
Restoring Monopoly and Exclusion as Core Competition Concerns*

Perhaps no areas of antitrust law reflect the different philosophies of the Chicago and post-Chicago antitrust schools more than monopolization and vertical restraints. Whereas the Chicago school sees little risk from exclusionary conduct, even by monopolists, and even less risk from vertical intrabrand distribution restraints,¹ post-Chicago and other scholars recognize that raising rivals' costs can frequently be a profitable strategy for dominant firms,² and that intrabrand vertical restraints such as resale price maintenance may well harm consumers.³ Contemporary conservative law and economics scholars accept the theoretical insights of the post-Chicago school, but question their empirical significance.⁴ The Obama administration's policy towards monopolization reflects a significant improvement over the laissez-faire approach of the Justice Department of the George W. Bush (Bush II) administration. But a more aggressive program is called for. On intrabrand vertical restraints (discussed later in this Transition Report), the agencies have essentially departed the field and done nothing to thwart the movement in the lower courts towards a rule of per se *legality*.

The next administration should chart a course consistent with antitrust's traditional concerns about monopoly power and modern economic thinking about exclusionary conduct. This chapter provides

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¹ See, e.g., ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 432 (1993) ("size will not last if it does not rest on superior efficiency"; predation is "rare"); *id.* at 297 ("[A]ll vertical restraints are beneficial to consumers and should for that reason be completely lawful.").

² See, e.g., Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

³ See, e.g., 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1604, at 38–75 (3d ed. 2010); John Asker & Heski Bar-Isaac, *Raising Retailers' Profits: On Vertical Practices and the Exclusion of Rivals*, 104 AM. ECON. REV. 672 (2014).

⁴ See, e.g., Joshua D. Wright, *Moving Beyond Naïve Foreclosure Analysis*, 19 GEO. MASON L. REV. 1163 (2012).

a roadmap for such a course, starting with a critique of the movement to roll back monopolization law in the name of fostering innovation and not chilling procompetitive conduct. The chapter makes recommendations for reinvigorating Section 2, including recommended tests for exclusionary conduct—in general and with respect to specific types of conduct—that balance concerns for “false negatives” as well as “false positives.” It also supports proposals for more effective remedies in monopolization cases, makes the case for retaining the quasi per se rule against tying, and advocates giving more credence to “consumer protection” market imperfections in assessing market power. Specifically, the chapter’s major recommendations are as follows:

MAJOR RECOMMENDATIONS

With respect to monopolization and exclusion, the next administration should:

- **Take a more aggressive enforcement posture towards exclusionary conduct by dominant firms, and renew antitrust’s historic skepticism of durable monopolies.**
- **Oppose efforts to promote a single proxy for exclusionary conduct under Section 2, such as the profit-sacrifice test, the no-economic sense test, or the equally efficient competitor test. The default framework should be the consumer-welfare balancing test articulated by the D.C. Circuit in *Microsoft*.**
- **Treat a monopolist’s exclusive dealing that reasonably appears capable of making a significant contribution to maintaining its monopoly power as presumptively anticompetitive, subject to rebuttal that actual or potential anticompetitive effects are unlikely or are prevented by procompetitive benefits to consumers.**
- **Reject cost-based safe harbors for conditional pricing practices (loyalty and bundled “discounts”), and treat such practices as presumptively anticompetitive when they help preserve, extend, or exploit a monopolist’s market power, subject to rebuttal that anticompetitive effects are unlikely or are prevented by procompetitive benefits to consumers.**
- **Support liability for a monopolist’s refusal to deal with a rival when: (1) such refusal helps preserve or extend its monopoly power; (2) the monopolist discriminates between the competitor and other customers, has previously dealt voluntarily with the**

competitor, or otherwise demonstrates a predatory intent; and (3) the anticompetitive effects are not prevented by procompetitive benefits to consumers.

