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The Legal Periphery of Dominant Firm Conduct

Herbert Hovenkamp

Introduction

Thank you for this invitation to share my thoughts about the anticompetitive practices of dominant firms. My interest today is in two different but related problems and how U.S. antitrust law and EU competition law approach them. The first is the offense of "attempt" to monopolize, which concerns anticompetitive acts of a firm that is not yet dominant but that threaten dominance. The second is the offense of monopoly or dominant firm "leveraging," which occurs when a firm uses its dominant position in one market to cause some kind of harm in a different market where it also does business.

Historically the monopolization offense in the United States, or the parallel offense of Abuse of Dominant Position in Article 82,¹ has been one of the most difficult for the law to define. Although our legal traditions have a wealth of law that deals with improper, unfair, or tortious practices by single firms, very little of it was concerned with competition as such, and nearly none of it was historically concerned with the structural manifestations of economic monopoly. In my own common law tradition there are plenty of good historical analogues for the restraints imposed by ' 1 of the Sherman Act on collusion or other restraints of trade,² but the only pre-Sherman Act precedents pertaining to single-firm monopoly really referred to monopolies created by the state and to the power that either the Constitution or some higher sovereign such as the federal government might impose.³

Further, monopolistic conduct is exceedingly difficult to observe and define, for a number of reasons. *First*, while most agreements among multiple firms are readily observed, the inner workings of most decisions by dominant firms are not. *Second*, many multifirm agreements seem suspicious, but not the unilateral acts of a dominant firm. For example, we are highly suspicious of multi-firm price setting, but the monopolist acting unilaterally cannot do business without setting a price. We rightfully distrust multilateral agreements, particularly if horizontal, that specify the locations of stores, dealerships, or other distribution arms of a company. In contrast, the monopolist must make a decision about where to build its own stores or how to

1. 15 U.S.C. ' 2; Treaty Establishing the European Community art. 82, Nov. 10, 1997, 1997 O.J. (C 340) 3. See also See Brian A. Facey & Dany H. Assaf, Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey, 70 Antitrust L.J. 513 (2002) (discussing the objectives of antitrust laws across jurisdictions); Eleanor M. Fox, What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect, 70 Antitrust L.J. 371 (2002).

2. See Herbert Hovenkamp, The Sherman Act and the Classical Theory of Competition, 74 Iowa L. Rev. 1019-1065 (1989); and Herbert Hovenkamp, Enterprise and American Law, 1836-1937, at Chs. 20-24 (1991).

3. See Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution, Ch. 7 (2006).

organize its distribution network. We question the manufacturer's attempts to specify the resale prices of its dealers; but the monopolist necessarily specifies the price of wholly owned reseller divisions. An agreement among multiple firms limiting the licensing of their patents or other IP rights might provoke close scrutiny. But every monopolist must make a decision about whether and how much to license its own IP rights rather than use them entirely for internal production.

One could go on with this list, but the point should be clear: many of the things that are suspicious when done by two or more firms acting in concert are essential parts of routine business for the dominant firm. As a result it is almost never enough to observe that the monopolist has engaged in a certain practices, such as setting a price or deciding where to build retail stores. One also needs a great deal of theory and analysis to identify the circumstances under which these practices are anticompetitive, with the knowledge that they very likely are anticompetitive in only a small proportion of cases.

These differences have quite naturally yielded significant problems in classifying the dominant firm's conduct, and the approaches of the United States and the EU reflect those differences, going to such things as:

- \$ Which of a dominant firm's practices should be unlawful because of the impact that those practices have in the primary market, which is the market in which the dominant firm has its monopoly power?
- \$ What are the circumstances under which we can and should condemn the conduct of a firm that is not yet a "monopolist," or dominant firm, but which creates a realistic threat of leading to single-firm dominance?
- \$ Which of a dominant firm's practices should be unlawful because of the impact that those practices have in a secondary market, which is a market in which the dominant firm lacks a dominant position at the time the practices occur?

One might characterize the first of these questions as the "central" question of monopolization law and the other two questions as "peripheral." The first one states our central concern with dominant firm behavior. The second two questions state concerns that we might regard as ancillary, or as arising less frequently or in more idiosyncratic situations.

While these questions are peripheral in this sense, they are very significant in another. In our modern complex world most dominant firms operate in multiple markets, either because they are vertically integrated or else because they produce complementary products. Indeed, most of the practices that we condemn as anticompetitive very likely relate in some fashion to the monopolist's participation in

multiple markets. To be sure, in most of them the threat is of monopoly maintenance in the dominant firm's primary market, but this is hardly invariably true.

The question, then, is how legal policy should address the conduct at the periphery of the concerns about dominant firms' anticompetitive practices in markets where they have monopoly power. Both by statutory language and judicial decision U.S. and EU law take two different approaches:

- \$ United States law explicitly recognizes both monopolization and "attempts" to monopolize as offenses, while European law does not recognize a separate attempt offense.
- \$ In the United States the strong trend in decisions is to hold that there is no offense of monopoly "leveraging"; in contrast, the "abuse of dominance" conception admits a notion of leveraging when the conduct in the secondary market is regarded as sufficiently abusive.

These differences naturally invite a number of questions.

First, do real and intended differences between these two statutory structures, or are these differences little more than the happenstance of drafting?

Second, assuming that there are real differences, what are the reasons for them, and should one approach be preferred to the other, on either issue. That is, should we or should we not have distinctive attempt and leveraging offenses?

Third, while the differences in the stated standards are clear enough, how often does it affect the outcome of cases? And relatedly, how much difference does it make to the mode of analysis that regulatory and judicial tribunals use in assessing dominant firm behavior?

Fourth, are there good reasons why legal policy makers should be more reluctant to go after this "peripheral" conduct than conduct that lies closer to the core? For example, are anticompetitive effects more difficult to assess, or the conduct more difficult to characterize? If so, are these differences severe enough that this particular classification of conduct should be abandoned?

On the first question, the literature goes to some lengths to make something of the linguistic differences between the two provisions, with some saying that the United States language is more oriented toward the protection of competition rather than competitors, while the Article 82 language is more concerned with protecting competitors in order to support competitive processes. Or with some saying that the explicit concern of ' 2 of the Sherman Act is exclusionary practices, while that of Article

82 is abusive practices, whether or not they actually exclude.⁴

Some also say that the American approach is more fundamentally "structural," while the EU approach is more "regulatory." United States antitrust policy is loathe to subject firms to what they regard as excessive oversight, trusting the market to discipline most of their misbehaviors. To that end, the United States approach historically focused on maintaining market structures where anticompetitive unilateral conduct was unlikely to occur. In this model the attempt to monopolize offense was intended to make the later, closer scrutiny that comes with single firm dominance unnecessary. By contrast, it has been said that the European approach seems to be less concerned about the creation of dominant positions and more focused on regulating their behavior once dominance has been achieved.⁵

One possible rationale for the presence of an attempt offense under U.S. law but not the law of the European Union lies in the differing standards of conduct that the two bodies of law impose on dominant firms. In general, the rules for pricing (high prices, predatorily low prices, discounting practices) in the EU are more aggressive than in the U.S., as are the rules for unilateral refusals to deal or abuses of IP rights. One could justifiably say that the U.S. has a more "structural" approach that attempts to pre-empt the conditions that give rise to the abuses, rather than remedying the abuses themselves.

