AN FTC GUIDE TO

Single Firm Conduct

Monopolization Defined

THE ANTITRUST LAWS prohibit conduct by a single firm that unreasonably restrains competition by creating or maintaining monopoly power. Most Section 2 claims involve the conduct of a firm with a leading market position, although Section 2 of the Sherman Act also bans attempts to monopolize and conspiracies to monopolize. As a first step, courts ask if the firm has “monopoly power” in any market. This requires in-depth study of the products sold by the leading firm, and any alternative products consumers may turn to if the firm attempted to raise prices. Then courts ask if that leading position was gained or maintained through improper conduct—that is, something other than merely having a better product, superior management or historic accident. Here courts evaluate the anticompetitive effects of the conduct and its procompetitive justifications.

MARKET POWER. Courts do not require a literal monopoly before applying rules for single firm conduct; that term is used as shorthand for a firm with significant and durable market power–that is, the long term ability to raise price or exclude competitors. That is how that term is used here: a “monopolist” is a firm with significant and durable market power. Courts look at the firm’s market share, but typically do not find monopoly power if the firm (or a group of firms acting in concert) has less than 50 percent of the sales of a particular product or service within a certain geographic area. Some courts have required much higher percentages. In addition, that leading position must be sustainable over time: if competitive forces or the entry of new firms could discipline the conduct of the leading firm, courts are unlikely to find that the firm has lasting market power.

EXCLUSIONARY CONDUCT

Judging the conduct of an alleged monopolist requires an in-depth analysis of the market and the means used to achieve or maintain the monopoly. Obtaining a monopoly by superior products, innovation, or business acumen is legal; however, the same result achieved by exclusionary or predatory acts may raise antitrust concerns.

Exclusionary or predatory acts may include such things as exclusive supply or purchase agreements; tying; predatory pricing; or refusal to deal. These topics are discussed in separate Fact Sheets for Single Firm Conduct.

BUSINESS JUSTIFICATION

Finally, the monopolist may have a legitimate business justification for behaving in a way that prevents other firms from succeeding in the marketplace. For instance, the monopolist may be competing on the merits in a way that benefits consumers through greater efficiency or a unique set of products or services. In the end, courts will decide whether the monopolist’s success is due to “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”

Monopoly: A firm with significant and durable market power–that is, the long term ability to raise price or exclude competitors.

EXAMPLE–THE MICROSOFT CASE: Microsoft was found to have a monopoly over operating systems software for IBM-compatible personal computers. Microsoft was able to use its dominant position in the operating systems market to exclude other software developers and prevent computer makers from installing non-Microsoft browser software to run with Microsoft's operating system software. Specifically, Microsoft illegally maintained its operating systems monopoly by including Internet Explorer, the Microsoft Internet browser, with every copy of its Windows operating system software sold to computer makers, and making it technically difficult not to use its browser or to use a non-Microsoft browser. Microsoft also granted free licenses or rebates to use its software, which discouraged other software developers from promoting a non-Microsoft browser or developing other software based on that browser. These actions hampered efforts by computer makers to use or promote competing browsers, and discouraged the development of add-on software that was compatible with non-Microsoft browsers. The court found that, although Microsoft did not tie up all ways of competing, its actions did prevent rivals from using the lowest-cost means of taking market share away from Microsoft. To settle the case, Microsoft agreed to end certain conduct that was preventing the development of competing browser software.