RESPONSE OF UNITED STATES GROUP

Question A: Abuse of a Dominant Position and Globalization

This year’s Question A illuminates especially well how the common law-based US antitrust system fundamentally differs from code-based competition law systems operating in most civil law countries. American antitrust was born out of a broad political concern for the negative effects of extreme dominance, namely monopoly power. In the famous Sherman Act 1890, Congress made it offense for an enterprise to “monopolize” a market, or to attempt or conspire to do so—but leaving it to the federal courts to give meaning and content to the “monopolize” concept and to define appropriate remedies for engaging in it.

For the next 125 years, the US Supreme Court and the lower federal courts have done exactly that, but not in ways that have been particularly consistent over time. For at least the first 80 years, the basic assumption was that monopolization was at heart a structural offense, and the appropriate remedy was structural, i.e., to break the monopolist up by judicially ordered divestitures. Monopoly cases were huge litigations that were few and far between, but the ultimate result was to break up some of America’s largest companies (running from Standard Oil in 1911 to American Telephone & Telegraph Company in 1982).

Since the 1980s, the judicial focus has largely changed, so that monopolization has come to be regarded more as a regulatory offense for which the appropriate remedy is an injunction against the dominant company continuing its offending conduct. Moreover, the Federal Trade Commission ("FTC") has become much more involved in pursuing monopolization claims in modern times, but it has never sought a divestiture remedy. The United States also differs from other countries, because neither the FTC nor a federal court (acting in a case brought by the Department of Justice ("DOJ")) has the authority to levy civil fines for monopoly infringements.

The basic change toward a more regulatory approach to monopolistic conduct has occurred without any new legislation being enacted by Congress. However, it has generated debate and some disagreement within the American antitrust community (and even within the US LIDC group).

Today’s prevailing judicial opinions, from the Supreme Court and many of the lower courts, reflect a recurring concern that over-enforcement of antimonopoly rules would deter innovators and investors in dynamic markets which are so important to a modern economy. Thus the government prosecutions and decided cases have moved away from structural considerations and divestitures, towards tailored
conduct restrictions. In some sense, this moves American antitrust enforcement away from (i) a courthouse-centered litigation process and closer to (ii) a more agency-centered process of dialogue and negotiated settlements, subject to limited of judicial review.

As this growing quasi-regulatory state expands through law enforcement processes at the Department of Justice and the Federal Trade Commission, critics question the caution of these agencies in bringing (few) cases and framing remedies. Opponents point to the unequal treatment of industries, such as finance, and the lack of transparency in US agencies administrative processes. In response to Question A, the American group will compare these two contrasting views any time that they are relevant to a particular question asked by the International Reporter.

**Is there any consistency between the recent approaches of the different jurisdictions to the notion of abuse?**

The US antitrust approach to dominant firm conduct differs from the rest of the world because it tends to be limited to exclusionary conduct and appears to be a lower priority for government enforcement action. (Exploitive conduct is dealt with by sectorial regulators, if at all.)

Thus, European competition authorities and their political supporters are committed to using competition law to curb abusive and exclusionary activity conduct by dominant firms, while the American consensus and enforcement focus only on only exclusionary conduct and not very frequently on that. American enforcers and judges are much more cautious because of concerns about the potential impact of anti-monopoly enforcement on risk-taking, innovation and investment, by aggressive competitors that prove successful (such as Intel and Google).

This global antitrust divergence is important and has both positive and negative dimensions. Its practical consequences are magnified today because both enterprises and enforcers operate in a global economy—where actions and their competitive effects flow across oceans and borders with increasing ease. Thus there are increasing risks that anti-monopoly prohibitions in one jurisdiction may have global effects in other jurisdictions where the prohibited conduct would be permitted, or even encouraged.

**Are there too many restrictions on legal rights and business opportunities?**

Particularly when compared to the rest of the world, the US has far fewer antitrust-imposed restrictions on business opportunities for dominant firms due to its narrower approach to what constitutes market dominance, enforcement caution by government agencies, and a high bar for private monopolization or other abuse suits.
Moreover, US antitrust law often does not, yet, highly account for a growing concern over local administrative monopolies and state-sanctioned barriers to entry in local markets like taxis and hairdressers and other small businesses. See *Parker v. Brown*, 317 US 341 (1943) (no antitrust jurisdiction over a state-sponsored marketing cartel for raisin growers). Thus the restrictions on business opportunities, that, might be considered barriers to entry occurring within markets due to a lack of anti-monopoly enforcement against entry-retarding regulation by industry dominated regulators at the state level. But see also the FTC’s recent Supreme Court victory in *North Carolina State Board of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015) (allowing antitrust injunction against an anti-entry rule promulgated by a state regulatory body made up of practicing dentists). State and local licensing of occupations is very widespread in the U.S. economy.

A question of “too many restrictions” begs a question of an appropriate balance between restrictions to preserve competition and lack of restrictions to promote innovation, but the premise of this question contains many assumptions. The first assumption is that may or may not be true is that legal restrictions necessarily harm innovation or markets as opposed to sometimes creating space for innovation.

But even beyond new business starts, there is a contingent in the US business community that indeed continues to argue that any antitrust enforcement is too much, and Sherman Act Section 2 authority remains contentious, particular in terms of definitions of dominance.

