

Unilateral Conduct Working Group Questionnaire

In case you have any questions on the questionnaire, please contact Elizabeth Kraus at the US FTC or Arno Rasek at the Bundeskartellamt. Please send the completed questionnaire by 31 October 2006 to ekraus@ftc.gov and arno.rasek@bundeskartellamt.bund.de, and provide a contact person who can answer possible questions on your response.

A. Objectives of unilateral conduct laws

1. With regard to your jurisdiction's unilateral conduct rules – e.g., rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (e.g., consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

- a. Constitution
- b. Statutes
- c. Regulations
- d. Agency enforcement policy (e.g., guidelines, speeches)
- e. Case law
- f. Other (please identify)

Section 2 of the Sherman Act (15 U.S.C. § 2) provides that “[e]very 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 U.S. Supreme Court has noted that the Sherman Act “was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.” *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). As the Department of Justice and Federal Trade Commission recently noted in its brief in the recently-argued Supreme Court case of *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co., Inc.*, “[t]he Act is designed to protect the ‘competitive process’ generally, not particular participants in that process.” Brief for the United States as Amicus Curiae Supporting the Petitioner at 15, *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co., Inc.*, No. 05-381 (U.S. Sup. Ct. Aug. 24, 2006), 2005 U.S. Briefs 381A. As Assistant Attorney General (Antitrust Division) Thomas O. Barnett stated in a speech opening the Joint DOJ/FTC Hearings Regarding Section 2, “it is a mistake to reflexively to infer harm to competition from harm to a competitor.” Thomas O. Barnett, *The Gales of Creative Destruction: The Need for Clear and Objective Standards for Enforcing Section 2 of the Sherman Act*, Opening Remarks for the Antitrust Division and Federal Trade Commission Hearings Regarding Section 2 of the Sherman Act (June 20, 2006), available at <http://www.usdoj.gov/atr/public/speeches/216738.pdf> at 9. The focus is on harm to competition, not individual competitors, as a competitor’s “painful losses” are “of no moment to the antitrust laws if competition is not injured.” *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 224, 231 (1993). See also, Opinion of the Commission at 28, *In the Matter of Rambus Inc.*, 2006 F.T.C. LEXIS 60 (2006)

(Docket No. 9302) (“The focus, at all times, is on harm to competition, not merely harm to competitors.”).

2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.

Generally, there are not. However, certain non-competition agencies may have some limited jurisdiction with regard to particularized antitrust issues. For example, the Department of Agriculture has enforcement responsibility for the Packers and Stockyards Act, 1921 (7 U.S.C. § 181 *et seq.*). This Act has been construed as broader than the Sherman Act, but “no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither destructive nor injurious to competition nor intended to be so by the party charged.” *Armour & Co. v. United States*, 402 F.2d 712, 722 (7th Cir. 1968). Therefore, the Packers and Stockyards Act supplements—but does not supplant—the Sherman Act. *See, e.g.*, 7 U.S.C. §§ 209(b), 225.

Similarly, the Federal Communications Commission, while lacking statutory authority to decide antitrust issues, has authority under the Communications Act of 1934 (47 U.S.C. § 313(a)) to revoke a license to any person found guilty of violating the antitrust laws. The FCC, however, has noted that, unlike the antitrust laws, its “overriding responsibility is not to foster the maximum level of competition in the industry but rather to promote the public interest.” *United States Cellular Operating Co.*, 3 F.C.C.R. 5345, 5345 n.3 (1988).

3. If there are multiple objectives, how are these balanced or reconciled?

Antitrust law in the United States seeks to balance short-term or isolated effects with the long-range benefits of efficiency, product development and innovation. While on one hand, there may be a tendency for monopoly to inhibit competitive behavior, and delay or reduce innovation, “[t]he potential to obtain monopoly profits serves as an important incentive to create better products for consumers.” Thomas O. Barnett, *The Gales of Creative Destruction*, at 6. The Supreme Court has, therefore, stated that “[t]he 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.” *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004).

The U.S. courts and enforcement agencies are continuing to seek the balance in enforcement in those situations where the conduct at issue has both beneficial and potentially exclusionary effects. The agencies have taken a leading role in 2006 with the ongoing Hearings Regarding Section 2 of the Sherman Act. Unilateral conduct has also been a subject of discussion during the pendency of the Antitrust Modernization Commission. Much of the discussion at these hearings has been associated with the best way to enforce Section 2 without inadvertently chilling pro-competitive conduct.

4. How has your jurisdiction balanced the risks associated with over-deterrence (detering efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result

of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?