- Treat a price squeeze by a monopolist as a constructive refusal to deal when the monopolist could not have made a profit selling at its retail rates if it purchased inputs at its own wholesale rates.
- Revitalize the essential facilities doctrine as an independent theory of liability for purposes of injunctive relief.
- Treat a vertically integrated monopolist's refusal to sell or license its intellectual property to a downstream competitor the same as a refusal to sell or provide access to physical property.
- Look for opportunities to bring predatory-pricing cases and encourage courts to develop a structured rule of reason that is more consistent with modern economic thinking about predatory pricing strategies than is current law.
- Use the Federal Trade Commission's "unfair methods of competition" authority to address anticompetitive conduct by dominant firms that may not be reachable under the Sherman Act or Clayton Act.
- Seek to employ structural remedies in appropriate cases, continue the increased use of equitable monetary remedies, and support legislation to allow both agencies to obtain civil penalties in Section 2 cases.
- Oppose efforts to overturn *Jefferson Parish*, and support a rule of presumptive illegality for tying by firms with market power.
- Recognize that information deficiencies and other "consumer protection" market imperfections may give a firm market power, regardless of conventional market share analysis, and may make markets susceptible to opportunistic conduct with exclusionary and other anticompetitive effects.

I. Monopolization

A. General Considerations

The agencies should take a more aggressive enforcement posture towards exclusionary conduct by dominant firms, and renew antitrust’s historic skepticism of durable monopolies.

The Obama administration has resuscitated DOJ enforcement of Section 2, but the next administration needs to do more. Under the Bush II administration, the Antitrust Division did not bring a single monopolization case.⁵ The number of Section 2 investigations also dropped dramatically,⁶ and the Antitrust Division accepted a settlement in *Microsoft* that was largely ineffectual.⁷ While stepping down its own enforcement activity, the Bush II DOJ stepped up its advocacy of a narrower role for Section 2. In nearly all of its Supreme Court amicus briefs in private Section 2 actions—*Trinko*, *Weyerhaeuser*, and *linkLine*—DOJ sided with the monopolist or would-be monopolist and advocated a permissive (i.e., noninterventionist) standard of exclusionary conduct.⁸ And in the waning days of the administration, DOJ issued a report on Section 2 that articulated a sharply restricted enforcement policy, which the bipartisan FTC notably declined to join.⁹ The FTC’s approach towards monopolization during the Bush II administration was far more balanced.¹⁰

Then-Senator Obama was critical of DOJ’s performance, and campaigned on a platform of reinvigorating antitrust enforcement.¹¹ As one of her first official acts, Assistant Attorney General Christine

⁵ In contrast, during the Clinton administration, the Antitrust Division brought at least seven monopolization cases, including notable cases against Microsoft, American Airlines, and Dentsply.

⁶ From FY 1993 to 2000, DOJ initiated an average of 12.5 monopolization investigations per year. From FY 2001 to 2008, the average dropped to 3.25 per year. See the Division Workload statistics for FY 1990–1999 and FY 2000–2009, which are available at <https://www.justice.gov/atr/division-operations>.

⁷ See *infra* note 120.

⁸ See THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE’S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT 59 & n.12 (Albert A. Foer, ed. 2008) [hereinafter AAI 2008 TRANSITION REPORT].

⁹ U.S. DEPT. OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008) [hereinafter DOJ SECTION 2 REPORT], <http://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf>; Press Release, Fed. Trade Comm’n, FTC Commissioners React to Department of Justice Report (Sept. 8, 2008), <https://www.ftc.gov/news-events/press-releases/2008/09/ftc-commissioners-react-department-justice-report-competition-and>.

¹⁰ AAI 2008 TRANSITION REPORT, *supra* note 8, at 60-61.

¹¹ Statement of Senator Barack Obama for the American Antitrust Institute (Sept. 27, 2007), available at <http://www.antitrustinstitute.org/node/10883>.

Varney withdrew DOJ's Section 2 Report.¹² DOJ also stopped filing amicus briefs in private actions in support of restricting Section 2. And it has brought important exclusion cases under Section 1.¹³ But, as of this writing, DOJ has brought only two Section 2 cases,¹⁴ and the number of Section 2 investigations has fallen below the level in the Bush II administration.¹⁵ The FTC during the Obama administration has brought more Section 2 cases than DOJ, and more than the Bush II FTC did.¹⁶

A cautious approach to Section 2 does comport with dicta in *Trinko*, in which the Supreme Court emphasized the “especially costly” harms from “false condemnations,” “[m]istaken inferences,” and “false positives,” which “chill the very conduct the antitrust laws are designed to protect,” and therefore “counsel[] against an undue expansion of § 2 liability.”¹⁷ Indeed, Justice Scalia’s opinion for the Court celebrated the *virtues* of monopoly, maintaining:

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

¹² See Press Release, U.S. Dept. of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), <https://www.justice.gov/opa/pr/justice-department-withdraws-report-antitrust-monopoly-law>.