Despite this criticism pushing for fewer restrictions, US jurists and enforcers have been increasingly cautious in anti-monopoly enforcement for over 30 years. They have tended to focus exclusively on the incentives and risk-taking by a monopolist, without adequate concern for the incentives and risk-taking by enterprises in the dependent markets where access, interconnection, or spare parts may be required. “Efficiency” justifications, stemming from the consumer welfare revolution in the early 1980s, are generally considered and sometimes accepted a reason for a non-enforcement decision.

As far back as 1944 before many of the modern elements of antitrust were developed with new economic perspectives, a famous US jurist, Judge Learned Hand, wrote, while imposing Section 2 liability in the 1944 *Alcoa* decision: “A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry….The successful competitor, having been urged to compete, must not be turned out when he wins.” *United States v Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945) (a landmark decision on Sherman Act Section 2 liability).
To the extent that there has been 21st Century criticism in the US about anti-monopoly enforcement unreasonably restricting business rights and opportunities, it has largely been directed against EU enforcement against US innovation-based monopolies (Microsoft, Intel, Google, etc.) as the US largely abandoned efforts to curb monopolies after aborting efforts against Microsoft throughout the 2000, as highlighted below. At the same time, it has been well recognized that these European cases have very often been based on investigations triggered by complaints from the American target’s US rivals.

**NATIONAL REPORT FOR THE UNITED STATES**

1. Introduction

This American concern about over-enforcement against successful monopolists has become more consistent and stronger in modern times. It has been particularly articulated by the enforcers and judges appointed by the Reagan and Bush Administrations that have dominated the Federal Government during so much of the last three decades.

The DOJ has opened very few monopoly investigations since it won Microsoft before the Court of Appeals in 2001 and has not brought any significant new Section 2 case. The Bush Administration actively chose to curtail and limit relief in Microsoft, against the opposition of several State Attorney’s General, after DOJ had essentially won on the merits in the DC Circuit Court of Appeals.1 The DOJ’s 2008 white paper on Sherman Section 2 was basically an apologia for not bringing the kinds of cases; it was summarily withdrawn by the new Obama Administration in 2009, but the new Administration has brought no new Section 2 cases of its own.

The “independent” FTC has been less hostile to Section 2 claims. Back in 2008, a majority of the FTC Commissioners publicly dissented from DOJ’s Section 2 white paper advocating a considerably narrower role for Section 2 law and its enforcement,2 and the Commission publicly disassociated itself from DOJ’s successful effort to get the Supreme Court to review (and then ultimately reverse) the established “price squeeze” liability under Section 2.3 During the Obama Administration, the Commission has also

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1 United States v Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
3 See infra Section 5.3 (a), discussion of the two agencies' different positions in Pacific Bell Telephone Co. v LinkLine Communications, No. 07-512. The FTC declined to join the DOJ recommendation that the Supreme Court review the Ninth Circuit’s decision in linkLine Comms’ns, Inc v SBC Cal, Inc, 503 F3d 876 (2007), cert granted, 128 S Ct 2957 (2008). The FTC’s 23 May 2008 press release and statement is available at www.ftc.gov/opa/2008/05/linkline.shtml.
been more active than DOJ in pursuing cases based on Section 2 principles—with most of its efforts directed at "patent ambushes" in standards making and "payments for delayed entry" in patented drugs. This ultimately resulted in a Commission pay-for-delay victory, though not an easily applied ruling, from the Supreme Court in *FTC v. Actavis.*

(a) Statutory Provision

Section 2 of the Sherman Act is short and simple: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...."

The original statute treated a Section 2 violation as a misdemeanor, but this was increased to a felony in 1974. However, DOJ has not brought a criminal charge since the felony power was added, and very few criminal charges had ever brought before that. Instead, Section 2 has always been used as a civil statute, making possible government claims for injunctive order (including divestiture) and private claims for damages and injunctions.

Section 2 of the Sherman Act covers three distinct offenses:

(1) monopolization;

(2) attempted monopolization; and

(3) conspiracy to monopolize.

Monopoly under Section 2 requires two elements: "(i) the possession of monopoly power in the relevant market and (ii) the willful acquisition or maintenance of that power..." To prove attempted monopolization, the plaintiff must demonstrate "...(A) that the defendant has engaged in predatory or anticompetitive conduct with (B) a specific intent to monopolize and (C) a dangerous probability of achieving monopoly power." To show conspiracy to monopolize requires proof of concerted action, like a Section I cartel violation, and intent to achieve a monopoly, however, it is not necessary to prove the defendants actual possess monopoly power.