U.S. courts have carefully scrutinized allegations of unilateral conduct in order to avoid excessive intervention. For example, in *Brooke Group*, the Supreme Court noted that for Section 2 purposes, it may be beyond the “practical ability of a judicial tribunal” to control the anticompetitive effects of prices above a relevant measure of cost without running the very real possibility of “chilling legitimate price cutting.” 509 U.S. at 223. Similarly, in *Trinko*, the Court noted that it is crucial to weigh the costs of antitrust intervention against any benefits thereof. 540 U.S. at 414. Thus, in assessing the appropriateness of dismissal of various Section 2 claims, the Court noted that even though the challenged practices were not obviously pro-competitive (as with the above-cost price reductions in *Brooke Group*), the “cost of false positives” is an important factor favoring dismissal. *Id.* As noted by Assistant Attorney General Barnett, “not all problems have antitrust solutions.” Barnett, *The Gales of Creative Destruction*, at 11.

FTC Chairman Deborah P. Majoras has also commented in this regard:

“[T]here is a consensus that antitrust standards that govern unilateral conduct must not deter competition, efficiency, or innovation. This is why we frequently worry about ‘false positives.’”

Deborah Platt Majoras, *The Consumer Reigns: Using Section 2 to Ensure a “Competitive Kingdom,”* Address Before the Hearings on Section 2 of the Sherman Act (June 20, 2006), available at <http://www.ftc.gov/speeches/majoras/060620revisedhearingonsection2.pdf> at 6.

5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.

Regulated Industries: Certain statutes do provide for limited exemption from antitrust liability. Many of the statutes are more generally applicable to Section 1 liability (e.g., Capper-Volstead immunity for agricultural cooperatives 7 U.S.C. § 291; McCarran-Ferguson Act for insurance 15 U.S.C. § 1011-15.) The Supreme Court has generally limited the scope of any exemptions in the Section 2 context, noting that “courts must be hesitant to conclude that Congress had intended to override the fundamental national policy embodied in the antitrust laws.” *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973). See also, *Trinko*, 540 U.S. at 405-6 (noting that existence of savings clause preserves claims for antitrust liability under the Telecommunications Act of 1996).

Intellectual Property: U.S. law provides certain exclusive rights regarding a firm’s intellectual property rights. While generally accepted antitrust principles are largely applicable to Section 2 claims involving intellectual property:

[S]trong intellectual property protection is not separate from competition principles, but rather, is an integral part of antitrust policy as a whole. Intellectual property rights should not be viewed as protecting their owners *from* competition; rather, IP rights should be seen as encouraging firms to engage *in* competition, particularly competition that involves risk and long-term investment. Properly applied, strong intellectual property protection creates the competitive environment necessary to permit firms to profit from their inventions, which encourages innovation effort and improves dynamic efficiency.

Thomas O. Barnett, *Interoperability Between Antitrust and Intellectual Property*, Presentation to the George Mason University School of Law Symposium: Managing Issues in a Global Marketplace (Sept. 13, 2006), available at <http://www.usdoj.gov/atr/public/speeches/218316.pdf> at 3-4.

6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (e.g., small, transition, or recently-liberalized), please explain.

Not applicable

7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.

Modern U.S. antitrust policy has focused on economic analysis, efficiency and consumer welfare. This has been the foundation of agency and Supreme Court decision making for at least the past thirty years. This position has evolved over the hundred-year history of the Sherman Act. For much of the early history of the Sherman Act, different goals had been espoused by policy and judicial decision-makers. See Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L.J. 21, 24 (1985) (noting concern for welfare of small business).

8. Are there institutional features (e.g., the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency's ability to achieve the objectives of the unilateral conduct rules? If so, please explain.

There are no such institutional features. Under Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) ("FTC Act"), the Federal Trade Commission's authority reaches acts covered by Section 2 of the Sherman Act. See, e.g., *In the Matter of Rambus, Inc.*, (Docket No. 9302) at 27, n.134. Procedurally, this means that an Administrative Law Judge hears a complaint brought under this section in the first instance, with an appeal taken to the Commission. However, Section 5(c) of the FTC Act provides for judicial review, and courts will refuse to uphold agency decisions in appropriate circumstances.

9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?

The current joint hearings on unilateral conduct reflect an ongoing dialogue amongst regulators, practitioners and academics aimed at attempting to formulate rules to protect consumer welfare without chilling pro-competitive behavior through over-enforcement. The lack of clearly articulated standards has, in some instances, led to judicial decisions with regard to unilateral conduct that are sharply debated in the U.S. antitrust community. Clear and easy to apply rules, such as that propounded in *Brooke Group*, will lead to greater certainty and enhance consumer welfare by encouraging firms to engage in innovation and other pro-competitive behaviors.