That explanation does find support in the fact that much of EU law respecting unilateral dominant firm conduct does seem to be more aggressive than United States law. For example, the United States law of predatory pricing requires a price below average variable or marginal cost and proof of recoupment of the predation investment in all cases.⁶ By contrast, EU law seems more willing to condemn prices that are above average variable cost and below average total cost.⁷ Further, European law dispenses

4. E.g., Eric S. Hochstadt, *The Brown Shoe of European Union Competition Law*, 24 *Cardozo L. Rev.* 287, 295-96 (2002); John Deq. Briggs & Howard T. Rosenblatt, *GE/Honeywell-Live And Let Die: A Response to Kolasky & Greenfield*, 10 *Geo. Mason L. Rev.* 459, 467 (2002).

5. See Eleanor Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity and Fairness*, 61 *Notre Dame L. Rev.* 981, 984 (1986). See also Eleanor Fox, *What is Harm to Competition? Antitrust, Exclusionary Practices, and Anticompetitive Effect*, 70 *Antitrust L.J.* 371, 393 (2002).

6. *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S.Ct. 1069 (2007) (making clear that the recoupment requirement applies to both monopolization and attempt to monopolize claims). See 3 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law Ch. ¶¶724, 726* (3d ed. 2008).

7. Case C62/86 *AKZO Chemie BV v. Commission* [1991], ECR I-3359 (prices below average total cost and intent to harm a competitor). The DG Discussion Paper suggests average avoidable cost rather than AVC as a benchmark for most cases. See European Commission, DG Competition, *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* ' ' 6.2.1. - 6.2.2 (Dec. 2005).

with the recoupment requirement, at least if prices are sufficiently low or the defendant's market share sufficiently high.⁸ The Discussion Paper on Article 82 suggests that recoupment should be presumed if market shares and entry barriers are high enough, and thus separate proof of recoupment is not required.⁹

Perhaps more significantly in considering the wisdom of a separate attempt to monopolize offense, EU law has also expressed a willingness to condemn high prices, which are defined as prices that are excessive in relation to the firm's costs.¹⁰ By contrast, the United States position is unambiguously that once the monopolist has attained its position it may charge any price that the market will bear.¹¹ As a result, U.S. law rightfully places a premium on preventing such dominance from coming into existence in the first place.

A case can be made that EU law of unilateral refusal to deal is more aggressive than U.S. law, and there are certainly historical precedents suggesting as much.¹²

8. Case-333/94P *Tetra Pak v. Commission* [1996] ECR-I-5951. Accord Case T 340/03, *France Télécom SA*. CFI (Jan. 30, 2007), at ¶¶226-230, particularly at ¶228 ("The Commission was therefore right to take the view that proof of recoupment of losses was not a precondition to making a finding of predatory pricing").

9. European Commission, DG Competition, Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses ¶122 (Dec. 2005). See also Michal S. Gal, Monopoly Pricing as an Antitrust Offense in the US and the EC: Two Systems of Belief about Monopoly?, 49 *Antitrust Bull.* 343 (2004).

10. See Case 226/84 *British Leyland Plc v. Commission* [1986] ECR 3263. See also *Deutsche Telekom OJ* 2003 L263/9; Case 27/76 *United Brands Co. et al v. Commission* [1978], 1 CMLR 429.

11. See 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 720 (3d ed. 2008).

12. Case COMP/C-37/37.792, *Microsoft Corp.*, 24 March 2004. But see the discussion infra of the 2007 decision of the CFI.

See also Cases 6/73 & 7/73, *Commercial Solvents v. Commission* [1974] ECR 223, para.25 ("an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition... [abuses] its dominant position." And see Case 311/84 *Centre Belge d'Etudes de Marche-Telemarketing v. CLT* [1985] ECR 3261; Case C-18-88 GB *Inno* [1991] ECR I-5941.

Here, the DG Competition Discussion Paper may be becoming *more* aggressive, suggesting that a refusal to supply an input may be unlawful if it is "likely to have a negative effect on competition." *Id.* at ¶¶ 218 (speaking only of termination of existing relationships), and 222 et seq. With respect to obligations to deal where dealing had not occurred before, see *id.* at § 9.2.2.:

Five conditions normally have to be fulfilled in order for a refusal to start supplying to be abusive: (i) the behaviour can be properly characterized as a refusal to supply; (ii) the refusing undertaking is dominant; (iii) the input is indispensable; (iv) the refusal is likely to have a negative effect on competition; (v) the refusal is not objectively justified.

However, the more recent decisions in *Bronner* and *IMS Health* indicate considerable reluctance to expand the doctrine.¹³ As of right now EU and U.S. law do not seem to be significantly far apart,¹⁴ Whether the 2007 *Microsoft* decision in the CFI opens the gap once again will be discussed below.

My purpose today, however, is not to assess substantive differences between EU and US law, but rather to look at the role of conduct at the periphery -- namely attempts to monopolize and monopoly leveraging.

The Attempt Offense: Do the EU and U.S. Differ Much?

In the United States the addition of an attempt offense to ' 2 of the Sherman Act almost certainly reflected Congress' appreciation of a common law criminal tradition in which attempt offenses were common. The Sherman Act was, after all, written as a criminal statute, and criminal statutes were frequently read to condemn the attempt as well as the completed crime. When Justice Holmes interpreted the offense in the 1905 *Swift* case he simply brought into the monopolization offense the classical common law attempt formulation that was used for such attempted crimes as murder or theft. That formulation required proof of a specific intent to engage in the unlawful conduct, one or more acts carried out in furtherance of that plan, and a "dangerous probability" that the conduct, if left to run its course, would have succeeded.¹⁵

One can make much of the presence of an attempt offense in United States antitrust law and its absence from EU law. But the fact is that today the difference does not amount to all that much in practice.

That was not always the case. Historically, but particularly from the 1960s through the 1980s, United States law recognized two very different offenses, and the structural requirements for the attempt offense were considerably less than they were for the substantive monopolization offense.

13. Case C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-7791 (requiring true essentiality and no reasonable alternative); Case C-418/01 *IMS Health v. NDC Health* [2004] ECR I-743 (condemning a refusal only if it (1) prevents the emergence of a new product; (2) is not objectively justifiable; and (3) eliminates all competition).