To reach conduct under Section 2 it is necessary to show that the defendant "already possess monopoly power or have a dangerous probability of achieving

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monopoly power." To demonstrate monopoly power a plaintiff must show both a dominant share of the relevant market (or in the case of attempted monopolization high probability of obtaining it) and entry barriers that permit the firm to exercise that power for a substantial amount of time.\(^9\)

"A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical, profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant."\(^10\)

(b) No list of prohibited practices in statute

The drafters of the Sherman Act clearly intended to create a common law system of antitrust enforcement (rather than a code-centered administrative system). We know this because they did not create rules or definitions to flesh out the law. Generalist federal judges applying the undefined concept of "monopolization" were left with huge discretion in defining legal wrongs in pragmatic terms. Both the Federal Government and private parties were given broad rights of enforcement, with private plaintiffs being offered extra bounties—in the form of treble damages and one-way cost recovery—to encourage their participation. Many of the most far-reaching US antitrust precedents have been created in earlier Government victories.\(^11\) Today, private antitrust plaintiffs have been generating negative precedents narrowing the scope of Section liability,\(^12\) precedents which are of course binding on the Government as well.\(^13\)

(c) Origin of the rule prohibiting anticompetitive unilateral conduct?

The interpretation and use of unilateral conducted has shifted significantly over time. The Sherman Antitrust Act was enacted in 1890. At the end of the 1800s powerful corporations had emerged as monopolies in the US dominating commodity markets and

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\(^9\) See W. Parcel Express v. UPS, 190 F.3d 974, 975 (9th Cir. 1999); Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 622-23 (6th Cir. 1999).


\(^13\) Because few Government investigations now end up in trials, the DOJ/FTC role in Section 2 area has increasingly become that of amicus curiae supporting the defendants in private cases (as they did in Trinko, Weyerhauser, and LinkLine during the past decade), as discussed in Section 5.3(a) below.
abusing the nascent patent system to create new monopolies. These companies were able to acquire excessive profits by charging monopoly prices. Several states passed laws to curb this behavior, but they were unable to hold the line when a few states, like New Jersey, chose to forgo the collective enforcement approach in favor of permissive corporate laws to lure tax paying firms.

The Sherman Act was the first federal US law to regulate these firms. The Sherman Act was initially of limited success. The Supreme Court declined to apply the Act to manufacturing. But in the early 1900s Presidents Taft and Roosevelt used the Act herald the era of “trust busting”. But this generated considerable public debate which turned out to be central to the 1912 Presidential campaign (where Woodrow Wilson prevailed against Roosevelt and Taft in a unique three-way election). As a result, Congress enacted the Clayton Act of 1914, to spell out clearer legal standards for corporate acquisition. Congress also established the FTC was to establish guidelines and investigate general unfair trade practices. President Wilson's principal advisor in formulating these measures was a reformist Boston lawyer, Louis Brandeis, whom Wilson would nominate in 1916 to the Supreme Court (where he would serve for 23 years as an important source of antitrust opinions).

The historic goal of Section 2 of the Sherman Act was to break up or curb excessive power which was seen as potentially having a wide range economic and social effects. "The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power." However, more recently the Supreme Court has outlined particular common law definitions of the purposes of Section 2 of the Sherman Act:

"[It] 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. It does so not out of solicitude for private concerns but out of concern for the public interest."  

What this boils down to is a mantra that US antitrust laws do not protect rivals against vigorous competition. "The antitrust laws are for the benefit of competition, not competitors." As for the definition of what best benefits competition, that remains both

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14 United States v. E. C. Knight Co., 156 US 1, 15 S. Ct. 249, 39 L. Ed. 325 (1895)
17 Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.).
an economic and political question that changes, slowly, depending on the prevailing political winds at DOJ and in the Courts.

Under the Supreme Court decisions of the 2000s, American law openly says that monopolists deserve the monopoly rents they receive for their assumed innovation and hard work. The legal assumption is that consumers benefit when less efficient firms are removed from the marketplace. Critics are increasingly questioning this interpretation, but it continues to be a central theme of modern antitrust.

A final, recently adopted principal of how the Sherman Act is enforced to avoid burdening business with the threat of litigation for fear of chilling competition and stifling innovation. This is takes what in an earlier era was an interest in ensuring that antitrust laws were clear, articulate, and consistently applied to a new, anti-antitrust level. There is a growing believe that antitrust laws can be hard to implement and some of the same conduct that raises concerns can also be the functioning of an efficient market place. Under this belief the current Supreme Court has reasoned that the "cost of false positives counsels against an undue expansion of § 2 liability."\(^{18}\)

(d) Other legal rules that prohibit practices similar to those prohibited by the competition rule.

The US has long had had a tradition of providing parallel regulation of what were believed to be monopolistic or competitively critical industry by a specialized agency. This originated with Interstate Commerce Act of 1887 (i.e., three years before the Sherman Act), which entrusted with supervision of railroad rates and practices by the Interstate Commerce Commission, a multi-member panel of commissioners who were appointed for fixed terms of years to encourage them to be independent. This was followed by the Federal Communications Act of 1934, creating elaborate systems of regulation for telephone companies, broadcasters and other wireless spectrum users. The wholesale activities of electricity and natural gas suppliers were regulated by the Federal Power Commission (now the Federal Energy Regulatory Commission ("FERC")), while retail rates that consumers pay were left to be regulated by state-created public utility commissions. Numerous other examples occurred in securities, banking, and other markets. The most recent example is Dodd–Frank Wall Street Reform and Consumer Protection Act enacted in 2010\(^{19}\) in response to the 2008 Financial Crisis. It created the Financial Consumer Protection Board to enforce a variety of rules directed at banks and other financial intermediaries; and it provided rate regulation of interchange fees on debit card transactions by the Federal Reserve Board.