B. Assessment of Dominance/Substantial Market Power

1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction’s general competition law, relevant agency policy statements (e.g. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (e.g., “super dominance”).

Under U.S. law, monopoly power is defined as “the power to control [market] prices or exclude competition.” *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). In order to find market power, it is first necessary to determine a relevant market, since without such a definition “there is no way to measure [the] ability to lessen or destroy competition.” *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965). Then, a plaintiff must demonstrate control over prices or exclusion of competition from the relevant market, whether through direct evidence or through indirect evidence, such as market share and evidence of barriers to entry in the relevant market.

Moreover, in addition to demonstrating monopoly power, in order to sustain a holding that Section 2 was violated, a plaintiff must prove “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?

- If dominance/substantial market power is present yes/no
- Acquisition or creation of dominance/substantial market power yes/no
- Attempt to acquire or create dominance/substantial market power yes/no
- Other (please identify)

Why did your jurisdiction choose these stages?

The Department of Justice (“DOJ”) has authority under Section 2 of the Sherman Act to proceed against violations by either criminal indictment or by civil complaint. Generally, Section 2 claims are brought in the civil context. *See, e.g., United States v. Dentsply Int’l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *United States v Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

The FTC has jurisdiction over “unfair method[s] of competition” under Section 5 of the FTC Act. 15 U.S.C. § 45. The FTC reaches conduct that would be illegal under the Sherman Act, through the enforcement of Section 5. *See, e.g., FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953). In fact, the FTC’s powers under Section 5 extend beyond extends, at least theoretically, beyond those unilateral practices outlawed in the Sherman Act. This construct was recently advanced by an FTC Commissioner in a concurring opinion in the recent *Rambus* ruling. *In the Matter of Rambus*, Docket No. 9302 (Leibowitz, C. concurring). Commissioner Leibowitz noted that “while the FTC has not left fallow its jurisdiction to challenge conduct outside the antitrust laws, neither has the Agency fully exercised it or explained it.” *Id.* at 2. However, there is little precedent at the agency level for intervention on this basis, which has sparked debate in the months following this concurrence.

3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/or as a “safe harbour”? yes/**no**

If so, please respond as applicable:

There is no market power presumption or safe harbor for unilateral conduct under U.S. law. However, Judge Learned Hand stated many years ago that ninety percent of supply was “enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.” *United States v. Aluminum Co. of Amer.*, 148 F.2d 416, 424 (2d Cir. 1945) (case certified by Supreme Court). However, these were not intended to provide presumptions or safe harbors since “[t]he relative effect of percentage command of a market varies with the setting in which that factor is placed.” *United States v. Columbia Steel Co.*, 334 U.S. 495, 528 (1947).

- What is the market share level of the dominance presumption? _____
- Is the dominance presumption rebuttable? yes/no
- What is the market share level of the safe harbour? _____
- Is the safe harbour absolute (*i.e.*, dominance/substantial market power cannot be found below the specified percentage level)? yes/no
- What is the legal basis of the presumption statute /case law/guidelines
- What is the legal basis for the safe harbor? statute /case law/guidelines

4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold ? yes/no

If so, please explain why and in which circumstances.

As discussed in B.2, it is theoretically possible for the FTC to utilize its Section 5 powers to intervene against unfair trade practices in circumstances where a firm does not necessarily possess market power. However, this would be outside the scope of the Sherman Act.

5. Does your jurisdiction’s analysis of dominance/substantial market power first require that a relevant product and geographic market be defined? **yes/no**

6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?¹

- Market share of the firm and its competitors **yes/no**
- Market position and market behavior of competitors **yes/no**
- Durability of market power **yes/no**
- Barriers to entry or expansion **yes/no**
- Economies of scale and scope/network effects **yes/no**
- Buyer power **yes/no**
- Access to upstream markets/vertical integration **yes/no**
- Access to essential facilities **yes²/no**
- Market maturity/vitality **yes/no**
- Financial resources of the firm and its competitors **yes/no**
- Profits of the firm **yes/no**
- High prices (at absolute or comparative level) **yes/no**

Please specify any other criteria that you use to assess single-firm dominance/substantial market power.

Consideration may also be given to the ability of a firm to price discriminate.

7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?