14. The United States Supreme Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398 (2004), also placed severe restrictions on unilateral refusal to deal doctrine.

15. *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905). See also *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946) (attempt requires methods that "though falling short [of attaining monopoly], nevertheless approach so close as to create a dangerous probability of it").

For example, beginning with the *Lessig* decision in 1964 and through the early 1980s the Ninth Circuit on the West Coast led a group of American Circuit Courts in holding that the attempt to monopolize offense was really about intent to create a monopoly.¹⁶ If the intent was there it really did not matter that the defendant was non-dominant or even that the market was structurally incapable of supporting a monopoly. If the intent was there, the Ninth Circuit concluded, then it was unnecessary to show any probability that the defendant might have monopolized a market. The court wrote:

We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires- perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective.¹⁷

Under that reasoning, the court concluded, the plaintiff did not even need to define a relevant market that was capable of being monopolized. The court noted that ' 2 of the Sherman Act spoke of attempting to monopolize "any part" of commerce, and that part could be a small portion of the market in question.

When one looks at the overall facts of *Lessig* the dubiousness of any monopolization claim becomes even clearer. Tidewater Oil Company, the defendant, was a relatively minor player in the retail market for gasoline and related automobile supplies. It was dwarfed in size by much larger rivals such as Standard Oil and Texaco. What was more, the practices that the plaintiff, a dealer, was challenging were resale price maintenance of gasoline, and a tying or exclusive dealing contract requiring Tidewater dealers to purchase all of their tires, automobile batteries and other automotive accessories from Tidewater. Tidewater itself did not even manufacture these things, but purchased them from other sources. Lucky for the plaintiff that it was not required to define a relevant market, for it is unlikely that he could even have articulated a market in which Tidewater had any reasonable prospect of attaining a monopoly.

Curiously, the court held that a dangerous probability of creating a monopoly could be inferred from the defendant's intent to do so, but then without discussion of the issue it inferred that intent from the resale price maintenance of gasoline and the tying of tires and batteries. How those practices could have manifested an intent to create a monopoly is unclear.

16. *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964); *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1216 (9th Cir. 1983), cert. denied, 471 U.S. 1007 (1985).

17. *Lessig*, 327 F.2d at 474. See also *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1219 (9th Cir. 1977).

Lessig started many United States courts down a thirty-year road during which they came close to turning the law of attempt to monopolize into a business tort provision. While not all circuits agreed with the Ninth that it was unnecessary for plaintiffs to define a relevant market in an attempt case, they routinely found unlawful attempts in circumstances where monopolization was clearly not in prospect. For example, several courts found market shares of twenty percent sufficient to support the offense.¹⁸ Other courts found that conduct that would never be capable of creating a monopoly sufficed to support an attempt. For example, one Second Circuit decision found that a defendant could not have monopolized the market for retail grocery sales because the market was competitively structured and entry was easy.¹⁹ But then it also held that this conduct could constitute the basis of the attempt offense, which required a lesser showing. To be sure, the showing is less, but a realistic attempt offense still requires a market that is structurally capable of being monopolized.

Today, the structural requirements for the attempt offense have become much more severe. In its *Spectrum Sports* holding in 1993 the Supreme Court overruled the line of Ninth Circuit decisions referenced previously and held that a relevant market must be alleged and proven to support an attempt claim.²⁰ The Supreme Court stated:

it is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.²¹

18. E.g., *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), cert. denied, 429 U.S. 1094 (1977); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 973-975 (8th Cir. 1968), cert. denied, 395 U.S. 961 (1969).

19. *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90 (2d Cir. 1998).

20. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455 (1993). See also *United States v. Microsoft Corp.*, 253 F.3d 34, 81 (D.C. Cir. 2001), cert. denied, 534 U.S. 952 (2001) (Microsoft could not be condemned of attempt to monopolize the market for internet browsers given that the relevant market had not been established).

21. *Spectrum*, 506 U.S. at 455-456. The Court added:

The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. ... Thus, this Court and other courts have been careful to avoid constructions of ' 2 which might chill competition, rather than foster it. It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects; moreover, single-firm activity is unlike concerted activity covered by ' 1, which "inherently is fraught with anticompetitive risk." For these reasons, ' 2

Since that time the clear trend of decision making under United States law is to require (1) a market that is structurally capable of being monopolized; and (2) a firm that is in reach of attaining a dominant position, assuming that it does not already have one. Consistent with this the Fourth Circuit adopted this classification scheme for attempt to monopolize cases:

(1) claims of less than 30% market shares should presumptively be rejected; (2) claims involving between 30% and 50% shares should usually be rejected, except when conduct is very likely to achieve monopoly or when conduct is invidious, but not so much so as to make the defendant per se liable; (3) claims involving greater than 50% share should be treated as attempts at monopolization when the other elements for attempted monopolization are also satisfied.²²

Holdings in other Circuits are largely consistent, although the Supreme Court has not returned to the issue since its 1993 decision.²³

makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. The concern that ' 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in "unfair" or "predatory" tactics. Such conduct may be sufficient to prove the necessary intent to monopolize, which is something more than an intent to compete vigorously, but demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant's economic power in that market.

(citations omitted).

22. *M&M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168 (4th Cir. 1992) (en banc), cert. denied, 508 U.S. 972 (1993) (relying on an earlier edition of Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 807 (3d ed. 2008)).

23. See, e.g., *U.S. Anchor Mfg., Inc. v. Ruel Indus., Inc.*, 7 F.3d 986, 993, 1000 (11th Cir. 1993), cert. denied, 512 U.S. 1221 (1994) (market share lower than 50 percent insufficient); *Barr Labs., Inc. v. Abbott Labs., Inc.*, 978 F.2d 98 (3d Cir. 1992) (50-percent share inadequate when new entry had occurred during alleged predation period); *MRO Communic. v. AT&T*, 205 F.3d 1351 (9th Cir. 1999), cert. denied, 529 U.S. 1124 (2000) (AT&T's 44% share of billing services insufficient for both monopolization and attempt when there were other viable rivals in the market and no obvious entry barriers); *Ford v. Stroup*, 113 F.3d 1234, 1997-1 Trade Cas. ¶ 71838 (6th Cir. 1997, unpublished) (radiologist group's market share of 50-55 percent insufficient where entry barriers were not high).

See also *United States v. Microsoft Corp.*, 87 F.Supp.2d 30, 47 (D.D.C. 2000), aff'd in part, rev'd in part, 253 F.3d 34 (D.C. Cir. 2001), cert. denied, 534 U.S. 952 (2001), holding that Microsoft attempted to monopolize by proposing a market division agreement to Apple Computer, which Apple rejected. See also *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984), cert. dismissed, 474 U.S. 1001 (1985) (finding unlawful attempt to monopolize when one airline's CEO proposed price-fixing to another airline, which the latter refused).