\(^{18}\) *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398, 414 (2004), ("Trinko").

\(^{19}\) Pub.L. 111–203, H.R. 4173
The extent to which these various sectoral regulation schemes displace antitrust jurisdiction entirely has been heavily litigated over the years, producing a patchwork of decisions based on both the statutes and the particular practices at issue. However, the modern trend has been for the Supreme Court to find that the regulatory remedy is exclusive.\(^\text{20}\)

2. Definition of 'Abuse'

(a) No definition of 'abuse' in the legislation.

(b) No definition of 'abuse' provided by the competition authorities.

(c) No single definition of 'abuse' provided by the case law.

3. Exploitative and Exclusionary Abuse

(a) Is there a distinction between exploitative and exclusionary abuse?

Today there is almost no debate in the US over whether Section 2 could be an appropriate or effective tool to regulate *exploitative abuses* by dominant firms (e.g., excessive pricing or refusals to deal with competitors in most dependent markets). Rather in the US it is just assumed that, when government control over monopoly is needed, this must be a task for some sectorial regulator. This basic political assumption underlies the difference between the United States and Europe (and indeed most of the rest of the world) in dealing with dominant firms. It is driven by history and culture—and by the central role given to private plaintiffs in the US antitrust system combined with the open-ended prohibition contained in Section 2.

(b) The decisional practice of the competition authorities.

The narrow (or almost non-existent) US approach to exploitative abuse is illuminated by the controversial *Rambus* saga concerning an alleged “patent ambush” in a standards making process for computer chips. Rambus was investigated and then charged by the FTC with misleading a standards setting organization (“SSO”) about its potential patent position and thus creating the opportunity for it to charge very high royalties when the adopted standard required use of Rambus’ intellectual property (IP). In finding that this “patent ambush” constituted a Section 2 violation, the Commission concluded that, had the SSO been properly informed, it would have either (1) adopted

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an alternative standard not requiring Rambus’ IP, or (2) insisted that Rambus agree to license its IP on fair, reasonable and non-discriminatory terms (“FRAND”).21

(c) Exploitative and exclusionary abuse in the case law.

On appeal in the Rambus, the D.C. Circuit Court of Appeals reversed the FTC finding of liability.22 It held the FTC’s “either/or” finding did not provide the necessary basis for a Section 2 violation. Citing Trinko, the court held that Rambus being able to charge higher than FRAND royalties was not exclusionary and hence overcharging standard-mandated licensees was not a Section 2 violation.23 Causing the SSO to adopt a standard that it would not have otherwise adopted was treated by the Court of Appeals as being exclusionary; but the Commission had only found that this was one of two potential alternatives and such a disjunctive conclusion was not dispositive of the issue.

Prevailing law in the US finds that monopoly power that exists for only a short time is not at this time enough to support a claim of monopolization. Simply having monopoly power therefore is not enough to support a Section 2 action. An antitrust violation occurs under US law when a firm uses exclusionary conduct to maintain or build that monopoly. As explained by Justice Scalia:

“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”24

Critics find this interpretation, while administrable, nonetheless overly narrow. Proving exclusionary conduct, which must be exclusionary by intent and show direct harm, is incredibly difficult without access to internal records. But the current rule allows for no middle ground other than clear proof of intent to monopolize. Thus we see the US prosecuting Apple in ebooks for a cartel, but making no direct moves against Amazon for dominate behavior.

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22 Rambus Inc. v FTC, 522 F.3d 456 (D.C. Cir. 2008).
23 Ibid.
24 Trinko, supra n. 18.
4. Price-Based and Non-Price-Based Abuse

US antimonopoly law generally does not draw a distinction between (i) price related unilateral conduct and (ii) non-price based conduct. One exception concerns the so-called “invitation to collude” cases—where a leading market participant invites a major competitor to raise its prices, but the latter declines. In these circumstances, there is no “conspiracy” (which be a felony under Sherman Act Section 1), but there is still reprehensible conduct so far competition is concerned. The question thus becomes: when can this be treated as attempted monopolization under Sherman Act Section 2?

(a) The legal provision prohibiting anticompetitive unilateral conduct.

Section 2 of the Sherman Act, explained in Section 1(a) above

(b) The decisional practice of the competition authorities

For almost 20 years the FTC has alleged that invitations to collude can violate Section 5 of the FTC Act as an unfair method of competition. Section 5 of the Federal Trade Commission Act prohibits “unfair or deceptive acts or practices in or affecting commerce.”

Historically, the FTC has taken a per se approach to invitation to collude and examines the anticompetitive effects of the invitation and the justifications for the conduct. If the FTC feels negatively about the conduct they will challenge the conduct as illegal per se—that is, illegal without a finding (or even an allegation) that the challenged conduct had any actual past or likely future anticompetitive effects. The theory in these cases is that the anticompetitive unilateral conduct has a dangerous propensity to develop into collusion and there is no procompetitive benefit for such conduct. Numerous consent orders demonstrate the FTC’s willingness to bring actions against such conduct.

(c) The case law.