No single factor or set of factors is determinative or necessarily more important than others. The criteria that are most frequently examined include market share and the existence of barriers to entry (or lack thereof),

¹ The answer “yes” should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer “no” should be provided if in practice you have not ever used that criterion.

² In the U.S., the essential facilities doctrine has been virtually vitiated, and exists today as little more than a theoretical construct. *Trinko*, 540 U.S. at 880-81.

8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.

U.S. courts will weigh the various factors described above, and apply them all in the context of consumer welfare. A number of tests have been proposed (e.g., profit-sacrifice; no-economic sense), however no clear and objective standards exist for ready application by the courts. It is, therefore, not possible to provide a concise answer to this question.

9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?

A patent alone does not confer market power. *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S.Ct. 1281, 1293 (2006). Antitrust liability does not flow from conduct that is permissible under the patent laws; however, intellectual property rights do not create a license to violate the antitrust laws. *In re Independent Serv. Orgs.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000). Courts will therefore look to an anticompetitive effect independent of the exercise of intellectual property rights in claims of unilateral conduct. See, e.g., *Broadcom Corp. v. Qualcomm, Inc.*, No. 3:05-cv-03350-MLC-JJH, 2006 WL 2528545 (D.N.J. Aug. 31, 2006) (dismissing, *inter alia*, Section 2 claim involving licensing of WCDMA technology).

Is intellectual property presumed to create dominance/substantial market power in your jurisdiction? yes/no

10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. [NB: Jurisdictions that do not consider themselves “small” economies are welcome to skip this question.]

Not Applicable

11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.

The standards promulgated by U.S. courts are inherently flexible, and allow for a very real assessment of the economic realities of a given market, thus reducing the likelihood of over-enforcement and chilling of otherwise pro-competitive business activities.

C. State-created Monopolies

Throughout this section of the questionnaire, the term “state-created monopolies” refers to firms that are dominant or that have substantial market power due to state-imposed restraints of competition. In most cases, these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. In an effort to avoid duplication with the ICN’s previous work, this project does not address the interface with network access or price-cap regulation implemented by a sector-specific regulator. Accordingly, we request that you do not focus on sectors that are/were regarded as “natural monopolies” and that are now subject to such regulation. Therefore, please answer the questions excluding references to the *telecoms*, *energy*, *water*, and *railways* sectors.

I. State-created Monopolies

1. What are the main sectors of your country in which state-created monopolies exist? Please describe important sector examples, including whether these monopolies are state-owned³, state-controlled⁴, state-enabled or facilitated⁵, recently privatized and/or liberalized, regional monopolies,⁶ etc.

Apart from certain state-owned or operated energy and water companies, state-created monopolies are rare in the United States. One example may be the state-owned liquor stores present in eighteen states. These regimes create government monopolies in the sale of liquor within their borders through what are termed ABC (“Alcoholic Beverage Control”) stores.

Another example is the taxi cab monopolies, where certain city governments heavily regulate entry into the market. Major U.S. cities such as Los Angeles, New York and Miami (among others) maintain this practice.

Finally, in many U.S. national parks, park concessions are operated as a government-controlled monopoly, not unlike a public utility. The monopoly is granted only to the narrowest extent, as regulated by Congress in Concessions Management Improvement Act, Pub. L. No. 105-391, 112 Stat. 3497 (1998) and its predecessor, the Concessions Policy Act. Other regimes of a similar nature likely exist, but impact a very minor portion of commerce.

2. Please discuss the objectives behind the creation and/or perpetuation of state-created monopolies by providing specific examples from your jurisdiction. If the rationale for retaining the state-created monopoly was challenged (for example as a condition of membership in an international organization or to join an economic alliance or regional trade agreement) or has changed over time, please explain.⁷

³ Those undertakings that are 100% owned by the State.

⁴ The control belongs to the State, without taking into consideration the amount of the % of the State share.

⁵ E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.

⁶ Includes public/private undertakings that are granted exclusive rights within a certain region.

⁷ The relevant information for answering questions 2, 5 and 6 may not readily be available within your agency. In this case, it is not necessary for you to conduct a research effort.

With regard to the above examples:

The policies underpinning operation of state liquor monopolies vary, but are often predicated on a desire to make alcohol available, but preventing over-consumption by limiting economic incentives for liquor sales. *See, e.g.*, Utah Department of Alcoholic Beverage Control Statement of Purpose, *available at* http://www.abc.utah.gov/Background/origin_purpose.html. Similarly, taxi cab monopolies are often based upon principles of public safety.

The United States Park Service has long operated its monopoly-like concessions system. The purpose of this state-created monopoly is to provide a consistent quality of service throughout the national park system.