That then raises the question whether significant differences remain between the European approach, which does not recognize the attempt offense, and the U.S. approach, which recognizes the offense but imposes very strict structural requirements.

Further, this must be considered in light of the fact that the definition of a "dominant firm" for purposes of Article 82 reaches to significantly lower market shares than does the definition of a "monopolist" under ' 2 of the Sherman Act. Indeed, if one looks at the more extreme decisions it seems clear that firms that could not be found guilty of an attempt to monopolize under United States law could nevertheless be found guilty of abuse of dominance under EU law. Or to say this differently, insofar as market shares are concerned, the EU conception of a "dominant" firm for Article 82 purposes reaches virtually all firms capable of committing either the monopolization or the attempt to monopolize offense under United States law, and perhaps even a few more.

A dominant position under EC law is said to be a position to "prevent effective competition being maintained" or the power to behave "to an appreciable extent independently of its competitors and customers and ultimately of its consumers."²⁴ Under this rubric, a dominant position has been found on market shares of as little as 40%.²⁵ And dominance is said to be presumed when market shares exceed 50%.²⁶ The position taken in the DG Competition Discussion Paper is telling:

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.²⁷

Of course shares and market structure do not tell the entire story. The attempt

24. Case 27/76 *United Brands v. Commission* [1978] ECR 207.

25. *Virgin/British Airways OJ* [2000] L 30/1. In fact, British Airway's market share had fallen almost every year since 1992, with the exception of 1996-1997. Market share fell from 46.3% in 1992, to 39.7% in 1998.

See also Case C-250/92, *Gottrup-Klim e.g. Grovvareforeninger v. Dansk Landbrugs Grovvarereselskab AmbA* [1994] ECR I-5641, ¶ 48 (market shares of 36% and 32% in two different market could be sufficient to establish dominance, depending on the circumstances).

26. Case C-62/86, *AKZO v. Commission* [1991] ECR I-3359.

27. DG Discussion Paper, ¶ 31 (citations omitted).

to monopolize offense requires conduct that can meaningfully be said to be on the road to monopoly. Article 82 requires "abuse" of a dominant decision. To the extent there is a difference here it would appear that U.S. law imposes the stricter requirement. To oversimplify, U.S. attempt to monopolize law looks at the 50% firm and asks whether it threatens to become an 80% firm. By contrast, EU looks at the 50% firm and asks whether that firm is "abusing" its position, whether or not it threatens to acquire a more domineering market presence.

On the other hand, what both bodies of law share in common is the notion that greater attention must be paid to conduct and anticompetitive effects as the defendant's market share becomes smaller. To put it differently, the assessment of single firm conduct must always look at the conduct in the context of the structure in which it is occurring. For example, unilateral predatory pricing rarely makes sense except for a firm with a very large market share.²⁸ As the dominant firm's share becomes smaller the costs of dispatching rivals becomes considerably larger and the ability of rivals to survive and expand during any recoupment period increases as well. The same thing is generally true of unilateral refusals to deal. When a firm has nearly 100% of a market the inference is considerably stronger that its refusal to share an input will exclude competitors than when its share is only 40%. In the latter case rivals constituting 60% of the market have presumably managed to survive without the defendant's scarce input.²⁹ By contrast, anticompetitive appeals to government officials, or fraudulently patent infringement suits, might suffice to give monopoly power even to a firm that previously enjoyed less than half of the market.

This hardly means that we should have a "sliding scale" that relates conduct to market share. Competition law tribunals are not up to the task of making such fine judgments. But in each case the question becomes whether the claim of harm that the sovereign abhors is justified, given the structural conditions in which the conduct is occurring.

Leveraging: Monopolization and Abuse of Dominance

Introduction

Unlike Section 2 of the Sherman Act, Article 82's definition of "Abuse of a Dominant Position" contains no analogue to the attempt offense. If it did it would have

28. See, e.g., *American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317 (7th Cir. 1991).

29. This was the error in *Image Technical Svcs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1207 (9th Cir. 1997), cert. denied, 523 U.S. 1094 (1998), after remand from the Supreme Court, which condemned a refusal to provide aftermarket parts to rival repair organizations when in fact most of the parts were freely available on the market from other sources.

to be expressed as something like "attempt to abuse a dominant position," or "attempt to create a dominant position by anticompetitive means."

When it comes to leveraging, the situation is precisely reversed. Section 2 of the Sherman Act condemns conduct only if it constitutes "monopolization," an "attempt to monopolize," or a conspiracy to monopolize. The gravamen of the offense is either the perpetuation or creation, or else the attempt to create, a monopoly as the antitrust case law defines it. Simply obtaining a competitive advantage or causing some kind of harm in a market in which the defendant lacks monopoly power cannot literally be an offense under the statute unless it either (1) strengthens the dominant firm's monopoly position in its primary market; or (2) threatens monopolization of a secondary market. By contrast, linguistically the "abuse" of a dominant position could mean any kind of "abuse," whether monopolistic or not.

In the United States the clear trend in decisions is either to reject monopoly leveraging claims altogether, or else hold that "leveraging" claims can be sustained only if they involve monopolization or a threat to monopolize the secondary market. This tends to render claims of leveraging superfluous in the sense that in order to make out a leveraging claim one must make out a showing of attempt to monopolize in any event. This fact is also key to understanding why the differences between U.S. and EU law can easily be exaggerated: as the leveraging offense is interpreted in European law it does much of the work that the attempt offense does in U.S. law.

United States antitrust law has not always been hostile toward leveraging claims under ' 2 of the Sherman Act. Beginning with the *Griffith* decision in 1948, the Supreme Court recognized a monopoly leveraging offense within ' 2.³⁰ The defendant was a firm that owned numerous movie theaters scattered across Texas. In some towns it had a monopoly position in these theaters while in other it did not. The firm then bargained with distributors for its entire chain of theaters, basically offering access to its monopoly theaters in exchange for preferential treatment at the competitive theaters. As the government presented the case there was no real threat that the competitive towns would become monopolized, but the ability of distributors to bargain with the defendant's theaters as a group gave it a significant advantage over competitive theaters that did not have a monopoly position elsewhere. The Supreme Court concluded that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." As the Court then explained,

When the buying power of [the defendant's] entire [theater] circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire.... The consequences of such a use of

30. *United States v. Griffith*, 334 U.S. 100 (1948).

monopoly power is that films are licensed on a non-competitive basis in what would otherwise be competitive situations.... It is... a misuse of monopoly power under the Sherman Act.³¹

Following *Griffith*, several lower courts signed on to the proposition that a dominant firm violates ' 2 of the Sherman Act if it employs

... monopoly power attained in one market to gain a competitive advantage in another..., even if there has not been an attempt to monopolize the second market.³²

In the last fifteen years, however, the United States Supreme Court has cut back very considerably on leveraging claims. For example, in *Spectrum Sports* the Court held:

' 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. The concern that ' 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in "unfair" or "predatory" tactics.³³

In its 2004 *Trinko* decision the Supreme Court reiterated that view, holding that no leveraging claim can exist unless there is a dangerous probability of monopolization in the secondary market.³⁴

Because the "abuse of dominant position" formulation appears to encompass leveraging one is tempted to say that the EU and U.S. approaches differ considerably. But this is true only if one compares Article 82 with ' 2 of the Sherman Act, and not with the full panoply of U.S. antitrust laws, including ' 1 of the Sherman Act and ' 3 of the

31. *Id.* at 108.

32. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

33. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 448 (1993).

34. *Verizon Communications, Inc. v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398 (2004). In its *Virgin Atlantic* decision, which has a parallel case in EU law, the Second Circuit held open this possibility:

Were we to allow pursuit of a monopoly leveraging claim, Virgin would need to submit proof that British Airways: (1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage over Virgin in another distinct market; and (3) caused injury by such anticompetitive conduct.

Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256, 272 (2d Cir. 2001).

Clayton Act.

Indeed, leveraging has always been a paramount concern of American antitrust policy. However, the concern was usually expressed with respect to tying arrangements. As early as 1912 the Supreme Court faced a leveraging challenge where a dominant firm (in an office copying machine) had no prospect of attaining a monopoly in the secondary market (ink, paper, and stencils).³⁵ The framers of the Clayton Act in 1914 apparently understood this, for that statute's Section 3 does not require monopolization of the secondary market, but allows condemnation where the impact of the tie may be to "substantially lessen competition."³⁶ That language, which is also used in the U.S. merger provision³⁷ and the Robinson-Patman Act,³⁸ indicates that either higher prices or increased market concentration can evidence a substantial lessening of competition. Under this formulation tying has routinely been condemned under U.S. law when there was no realistic possibility that the defendant would ever acquire anything approaching a dominant position in the secondary market. Indeed, under our per se rule tying has been condemned when there was no measurable impact at all on market concentration, performance, or price in the secondary market.³⁹

In the United States most "leveraging" claims can be reduced to some version of the tying formulation, broadly defined. To be sure, ' 3 of the Clayton Act refers explicitly to contractual ties,⁴⁰ but that is undoubtedly because contractual ties were what Congress knew about in 1914. Package discounts, bundled discounts, package licensing, and so-called technological ties all came to the courts later.

Of course, not every leveraging claim can be formally characterized as a tie. In *Griffith* the defendant, who had motion picture theaters in monopoly towns and competitive towns, negotiated for exhibition contracts in bundles, and used its power to deny access to its monopoly towns in order to obtain a competitive advantage in

35. *Henry v. A.B. Dick Co.*, 224 U.S. 1, 29B30 (1912), which refused to condemn such a tie. The decision provoked the passage of ' 3 of the Clayton Act.

36. 15 U.S.C. ' 14.

37. Section 7 of the Clayton Act., 15 U.S.C. ' 18.

38. 15 U.S.C. ' 13.

39. E.g., *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947) (tied product was common salt); *United States v. Loew's*, 371 U.S. 38 (1962) (old motion pictures licensed for television); *Siegel v. Chicken Delight*, 448 F.2d 43, 46-47 (9th Cir.1971), cert. denied, 405 U.S. 955 (1972) (common food service items by nondominant franchisor).

40. That provision requires a "condition" or "understanding" that the purchaser will buy the secondary goods from the seller and not from a competitor. 15 U.S.C. ' 14.

competitive towns.⁴¹ But such a claim is not distinguishable in principle from a contractual tie: I'll give you access to my monopoly theaters if you give me preferential treatment in the competitive theaters.

American antitrust law has always included contradictory impulses, with overly aggressive treatment of ties if they involved an explicit contract that tied together a dominant and non-dominant product, but considerable difficulty assessing claims that did not involve such contracts unless they created or threatened monopoly in the secondary product. Both ' 1 of the Sherman Act and ' 3 of the Clayton Act require an agreement. Section 2 of the Sherman Act does not require an agreement, but its provisions are invoked only when they threaten monopoly in an affected market. As the law of contractual ties developed in the United States it did not require a threat of monopoly in the secondary market. Indeed, it did not even require significant foreclosure.⁴² So the *non-contractual* assembly of something that relates two markets tends to fall between the cracks. This includes many discount practices, including bundled discounts, and also technological ties, in which the defendant designs complementary products in such a way that they must either be sold together⁴³ or else so that they will work only with each other.⁴⁴

The ongoing *Microsoft* litigation in both jurisdictions exposes some of these differences. Consider this illustration. Suppose that at one point in history there was a highly competitive market for computer solitaire games, which people could purchase and install on their computers. Now Microsoft, with a near monopoly in its Windows operating system, incorporates a pretty good solitaire game into the program and includes it in the price. Everyone who purchases a copy of Windows, whether standalone or as part of a computer system, also obtains a copy of MS solitaire. If solitaire games were perfectly fungible Microsoft would wipe out the independent market for solitaire games. However, there is considerable product differentiation among solitaire games. As a result, Microsoft's bundling cuts the volume of solitaire games sold by perhaps 60% or even more, but firms do keep on selling them. This happens to be the reality, and in fact a viable market continues to exist for computer solitaire games with different features than those in the Windows version, although that market is undoubtedly very much smaller than it would be absent Microsoft's bundling

41. *United States v. Griffith*, 334 U.S. 100 (1948)

42. See 10 Antitrust Law ¶1725 (3d ed. 2011) (forthcoming).

43. E.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 65-67 (D.C.Cir.), cert. denied, 534 U.S. 952 (2001) ("commingling" of Windows platform and Internet Explorer browser code).

44. E.g., *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1379 (Fed.Cir. 1998) (unlawful under Sherman Act ' 2 for firm to reconfigure its patented biopsy machine so that it would accept only its own disposable needles and not those of rivals).

that forces all Windows purchasers to take Microsoft solitaire.⁴⁵

Note that if Microsoft accomplished this bundling by means of a contract it would very likely be actionable tying under U.S. law. The requirement of tying market power is certainly met. The "separate products" requirement is met by virtue of the fact that a robust market exists for both computer operating systems and computer solitaire games sold separately. Indeed, under the so-called "per se" tying rule in the United States a plaintiff would not even need to show substantial market foreclosure, although it very likely exists in this case.⁴⁶

However, if Microsoft accomplishes its solitaire bundling simply by including that game's code within the code for the Windows operating system, then U.S. law treats the conduct as unilateral. As a result, neither ' 1 of the Sherman Act nor ' 3 of the Clayton Act applies. Under U.S. law as it currently exists the challenger would have to show either that the bundle serves to strengthen the monopoly in Windows, the "tying" product, or else that it creates a significant threat of monopolization of the market for computer solitaire games. The mere fact that Microsoft obtained a "competitive advantage" in the solitaire market by bundling the Windows code would not be sufficient.