"I think it's dumb as hell for Christ's sake, all right, to sit here and pound the *** out of each other and neither one of us making a ******

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25 15 USC §45.
dime...Raise your goddamn fares twenty percent. I'll raise mine the next morning."²⁷

The above solicitation by Robert Crandall, President of American Airlines, to Howard Putman, President of Braniff Air Lines, was found to be illegal.²⁸ The only successful case against an invitation to collude under the Sherman Act was brought under Section 2. This case was characterized as attempted monopolization, because Putnam (who recorded the conversation) did not accept Crandall's invitation and hence there was no "agreement" necessary to invoke Section I of the Sherman Act. The DOJ's of use attempted monopolization was made possible because the two companies together accounted for a dominant share of the market for air traffic in and out of Dallas-Ft. Worth, Texas. As the court of appeals explained, "...if Putnam had accepted Crandall's offer, the two airlines, at the moment of acceptance, would have acquired monopoly power. At that same moment, the offense of joint monopolization would have been complete."²⁹

5. Enforcement

Plaintiffs in Section 2 actions are one of three types, federal enforcement agencies, state enforcers, or private plaintiffs. Civil remedies include treble damages and injunctive relief. The FTC can bring administrative proceedings under Section 5 of the FTC Act. Section 4 of the Clayton Act allows state enforcers to bring Section 2 claims in federal courts. Private parties may bring Section 2 actions for injunctive relief, treble damages, and attorney's fees.

Enforcement actions by these plaintiffs can be intertwined. Federal actions can be accompanied by state actions. In some cases, private plaintiff actions follow successful federal cases. In addition, agencies can provide amicus briefs in private enforcement actions.

5.1 Decision-Making Practice

(a) By agencies.

DOJ and the FTC have overlapping authority to bring anti-monopoly cases. DOJ used Section 2 of the Sherman Act, while the FTC uses the "unfair competition" prohibition in Section 5 of the Federal Trade Commission Act to bring cases based on

²⁷ US v. American Airlines, Inc., 743 F.2d 1114, 1116 (5th Cir 1984) (Transcript of telephone call between Robert Crandall, President of American Airlines and Howard Putman, President of Braniff Air Lines, regarding competition at the Dallas Fort Worth International Airport, which Putman recorded and turned over to the government).
²⁸ Id.
Section 2 principles. E.g., Because the authority of the agencies overlaps, and complements each other. In some areas, an agency develops an expertise in certain industries. Before an investigation commences, the agencies will agree (sometimes after an acrimonious dialogue) which one will handle a particular case. In general, investigations are non-public. If the agency believes the company has broken the law, the agency can issue a complaint and/or seek to obtain voluntary compliance by negotiation for a consent order. A consent order does not require an admission of guilt, but it does require the company to stop the disputed practice.

It a consent order is not reached, the FTC can issue an administrative complaint and/or seek injunctive relief in federal court (but such an injunction is unlikely to be sought except in a merger case). Administrative complaints initiate a formal proceeding before an administrative law judge. After the proceeding, which can involve evidence, testimony, and witnesses, a decision is reached by the judge. If the defendant is found guilty a cease and desist order would normally be issued. The administrative law judge's decision is appealable to the full Commission. Final decisions of the Commission are then appealable to a US Court of Appeals. In some cases, the FTC can also go directly to federal court for an injunction, civil penalties, or consumer redress.

The FTC can refer a case to the DOJ, the DOJ has the sole ability to obtain criminal sanctions. The DOJ also has jurisdiction over telecommunications companies, banks, railroads, and airlines.

(b) By Courts.

The language of Section 2 of the Sherman Act is broad, leaving it up to the courts to define the concept of monopolization. The courts' analysis has changed over time echoing changes in industry practice, market structure, and economic analysis. The general trend has been to narrow the scope of Section 2 and gives market leaders more freedom to enact business practices.

(c) By Settlements.

Consent decrees have been a popular tool for antitrust enforcement agencies. since the 1980s, more than 90 percent of all civil actions have been settled via consent decree. The consent decree process is driven by the enforcement agencies' desire to use their limited resources to cover more investigation and cases, and the defendants' desire to save litigation costs and avoid prolonged legal uncertainty. The typical consent decree probably involves something less than what the agency might have obtained if it had prevailed through the often long process of litigation and appeal.

What has increasingly been happening in recent years is that consent decrees are being negotiated before any complaint has been issued, whereas in the past the
agency usually issued a complaint to commence the case and then often negotiated a consent decree to resolve the case at some point in the trial process. This has made the whole consent decree process less transparent, because the government's complaint will tend be limited to whatever conduct has been agreed that it would be covered by the settlement.

The 1974 Antitrust Procedures and Penalties Act (Tunney Act), required a federal court to review consent decrees in DOJ antitrust cases to ensure that the agreed remedy is in the "public interest." This provision responded to Congressional concern, arising out of the Watergate crisis, that the White House or lobbyists for a major corporation had been able to successful in persuading DOJ to settle a group of antitrust merger cases brought against the corporation. The statute contemplates that DOJ will submit to the court with its complaint and proposed consent decree a so-called "Competitive Impact Statement", explaining (i) why it agreed to settle the case on the terms that it did, and (ii) what alternatives it considered. The defendant is require to submit a list of its governmental contacts in connection with the case, other than those with the DOJ Antitrust Division.