3. Are there any legal or practical restrictions or difficulties faced by your competition agency in antitrust enforcement against state-created monopolies? If yes, please provide details and/or sample cases, for example:

- Legal restrictions/scope of application: Is there a "state action defense" (i.e. competition law does not apply to state entities or state acts) or any special exemptions/exceptions for the state-created monopolies from the general antitrust law in your jurisdiction?

The State Action Doctrine has been applied with regard to energy and other state-created public service monopolies. With regard to the exemplar monopolies described above, there is no special exemption from the laws for such state-created monopolies. In fact, the Washington state alcohol regulation laws were recently—and successfully—challenged by a retailer on, *inter alia*, Sherman Act Section 2 grounds. *Costco Wholesale Corp. v. Washington Beer and Wine Wholesalers Ass'n*, No. 04-360-P, 2006 U.S. Dist. LEXIS 27141 (W.D. Wa. Apr. 21, 2006), 2006-1 Trade Cas. (CCH) ¶ 75,250. Immunity under the state action doctrine was not considered in the decision.

- Practical restrictions/difficulties: Please describe any practical restrictions that you have faced or may face in antitrust enforcement against state-created monopolies, such as instructions that your agency may receive from the government, political pressure, or overcoming vested interests.

4. How does the assessment of dominance/substantial market power of state-created monopolies differ from other dominance/substantial market power cases?

There is no difference in application of antitrust laws for state-created monopolies, unless otherwise provided by federal statute.

II. Privatization and Liberalization Process and the Advocacy Role of Competition Agencies

5. Please briefly describe the ongoing or past privatization and liberalization process in your country. Is there a specific legal framework for the privatization in your country (e.g. a specific privatization law) ?

Not applicable.

6. What are the objectives of your government in the privatization and liberalization of state-created monopolies (for example, raising competition/consumer welfare, maximizing revenue from the sale, etc.)?

Not applicable.

7. Is competition law applicable to privatization transactions (e.g. approval of interested bidders or the successful bidder under its merger control powers)?

Not applicable

8. Please summarize the advocacy role of your agency in the privatization and liberalization of state-created monopolies, including as applicable:

- What are the legal instruments used by your agency for that purpose? To what extent are other government entities obliged or encouraged to seek the competition agency's opinion on or approval of privatization and/or liberalization proposals?
- To what extent does the advocacy role of your agency have impact on privatization and liberalization? Please provide examples of successes or failures if available.

Not applicable

D. General

1. From among the following, how would you characterize your jurisdiction:
developed / developing / transitioning?

The U.S. is a developed antitrust jurisdiction. However, the U.S. continues to explore best practices and enhancements to its antitrust regime. For instance, the Antitrust Modernization Commission was created by act of Congress, and is intended to “examine whether the need exists to modernize U.S. federal antitrust laws and to identify and study related issues.” Charter, Antitrust Modernization Committee, *available at* http://www.amc.gov/pdf/charter/amc_charter.pdf at II(1). Similarly, the DOJ and FTC have been conducting joint hearings on unilateral conduct intended to “advance the development of the law, particularly by articulating points of consensus.” Thomas O. Barnett, *The Gales of Creative Destruction*, at 2.

2. Please provide English-language citations to or summaries or excerpts of legislative history, leading judicial or agency decisions, or articles that explain your jurisdiction's choice of its unilateral conduct law objectives, its definition and assessment of

dominance/substantial market power and/or its approach to state-created monopolies and privatization.

The following are intended to be representative examples, and the list is not intended to be all-inclusive. Other helpful presentations and comments may be found on the websites of the Antitrust Modernization Commission (www.amc.gov) and the Joint DOJ/FTC Section 2 of the Sherman Act Hearings website (<http://www.ftc.gov/os/sectiontwohearings/index.htm>).

Cases

Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

Brooke Group Ltd. v. Brown Williamson Tobacco Corp., 509 U.S. 209 (1993).

United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).

In the Matter of Rambus, Inc., 2006 F.T.C. LEXIS 60 (2006) (Docket No. 9302).

Amicus Briefs

Brief for the United States as Amicus Curiae Supporting the Petitioner, *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co., Inc.*, No. 05-381 (U.S. Sup. Ct. Aug. 24, 2006), 2005 U.S. Briefs 381A.

Books

HERBERT J. HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLES AND EXECUTION* (2006).

ROBERT H. BORK, *THE ANTITRUST PARADOX* (2d ed. 1993).

Articles

Herbert J. Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147 (2005).

Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253 (2003).