mobile. The concern was not over the share of traditional telephone service, but rather the share of mobile phone service (and the pricing of that service). The point here is not to analyze the merits of the case, but simply to note that it was brought out of an expressed concern that the two largest companies in the field (Verizon and AT&T) were acquiring too much power—private economic power. The details of that concern are laid out on the DOJ Complaint in the case.[17]

So if we pull back a bit, what we see is an old technology problem (monopolization of telecommunications services) transitioning into a new technology (mobile phone services). And it is in new technologies that we can expect to see the most antitrust scrutiny (as well as the most outraged whining about how the government is too far behind the curve to do any good, and that any remedy will harm the innovative process and structure). In traditional markets we have a history of who can do what to whom, and there is no "special obligation" there. So the fight will be in the new markets.

B. New Markets

While we had an AT&T in telecom, and an IBM in computers[18] nothing has been really analogous to the size and scope of the companies challenged in "computer operating systems" (Microsoft) or "search engine technology" (Google). But given our concern today about the exercise of private power, when it appears as if one company is dominating even one of these new areas, the antitrust eye is attracted.

Here, a confession is required. It is spectacularly unclear to this writer who "won" the *Microsoft* case in the United States.[19] Windows remains the largest (dare one say dominant) operating system on personal computers, and personal computers remain a big area of commence. A good case can be made that the remedy ended the practices that were deemed to be unlawful. But it is a closer question whether the remedies "restored competition."[20] The challenges to Internet Explorer (Microsoft's search engine) came from other angles, such as Google.

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[15] *Id.* at 23.

[16] As one commentator noted: "Everybody knows that breaking up is hard to do, but the dismantling of Ma Bell must have set some sort of record. Two decades have passed since a federal judge ordered an end to the old AT&T monopoly, yet its four surviving Hydra heads—better known as the Baby Bells—continue to dominate local phone service." Mark Lewis, Forbes.com (1/6/2003) *available at* http://www.forbes.com/2003/01/06/cx_ml_0106fcc.html .

[17] Reprinted at http://www.justice.gov/atr/cases/f274600/274613.htm.

[18] Life is not long enough for us to get into the IBM monopolization litigation. An informal overview may be found at http://dwkcommentaries.wordpress.com/2011/07/30/the-ibm-antitrust-litigation/ for those who are intrigued.

[19] *See* T. Brennan, *supra* note 12, for a good explanation of the theories at play in the case, and how each worked out in the final judgment.

[20] *See* generally Heiner, *Microsoft: A Remedial Success?*, 78 ABA ALJ 329 (2012) for a full exploration of this issue.

And now we see Google is in the sights of the Federal Trade Commission. The Agency's central focus is whether Google manipulates search results to favor its own products, and makes it harder for competitors and their products to appear prominently on a results page.[21] So the relevant market in which to judge Google's power is…? And suddenly we are back to an old antitrust issue in new clothing—defining markets. We not only have to define product markets[22] and customer markets, but, by extension, the relevant regulatory domain in a time of global technological ferment.

What is perhaps most interesting here is that the allegations in the U.S. case against Google mirror those brought in European Union back in 2010, and investigated by the European Commission.[23] The parties there are reported to be in settlement talks.[24]

V. TWO INTRIGUING QUESTIONS

So as we move into 2013, two intriguing question poke up their heads: Is the United States moving into convergence with the EU view of antitrust when it comes to dominance and bigness? Are we moving towards a system where big companies will have a "special obligation" not to harm their smaller competitors?[25]

The U.S. system has traditionally been based on raw, sometimes brutal, competition among private entities, with the government taking a relatively minor role as a referee, enforcing the rules (and prosecuting criminal cases), but otherwise not setting policy for the market. As Judge Easterbrook noted approvingly in *Ball Memorial Hospital*, "competition is a ruthless process. A firm that reduces cost and expands sales injures rivals—sometimes fatally. … [but] the antitrust laws are for the benefit of competition not competitors."[26]

The European system is different, and starts with a premise that the Government has a major role not only in setting policy, but as the primary enforcer of that policy. Private parties have a special obligation not to upset the structure set up by the government. As expressed by the Court of Justice in the French Telecom (*Wanadoo)* case, that obligation is as follows:

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[21] Lohr, *Drafting Antitrust Case, F.T.C. Raises Pressure on Google*, (October 12, 2012), (*available at* nytimes.com)

[22] In this regard, the attempt by the Department of Justice and the Federal Trade Commission to deemphasize the use of market definition in merger analysis as set out in the 2010 Horizontal Merger Guidelines, *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf seems to be both futile (the Courts insist on knowing where the ill effects will be felt from a deal being challenged), and to put merger analysis at odds with the analysis used in the dominance cases that are the subject of our discussion.

[23] Cendrowicz, *The E.U. Probe: Is Google Rigging Its Search Results?*, (December 2, 2010), *available at* time.com.

[24] Geitner, *Google Moves Toward Settlement of European Antitrust Investigation*, (July 24, 2012) *available at* nytimes.com.

[25] The classic exposition of this doctrine comes from the case of Hoffman La Roche v. Commission, Case 85/76, 1979, *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976J0085:EN:NOT. For a brief discussion of the doctrine, and its philosophical underpinnings, *see* Bernard, *Some Thoughts on Article 82 Jurisprudence – If the Government Always Wins, Should Private Litigants Win as Well?,* GCP MAGAZINE, 8-10 (August 2009, Release 1).

[26] Ball Mem'l Hosp. v. Mutual Hosp. Ins, 784 F.2d 1325 (7th Cir. 1986). For a fuller discussion of this contrast between the U.S. and the EU approaches, *see* Bernard, *Monopolization / Abuse of Dominance and the Research Based Pharmaceutical Industry*, Fordham Competition Law Institute, INTERNATIONAL ANTITRUST LAW AND POLICY, Ch. 14 (2008).

> [A]n undertaking which holds a dominant position has a special responsibility not to allow its behavior to impair genuine undistorted competition [citation omitted].
>
> As the Court has already stated, it follows that Article 82 EC prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality. From that point of view, not all competition by means of price can be regarded as legitimate [citation omitted].[27]

When antitrust scholars talk about "convergence," it is generally used in the sense that the non-U.S jurisdictions are coming around to "our" point of view. But what we are seeing here may be a case of convergence moving the other way.

Are we moving towards a regime where Google has an obligation not to impair competition by capturing too much of the search market? What about other industries, and their lead players—will we see antitrust challenges that, in effect, tell the leaders that they cannot compete too effectively, or by certain means?

And if we reach that conclusion, would this be a good thing, or a bad one? That seems to depend upon which side of the Atlantic Ocean you are standing.

[27] France Telecom SA v. Commission, Case C-202/07 P, European Court of Justice (2 April 2009) at ¶¶105-106.