Many critics and some members of Congress have complained that the federal judges have been routinely approving these antitrust decrees, rather than properly fulfilling their duty to make "public interest" determinations. In response to widespread criticism of the DOJ's 2002 settlement of its Section 2 case against Microsoft, Congress amended the Tunney act in 2004. The amendment was intended to give the judicial a larger role in the approval process and requires more oversight of antitrust consent decrees. Critics claim that the amendments left the process for approval largely unchanged.

5.2 Competent Courts and Authorities

(a) General Courts.

Antitrust enforcement by the DOJ, the state attorneys general, and private plaintiffs is before the US District Courts. Claims for damages (which can be brought by public bodies and private plaintiffs) are normal tried before juries. Requests for injunctions or other equitable relief are tried by a judge sitting alone (and these include FTC requests to block a pending merger).

Appeals from District Court decisions and FTC administrative orders are normally heard by one of the 12 regional Circuit Courts of Appeals. Three judges hear the normal
appeal, but occasionally there is an en banc review by all the active Circuit Judges in the particular court (as happened in US v. Microsoft).\(^{30}\)

(b) Specialist Courts.

In 1982 Congress created the Court of Appeals for the Federal Circuit. The Federal Circuit is located in Washington, D.C. and has exclusive jurisdiction over certain types of appeals, including patent cases. Patent appeals from District Courts proceed directly to the Federal Circuit regardless of where the District that heard the case was located. This removes the issue of circuit splits that can arise in other antitrust issues and was intended to provide more consistency and reliability of patent law (and Federal Circuit decisions have turned out to be somewhat more favorable to patent owners that regional courts of appeals had been). Federal Circuit decisions can be appealed only to the Supreme Court.

(c) Sectorial Regulators

The sectorial regulators (FCC, Federal Reserve, FERC, etc...) have authority (which they seldom use) to enforce Section 7 of the Clayton Act (prohibiting anticompetitive mergers), and they are thus in a position help prevent the creation of monopolies using this provision or their “public interest” authority under their own authorizing statutes, however, they do not have authority to enforce the monopolization provisions of Section 2.

(d) Guidelines.

There have been no Guidelines issued in the Section 2 area. In 2008, at the end of the Bush Administration, DOJ issue a long white paper on Section 2 was basically a argument for construing Section 2 more narrowly the Courts had done and an apologia for not having brought any Section 2 cases during it eight years in office.\(^{31}\) It was summarily rejected and withdrawn by the new Obama Administration in 2009,\(^{32}\) but the Obama Administration has since brought no new Section 2 cases of its own to illuminate its presumably broader vision.

5.3 Approaches Followed by Competent Courts and Authorities

(a) Standards of Harm.

\(^{30}\) United States v Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).


During the Bush Administration (2001-2008), DOJ took a narrower view of the scope of Section 2 liability and remedies than most of its predecessors had—and, in the process, DOJ helped widen the gap in anti-monopoly enforcement between the United States and much of the rest of the world (especially the EU).

The Microsoft story is familiar. The Clinton Administration’s DOJ (joined by the Attorney Generals of 19 states) had brought and actively prosecuted the case in the District Court and secured a major Section 2 victory. However, the District Judge then declined to hold a detailed evidentiary hearing on the proper relief in the case. DOJ had sought a broad divestiture order (a remedy which was consistent with the traditional Section 2 jurisprudence), but whether and how such a remedy might be applied in Microsoft presented difficult and important questions of fact and public policy. Instead the Judge found that the Government, having won on the merits, was presumptively entitled to the divestiture relief that it sought. When Microsoft appealed, the DC Circuit sitting en banc sustained most of the District Court’s findings on liability in an important opinion; but on remedy, quite properly, the court reversed the divestiture order and remanded the case for a proper hearing and new order before a new District Judge.

Before any new hearing on relief could occur, the incoming Assistant Attorney General Charles James negotiated a narrow and highly regulatory order that was essentially confined to prohibiting Microsoft’s past conduct that the Court of Appeals had found illegal. In doing so, the DOJ backed away from the more traditional view that a pattern of exclusionary conduct could justify divestiture in a Section 2 case (as illustrated by Supreme Court decisions in Standard Oil, United Shoe Machinery and Grinnell as well as the famous settlement in AT&T). In an industry as dynamic as computer software, DOJ’s narrow consent decree has been widely regarded as someplace between incremental and irrelevant (which is why a number of state AGs, who had supported DOJ, protested the decree, unsuccessfully in the end).

Important as the Microsoft story is, the DOJ’s role as amicus curiae before the Supreme Court during the Bush Administration may well turn out to its more important role in narrowing the practical scope of US enforcement against monopolies. The practical reality is the Supreme Court accepts relatively few of certiorari petitions that are filed with it; and the support (or opposition) of the Government can be very important to the Court’s choice of which cases it decides to hear. During the Bush Administration, the DOJ (in briefs by the Solicitor General) urged the Court to review and reverse most Court of Appeals decisions in favor of Section 2 plaintiffs, and has succeeded in obtaining review and reversal in what are now three major cases.

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34 United States v Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
35 At least one member of the U.S. LIDC Group regards the "regulatory" decree as having been considerably more successful then is widely assumed.

1. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398 (2004) ("Trinko"). The essential issue in the case was whether a monopoly telephone company’s breach of its statutory duty to provide new local competitors with interconnection under the Telecommunications Act of 1996 also breached Section 2 of the Sherman Act, thereby entitling the consumer class plaintiffs to bring a potential treble damages claim. The DOJ (joined by the FTC) firmly said that “...unilateral conduct can violate Section 2 of the Sherman Act...only if it is exclusionary or predatory. In the context of an alleged refusal to assist a rival, conduct is exclusionary only if it would not make business or economic sense.”\(^{36}\) The Supreme Court majority essentially adopted what Government had properly described as “[t]his demanding standard.”

2. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Weyerhaeuser Co. v Ross-Simmons Hardware Lumber Co., 549 U.S. 312 (2007) ("Weyerhaeuser"), which involved competition between a dominant firm and its smaller competitor in purchasing some specialized timber. The “Question Presented” for review was:

"Whether a plaintiff alleging that a defendant engaged in 'predatory bidding' [under] Section 2...must prove that the defendant suffered loss in the short term and that it had a dangerous probability of recouping its loss in the long term."\(^{37}\)

The Government argued that the Court of Appeals had erred in not requiring this strict "recoupment standard borrowed from the predatory pricing rule in Brooke Group Ltd. v Brown & Williamson Tobacco Corp."\(^{38}\) It also criticized "an instruction that would allow a jury to base its verdict on subjective assessments of factors such as 'fairness' and 'necessity'."\(^{39}\) Again, the Supreme Court majority essentially accepted the Government’s argument and ruled for the defendant-appellant.

3. Pacific Bell Telephone Company v LinkLine Communications, 555 U.S. 438 (2009). Here DOJ urged the Court to reject “price squeeze” as a Section 2 violation.\(^{40}\) DOJ argues that “Such a theory of liability could not be reconciled with this Court’s “modern antitrust jurisprudence”.\(^{41}\) DOJ position which is inconsistent with the much

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\(^{36}\) Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner (2003), 7 (emphasis added) in Trinko.

\(^{37}\) Ibid.


\(^{39}\) Ibid, 7.

\(^{40}\) Brief of the United States as Amicus Curiae (May 22, 2008).

\(^{41}\) Ibid. (emphasis added).
broader principle in Judge Learned Hand’s famous *Alcoa* decision, 60 years earlier.\(^{42}\)
The Supreme Court’s conservative majority accepted this position, and overruled *Alcoa*. The FTC publicly declined to join this brief and it seemed clear that a majority of the Commissioners disapproved of the DOJ position on *Alcoa*.

On September 8, 2008, the Bush Administration’s DOJ topped off its 7-year effort to narrow Section 2 law and remedies by issuing a 200 page white paper entitled *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act*, which is purportedly based on a series of joint hearings with the FTC on Section 2 policy held in 2006-2007.\(^{43}\) According to DOJ, the white paper is based on existing law and it “examines whether and when specific types of single-firm conduct may or may not violate Section 2 of the Sherman Act by harming competition and consumer welfare.”\(^{44}\) A majority of the FTC Commissioners did not agree with these conclusions from the joint hearings and issued a critical press release the same day. Commissioners Harbour, Leibeowitz, and Rosch, said that,

"[t]he Department’s premises lead it to adopt law enforcement standards that would make it nearly impossible to prosecute a case under Section 2...In almost every case, the Department adopts standards that are tougher—and in some cases much tougher—than existing standards as defined by Section 2 cases."\(^{45}\)

Seven months later, the incoming Obama Administration’s new Assistant Attorney General rejected the 2008 report as any longer representing the Government’s Section 2 policy.\(^{46}\) However, neither she nor her successor have actually brought, let alone litigated, a Section 2 case to make clear what DOJ’s replacement policy was or now is.

(b) Policy Goals.

The historic American approach has been structural: to the extent that a dominant firm behaves by taking action designed to exclude rivals or potential entrants, it should be free to behave like a monopolist (charging high prices, etc); but, if it has been shown to have taken exclusionary actions (or achieved monopoly by corporate acquisitions, it should be broken up (which was last accomplished with the big telecommunications monopoly, AT&T, in 1982 (2)).

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\(^{42}\) *US v Aluminum Co. of America*, 148 F.2d. 416, 437-8 (2d Cir. 1945).


\(^{46}\) See fn. 32 supra.
Since then, government enforcers and courts have increasingly relied on so-called "Chicago School" economics that assumes that the goal of antitrust is to promote allocative efficiency in the society as a whole. It also assumes that enterprises are run by profit maximizers who would recognize that most predatory and leveraging activities are irrational. Because they believe that markets are self-correcting, Chicago thinkers tend to see antitrust interventions directed at changing market structures as at best wasteful and at worst misguided.