Presumably, the Windows-Solitaire technological bundle could violate Article 82 upon a lesser showing. Indeed, the different language almost certainly explains the differing approaches in the United States and EU actions against Microsoft. The EU approach, with its concern about leverage, pursued Microsoft's incorporation of its Media Player software into the Windows operating system, as well as its refusal to share code protocols that would enable rival manufacturers of workgroup server software to function effectively. In contrast, the central and ultimately most successful claim in the United States litigation was that the "commingling" of Windows platform and Internet Explorer browser code served to strengthen the Windows monopoly *itself* - i.e., Microsoft's dominant position in its primary market. It did so by undermining attempts by rival browser manufacturers such as Netscape to deploy alternative operating systems, or attempts by writers of multi-platform language, such as Sun Microsystems's Java, to make different operating systems compatible with one another.

These differing approaches to the leveraging problem in U.S. law were not very well exposed in our own Microsoft litigation because there was no final resolution of the explicit tying issue and, in any event, that issue always lay at the periphery of the

45. E.g., see <http://www.solitairegames.com>, a website devoted to the sale of computer solitaire games that run on Windows computers. In addition, <http://www.amazon.com> lists more than 100 different computer solitaire games.

46. On these requirements of U.S. tying law see volumes 9 & 10 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, Ch. 17 (2d ed. 2005), especially ¶1720.

government's theory. The principal concern of the United States *Microsoft* decision was Microsoft's restraints on innovation that threatened to offer competition to Microsoft in its primary market, which is for computer operating systems.⁴⁷ By contrast, the principal concern of the EU case was Microsoft's attempts to leverage the power it held in its primary market into secondary markets.

In sum, it is not really correct to say that leveraging is more important in the EU competition law structure than it is under United States antitrust law. If the agreement can be characterized as traditional tying the historical United States position is in fact more aggressive than the EU position because the EU requires real foreclosure and does not generally apply our unique per se tying rule, which can condemn completely non-foreclosing ties. By contrast, as soon as no contract is apparent and the firm's conduct must be regarded as unilateral, then the absence of any "abuse" language in our monopolization provision precludes leveraging claims unless monopoly is threatened in the secondary market.

Or to say this somewhat differently, in the United States our tradition contains a rather overly aggressive leveraging theory when the conduct in question involves a contractual tie, but a much more tolerant approach when the conduct is deemed to be unilateral. It is also worth noting that the question whether or not a contract exists seems much less important under the EU approach than under ours, and I believe the EU approach is superior in that regard. As with many vertical arrangements, very little turns on whether the defendant was acting unilaterally or pursuant to an agreement.

What seems not to be very well worked out in EU law is the degree of harm in the secondary market that is necessary to support this leveraging offense. In nearly all the cases in which the doctrine has been applied the injury in the secondary market has been very substantial, leading to substantial competitor foreclosure in that market. The DG Discussion draft places great emphasis on foreclosure in the secondary market.⁴⁸ Other leading "leverage" cases such as *Tetra-Pak*,⁴⁹ while not explicitly

47. See Herbert Hovenkamp, *Restraints on Innovation*, 29 *Cardozo L.Rev.* 247 (2007).

48. See DG Discussion Paper, ' 8.2.3:

The main direct anticompetitive effect of tying and bundling is possible foreclosure on the market of the tied product.¹²¹ In principle, the assessment of the foreclosure effect on the tied market can be considered to consist of two parts. First, to establish which customers are "tied" in the sense that competitors to the dominant company cannot compete for their business. Second, to establish whether these customers "add up" to a sufficient part of the market being tied. However, an overall assessment of the likely foreclosure effect of the tying or bundling practice will be made, which will combine an analysis of the practice, its application in the market, and the strength of the dominant position. The elements described below therefore cannot be applied in a mechanical way. Where the Commission on the basis of the elements described below finds that the dominant company ties a sufficient part of the market, the Commission is likely to reach the rebuttable conclusion that the tying practice has a market distorting foreclosure effect and thus constitutes an abuse of dominant position.

requiring that the defendant achieve dominance in the secondary market,⁵⁰ clearly involved significant market foreclosure there.⁵¹ About the most that can be said is that EU law might be somewhat less strict than U.S. law in requiring a "dangerous probability" that the secondary market will be monopolized.

Leveraging and the Microsoft Decision in the CFI

The 2007 decision of the Court of First Instance in *Microsoft* pursues this issue further, although to an outside observer it does not seem to depart noticeably from existing European law.⁵² The central issues were the refusal to supply rival producers of server group software with interoperability protocols necessary for them to work properly with Microsoft's Windows operating system for PCs; and also Microsoft's tying of its Windows Media Player to the Windows operating system.⁵³ Both cases involve traditional leverage concerns -- namely, the use of market power in a dominated market in order to cause some kind of injury in a secondary market.

Leveraging as Unilateral Refusal to Deal

With respect to the claim involving servers, the principal difference with United States law appears not to be the degree of impact in the secondary market, but rather compulsory dealing requirements. While United States law has historically embraced tying as a form of improper leverage, it has not generally embraced the concept that a

A footnote provides similar analysis for minimum purchase requirements and loyalty rebates. *Id.*, n. 118.

49. In particular, Case 333/94 P, *Tetra Pak Int'l SA v. Commission*, 1997 All ER (EC) 4 (1996) (*Tetra Pak II*).

50. This was the conclusion with respect to the non-aseptic portion of the market.

51. See *Tetra Pak II*, 1997 All ER (EC) 4, P 105. See also Commission Decision 92/163/EEC, 1991 O.J. (L 72) 1, 22. See also this conclusion in the CFI:

Tetra Pak's practices on the non-aseptic markets are liable to be caught by Article 86 of the Treaty without it being necessary to establish the existence of a dominant position on those markets taken in isolation, since that undertaking's leading position on the non-aseptic markets, combined with the close associative links between those markets and the aseptic markets, gave Tetra Pak freedom of conduct compared with the other economic operators on the non-aseptic markets, such as to impose on it a special responsibility under Article 86 to maintain genuine undistorted competition on those markets.

Case T-83/91, *Tetra Pak Int'l SA v. Commission*, 1994 E.C.R. II-755, II-816-17 (Ct. First Instance 1994).