This approach is in clear contrast with the European enforcers who seem to have less confidence that markets are self-correcting and thus tend to focus on actions that seem to interfere with "competition on the merits" in either a monopoly market or dependent markets. Thus, DG Competition and European NCAs see it as generally proper to put the burden on the dominant firm to show that an alleged abuse enhances efficiency; and "ultimately the protection of rivalry and competitive process is given priority over possible pro-competitive efficiency gains."\(^{47}\)

In discussing these issues, then FTC Chairman William Kovacic has described

"What appear to be [Transatlantic] differences in assumptions about the operation of markets and the efficacy of government intervention as a tool to correct market failure. Embedded in EU and US agency evaluations...are differing assumptions about the adroitness of rivals and purchasers to reposition themselves in the face of exclusionary conduct by a dominant rival, the appropriate tradeoff between short-term benefits of a challenged practice and long-term effects, and the robustness of future entry as a means of disciplining firms that enjoy dominance."\(^{48}\)

The central role given to private plaintiffs and juries in the United States, coupled with the penal treble damages remedy, have understandably bred long-term judicial caution about reading Section 2 expansively. Indeed, the U.S. politicians, enforcers and courts seem to have implicitly made the broad judgment that, when recurring monopoly abuses are likely to occur, a sectorial regulator should be created to police the affected situation(s)—rather than trying to rely on courts apply the Sherman Act. The apparent reasons are generally not articulated—but it appears that they flow from the reality that violations of sectorial regulatory regimes do not generate private treble damage liabilities, while sectorial regulators tend to be closer to the monopolist(s) involved, and more cautious about disrupting the status quo than independent judges and juries can.


sometimes be. Moreover, most judges do not like the idea of courts becoming ongoing regulators of future conduct by a defendant monopoly under detailed injunctive orders.

This “risk of private litigation” rationale seemed especially clear in the recent Trinko and Credit Suisse decisions, where the Supreme Court recently introduced much greater deference to sectorial regulators because

“Antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different non-expert judges and different non-expert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many courts to reach consistent results.”

These decisions are so important (and, we believe, unfortunate) because they exclude not only private antitrust plaintiffs from bringing treble damage claims against conduct already dealt with by the regulatory agency but also prevent the DOJ and FTC from dealing with potential Section 2 violations in regulated markets where the regulator has not dealt with the monopolistic practices at issue (as in U.S. v. AT&T). Thus in Trinko, the Supreme Court opined by way of dicta 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.” This would reverse what is generally regarded as the leading modern “essential facilities” decision, MCI’s celebrated 1983 victory against AT&T, as well as overturning at least two of DOJ’s important Supreme Court victories compelling access relief against monopolies created by regulated entities.

5.4 Creating and Applying Remedies

Creating an effective equitable remedy for a monopolistic abuse can be a particularly challenging problem. Of course, the ability of a non-U.S. enforcement agency to charge a big fine for a monopolistic infringement may cause the agency to believe that the offending enterprise can be forced to figure out how to solve the problem and thus avoid future fines. Lacking this option, the US agencies have to have a relief plan in mind when formulating a Section 2 case—and sometimes this difficult challenge may make them even more cautious about filling such a case.

In dealing with a particular monopolistic abuse, a non-U.S. administrative agency may well have (or think it has) the experience and staff necessary to create and enforce a “regulatory” remedy which a US District Court might well reject as being too complex.

50 ibid, 2395.
51 Trinko, supra n 18, 411.
52 MCI Communications Corp. v American Tel. & Tel. Co., 708 F2d. 1081 (7th Cir. 1983).
for it to handle. (The trial judge in *US v Microsoft* did not want to seriously confront the difficult remedy issues, and was reversed for his failure to do so.)\(^{54}\) By contrast, the US has made use of the basic *structural remedy—divestiture*—for monopolies (most notably *Standard Oil in 1911*, *United Shoe Machinery in 1964*, and *AT&T in 1982*), which is something that European enforcers have been unwilling to attempt for a litigated Article 82 violation by a single firm.

In seeking divestiture, the Clinton Administration's DOJ (led by Joel Klein) clearly had a broader approach to the scope of appropriate relief than that adopted by his successor Charles James. Many members of the U.S. LIDC Group would favor renewed use of structural remedies in appropriate cases in the future.

### 5.5 Criticisms of Agency Enforcement.

The general concern about legal uncertainty and potential over-enforcement of Section 2 was reflected in the 2007 report and recommendations of the bi-partisan Antitrust Modernization Commission.\(^ {55}\) "In recent decades the courts have adopted and applied sound general principles of Section 2 enforcement. These general principles emphasize that appropriate legal rules should identify unreasonably exclusionary conduct, without discouraging aggressive competition that benefits consumers or creating excessive litigation and compliance costs for businesses and problems of administrability for courts."\(^ {56}\) On *unilateral refusals to deal*, the Modernization Commission seemed to endorse the modern Supreme Court's conservative decisions, saying, "[r]efusals to deal with horizontal rivals in the same market should rarely, if ever, be unlawful even for a monopolist."\(^ {57}\) The Modernization Commission expressed concern about exceptions to this general rule "undermining the value of [a] lawfully acquired monopoly and discouraging others from making similar investments."\(^ {58}\)

Some U.S. lawyers (including some members of the U.S. LIDC Group) think that Antitrust Modernization Commission was simply too cautious in its approach to Section 2 enforcement issues and priorities.

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\(^{54}\) *US v Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

\(^{55}\) The Commission was created by statute in 2005 and its members were appointed by the President and the Congressional leadership of both major parties.


\(^{57}\) Antitrust Modernization Commission 2007 Report, 101-104.

\(^{58}\) *Ibid.*
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