52. Case T201/04, *Microsoft Corp.* CFI (Sep. 17, 2007).

53. See *id.*, ¶¶ 792-989,

mere refusal to deal is a leveraging offense. For example, in its *Trinko* decision, which involved a refusal to deal, the United States Supreme Court expressly refused to apply any theory of monopoly leveraging, stating two things. First, it held that the leveraging theory presupposes that there be a dangerous probability of success in creating a monopoly in a second market. Second, it held, that leveraging "presupposes anticompetitive conduct," and in this particular case the conduct "could only be the refusal-to-deal claim we have rejected."⁵⁴

The tone of the *Trinko* opinion is very different from that of the Court of First Instance in *Microsoft*. However, there are also important differences in the facts and the regulatory environment. First, in *Trinko* an elaborate body of telecommunications law required Verizon to make the interconnections at issue and the plaintiff was attempting to use the antitrust laws to create a treble-damages antitrust violation out of a regulatory requirement that was already established. Second, in *Microsoft* there was a long history of voluntary dealing between the parties, while the Court in *Trinko* made clear that there had never been voluntary dealing in that case. That places the *Microsoft* case somewhere between the U.S. *Trinko* decision and our *Aspen* decision, which held that the termination of a joint venture that had been voluntarily entered was unlawful.⁵⁵ This is hardly a prediction that our current Supreme Court would come out the same way on the server issue that the CFI did, but in the case of a lacuna in the law and a clear injury to competition a United States court might see the situation differently than the *Trinko* court did. Indeed, the Court of First Instance noted the Commission's claim that Microsoft's currently deficient provision of server software protocols constituted "a disruption of previous, higher levels of supply."⁵⁶ This would seem to bring the case somewhat closer to *Aspen* than to *Trinko*. It should also be noted that the *Trinko* decision purported to qualify, but not to overrule, *Aspen*.

On the question of injury in the secondary market, the CFI found that the refusal threatened the virtual elimination of competition there.⁵⁷ It wrote:

... What matters, for the purpose of establishing an infringement of Article 82 EC, is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market. It must be made clear that the fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such

54. *Verizon Communications, Inc. v. Law Offices of Curtis Trinko, LLP*, 540 U.S. 398, 415 n.4 (2004).

55. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

56. *Microsoft*, ¶ 41, referring to Commission recitals &&578-584.

57. *Microsoft*, ¶¶ 560-561.

competition.⁵⁸

Further, the Court of First Instance held, the Commission was justified in acting before the complete elimination of competition actually occurred because if it did the situation would be very difficult to reverse.⁵⁹

Given a market with (1) very strong network effects, (2) a history in which the dominant firm participated actively and voluntarily with others in developing a relationship involving network dependency, and (3) subsequently holding back on information in order to eliminate or marginalize the firms in such a relationship, I cannot state categorically that United States law would not come to the same conclusion. It must always be kept in mind that Microsoft never simply placed a product on the market and sold it on a take it or leave it basis. Its entire survival and growth has rested on its ability to share information with hundreds of other firms offering complementary products. These firms have in many cases come into existence, developed and grown in reliance on these sharing protocols. But the benefits are very much a two way street. Other firms need Microsoft, but Microsoft has the position it has because it is able to coordinate in network fashion the output of numerous producers.

Leveraging as Tying

The EU claim against Microsoft regarding the tying of Windows Media Player is in fact very consistent with traditional tying principles in the United States. Although the tie is technological rather than contractual, the EU law tends to regard that as a mere detail, which seems quite proper. Although, United States law is beginning to move away from the overly aggressive tying principles that it once adopted, this movement would not seem to affect the important issues in the *Microsoft* decision.

Tying in the United States has been understood since the early twentieth century as a "leveraging" offense. The early conception, developed by Justice Brandeis in the 1931 *Carbice* decision was that a patent monopolist could use tying to acquire a second monopoly in a tied product and then earn two monopoly profits instead of one.⁶⁰

58. *Id.*, ¶ 563.

59. *Microsoft*, ¶562.

60. *Carbice Corp. v. American Patents Development Corp.*, 283 U.S. 27, 31-32 (1931), writing that tying enables:

the patent-owner to "derive its profit, not from the invention on which the law gives it a monopoly, but from the unpatented supplies with which it is used" [and which are] "wholly without the scope of the patent monopoly."... If a monopoly could be so expanded, the owner of a patent for a product might conceivably monopolize the commerce in a large part of the unpatented materials used in its manufacture. The owner of a patent for a machine might thereby secure a partial monopoly on the unpatented supplies consumed in its operation.

This theory was defective on its face, particularly in light of the fact that the tying arrangement at issue in *Carbice* involved an old fashioned refrigerator box as the tying product and common dry ice as the tied product -- something over which no one could ever hope to achieve dominance. The theory was completely exploded by early Chicago School critics, who observed that a single monopolist in a distribution chain can earn all the monopoly profits available in that chain and cannot earn more simply by acquiring a second monopoly.⁶¹ The monopolist of the ice box cannot earn more by obtaining a second monopoly over the ice.⁶² Some antitrust commentators, such as Robert H. Bork, wrote as if the destruction of the classical leverage theory removed all economic objections to tying.⁶³

Tying law has persisted in the United States notwithstanding these critiques. Today I think it is fair to say that the centrist position believes that while Justice Brandeis' decision significantly exaggerated the competitive harms, particularly in the tying of a common commodity, the classical Chicago Approach understates the concerns. Competitive harm can result in the presence of serious power in the primary market and a significant risk of foreclosure in the secondary market.⁶⁴

61. E.g., Ward Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L.J. 19 (1957). For a recent decision expressing this view, see Judge Easterbrook's decision in *Schor v. Abbott Laboratories*, 457 F.3d 608, 611-612 (7th Cir. July 26, 2006),

The basic point is that a firm that monopolizes some essential component of a treatment (or product or service) can extract the whole monopoly profit by charging a suitable price for the component alone. If the monopolist gets control of another component as well and tries to jack up the price of that item, the effect is the same as setting an excessive price for the monopolized component. The monopolist can take its profit just once; an effort to do more makes it worse off and is self-detering.

62. To be sure, a primary level monopolist can earn more by vertically integrating into a *non*-competitive market. But the result will also be lower prices for customers and higher output from the elimination of double marginalization. See 3B Antitrust Law ¶758 (3d ed. 2008); 4A Antitrust Law ¶ 1022 (3d ed. 2009).

A very common explanation for this form of leveraging is price discrimination, particularly when the secondary good is used by different users in different proportions. See 3A Antitrust Law ¶ 721 (3d ed. 2008) (monopolization); 9 Antitrust Law ¶1711 (tying) However, most such uses of tying or equivalent leveraging devices are probably welfare increasing. Further, their profitability does not depend on excluding anyone. Indeed, they are most likely to exclude when they result in lower effective prices to high elasticity customers, and thus increase output.

On recent attempts to revise the leverage theory and why they have failed, see Erik N. Hovenkamp & Herbert Hovenkamp, Tying Arrangements and Antitrust Harm, ___ Ariz. L.Rev. ___ (2010), in press, currently available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443284

63. Robert H. Bork, The Antitrust Paradox: a Policy at War with Itself 365-381 (1978).

64. This is generally the position of Volumes 9 & 10 of *Antitrust Law*.

Formally today, tying is condemned in the United States under a rather odd *per se* rule when the defendant has (1) sufficient market power in the tying product; (2) engages in tying of (3) separate products; and (4) affects a not-insubstantial amount of commerce. The most important qualifications on this theory are *Jefferson Parish*, which held that a 30% market share in an unpatented tying product is inadequate to establish power;⁶⁵ and the *Illinois Tool* decision in 2006, which overruled earlier decisions creating a presumption of sufficient market power in the tying product if it was patented or copyrighted.⁶⁶ Finally, our own *Microsoft* decision rejected the classical *per se* rule and adopted a rule of reason for ties involving computer operating systems.⁶⁷

None of these decisions qualifying tying doctrine in the United States would serve to produce a different outcome on the Media Player tie. First, market power in the tying product seems quite overwhelming on conventional grounds and is hardly being presumed from Microsoft's intellectual property. Second, the Commission found, and the CFI agreed, that all of the traditional indicia of competitive harm in the secondary market were present in this case. So Microsoft would very likely have lost the tying case in the United States as well under existing law. Any hesitancy about saying that categorically derives not from ambiguities in the existing law, but rather because the Supreme Court has consistently stepped back from the broadest implications of its traditional tying doctrine, and a new Microsoft tying case might give them an impetus to go further in that direction. Nevertheless, the fact is that the D.C. Circuit court of appeals, which is probably as non-interventionist on these issues as the Supreme Court is, did not dismiss the government's tying claims. To the contrary, it affirmed liability under ' 2 on a "commingling" theory that involved the forced combination of Windows and Internet Explorer, and it remanded the traditional tying claim for further inquiry into the question of competitive effects.⁶⁸

In any event today we recognize far more robust alternatives that survive the Chicago School leveraging critique, particularly in network industries.⁶⁹ This is

65. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

66. *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006), overruling *International Salt Co. v. United States*, 332 U.S. 392 (1947) (presuming market power from patented tying product); *United States v. Loew's Inc.*, 371 U.S. 38 (1962) (presuming market power from copyrighted tying product).

67. *United States v. Microsoft Corp.*, 253 F.3d 34, 85-88 (D.C. Cir. 2001), cert. denied, 534 U.S. 952 (2001). See Herbert Hovenkamp, IP Ties and Microsoft's Rule of Reason, 47 Antitrust Bull. 369 (2002).

68. *Microsoft*, 253 F.3d at 89.

69. See Roger D. Blair & David Kaserman, Vertical Integration, Tying, and Alternative Vertical Control Mechanisms, 20 Conn. L.Rev. 523, 529-530, 538-540 (1988). Cf. Mark A. Lemley & David McGowan, Legal Implications of Network Economic Effects, 86 Calif. L. Rev. 479 (1998); Michael L. Katz & Carl Shapiro, Network Externalities, Competition, and Compatibility, 75 Am. Econ. Rev. 424 (1985).

particularly true when technology is evolving and the monopolist uses leveraging to ensure that the new technology will be its own monopoly as well, rather than competitive or a monopoly owned by someone else. For example, Microsoft's bundling of Internet Explorer with Windows was manifestly not a mechanism by which Microsoft hoped to earn two monopoly profits, one on Windows and one on Internet Explorer. Rather, it was a way of ensuring that the platform market would not become competitive as technology permitted an evolution toward web-based rather than workstation-based programs and multi-platform communications capabilities that threatened to make Windows one among many platforms.

So leverage theories have not gone away, and today so-called "post-Chicago" scholarship has produced an array of them.⁷⁰ Indeed, I believe it is fair to say that the leverage theory in some form will always be a viable part of the U.S. antitrust policy and remains a fruitful area of expansion. A case in point is the recent attention given to practices such as bundled discounts, where the gravamen of the offense is typically that the dominant firm aggregates within its discount both dominant and non-dominant goods, seeking to increase its position in the latter.⁷¹ Leverage also continues to play a prominent role in antitrust or "misuse" litigation involving intellectual property rights, where the claim is often that the defendant is attempting to use a contractual provision or other practice to enlarge the scope of an IP right, or perhaps to "sequester," or deny public access, to goods or information that are rightfully in the public domain.⁷²

Whatever one makes of these theories, however, the Sherman Act does not prohibit conduct unless it creates or threatens to create a monopoly. That threat may concern either the monopolist's primary market or else some secondary market, but nevertheless it must be a real threat. At the same time, however, the point should not be pushed too far. After all both the district court and the D.C. Circuit ended up condemning Microsoft's "commingling" of platform and browser code, and without the benefit of any "leveraging" theory, which had been removed by the district judge at an earlier stage. The fact is that the modern uses of leveraging in rapidly evolving market

70. On this point see Herbert Hovenkamp *Post-Chicago Antitrust: A Review and Critique*, 2001 *Columbia Business Law Review* 257 (2001).

71. E.g., *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008) (adopting a cost-based test for bundled discounts); *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc), cert. denied, 542 U.S. 953 (2004) (condemning bundled discount without an inquiry into cost). See 3A Areeda & Hovenkamp, *Antitrust Law* ¶749 (3d ed. 2008).

72. E.g., *Assessment Technologies v. Wiredata, Inc.*, 350 F.3d 640 (7th Cir. 2003); 361 F.3d 434 (7th Cir. 2004) (condemning use of copyrighted database in which defendant had a dominant position so as to "sequester" public domain information contained in the database). See also *Chamberlain Group v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) (refusing to construe Digital Millennium Copyright Act so as to permit garage door manufacturer to deny access to uncopyrighted information necessary for making a universal remote control, where such a denial would otherwise constitute copyright misuse).

typically do involve situations where the monopolist is either trying to dominate a second market or -- as in the United States *Microsoft* decision -- is trying to maintain its monopoly in its primary market against a technological challenge from a secondary market. But this makes it a typical "monopoly maintenance" case, which has been in the heart of ' 2 litigation for decades.

Conclusion

The language of EU and U.S. provisions concerning dominant firms provokes one to think that the differences between them are significant. The Sherman Act includes an express attempt to monopolize claim while Article 82 does not. Article 82's "abuse of dominance" language invites in a concept of non-monopolistic leveraging while the U.S. antitrust law is moving in the opposite direction.

In practice, the differences are not so great, although they should not be minimized either. Further, when one looks at the full range of competition laws and not just the provisions respecting unilateral conduct by dominant firms, then the differences appear to result more from the happenstance of statutory drafting than from significant differences concerning the scope of unlawful single-firm conduct.