¹³ See *United States v. Blue Cross Blue Shield of Michigan*, No. 2:10-cv-14155-DPH-MKM (E.D. Mich. Oct. 10, 2010); *United States v. Am. Express Co.*, No. 1:10-cv-04496-NGG-CLP (E.D.N.Y. Oct. 4, 2010). DOJ also urged a more aggressive approach towards pay-for-delay cases, which typically involve claims of monopolization through collusion.

¹⁴ See *United States v. United Regional Health Care System*, No. 7:11-cv-00030 (N.D. Tex. Feb. 25, 2011) (alleging monopolization of hospital services market through loyalty “discounts”); *United States v. United Continental Holdings, Inc.*, No. 2:15-cv-07992 (D. N.J. Nov. 10, 2015) (alleging that slot acquisition monopolized markets for airline slots and airline passenger service to and from Newark).

¹⁵ From FY 2009 to 2014, DOJ initiated an average of two Section 2 investigations per year. See U.S. DEP’T OF JUSTICE, ANTITRUST DIV., WORKLOAD STATISTICS FY 2005 – 2014. Cf. note 6, *supra*.

¹⁶ To date, the Obama FTC has brought seven Section 2 cases (not including strictly collusive pay-for-delay cases with Section 2 claims). See *FTC v. Cardinal Health, Inc.*, No. 15-cv-3031 (S.D.N.Y. Apr. 20, 2015); *FTC v. AbbVie, Inc.*, 107 F. Supp. 3d 428, 430 (E.D. Pa. 2015); *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015); *In re INDEXX Labs., Inc.*, FTC Dkt. No. C-4383 (Feb. 11, 2013); *In re Pool Corp.*, FTC Dkt. No. C-4345 (Jan. 10, 2012); *In re Intel Corp.*, 150 F.T.C. 420 (2010); *In re Transitions Optical, Inc.*, FTC Dkt. No. C-4289 (Apr. 22, 2010). The Obama FTC also filed several amicus briefs in private cases in support of Section 2 enforcement. See *Mylan Pharm., Inc. v. Warner Chilcott PLC*, No. 15-2366 (3d Cir. filed Sept. 30, 2015); *Mylan Pharm. Inc. v. Celgene Corp.*, No. 2:14-CV-2094-ES-MAH (D.N.J. filed June 17, 2014); *Actelion Pharm. Ltd. v. Apotex Inc.*, No. CIV. 12-5743 NLH/AMD (D.N.J. filed Mar. 11, 2013). In contrast, the Bush II FTC brought four Section 2 exclusion cases, each involving abuse of a regulatory or standard-setting process. See *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008); *In re Union Oil Co. of California*, 138 F.T.C. 1 (2004); *In re Bristol-Myers Squibb Co.*, 135 F.T.C. 444 (2003); *In re Biovail Corp.*, 134 F.T.C. 407 (2002). And the Bush II FTC joined the DOJ’s defendant-friendly briefs in *Trinko* and *Weyerhaeuser*, but not *linkLine*.

¹⁷ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004).

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*.¹⁸

Trinko and the Bush II DOJ apparently favor the “Schumpeterian hypothesis,” which views monopoly, rather than competition, as being most conducive of innovation.¹⁹ This perspective naturally implies tolerant monopolization standards.²⁰

However, this favorable view of monopoly is contrary to the long tradition of antitrust that approaches monopolies with skepticism. As Professor Gavil notes, “the evils of monopoly are widely recognized: restricted output, higher prices, perhaps diminished incentives to pursue cost-cutting measures and innovation, and increased incentives to pursue rent-seeking strategies, as with predation.”²¹ Judge Hand’s observation about monopoly power in *Alcoa* is antitrust bedrock: “Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.”²²

¹⁸ *Id.* at 407; see DOJ SECTION 2 REPORT, *supra* note 9, at 1 (noting “greater appreciation for the potential harm from excessive restrictions on single-firm conduct, particularly harm to innovation”).

¹⁹ See Thomas O. Barnett, Ass’t Att’y Gen., Antitrust Div., The Gales of Creative Destruction: The Need for Clear and Objective Standards for Enforcing Section 2 of the Sherman Act, Remarks at the Antitrust Div. and Fed. Trade Comm’n Hearings Regarding Section 2 of the Sherman Act at 6 (June 20, 2006) (citing “Schumpeter’s observation that high profits serve as ‘baits that lure capital on to untried trails,’ thereby producing a ‘perennial gale of creative destruction’ resulting in better ways to satisfy our needs and desires.”). The Schumpeterian hypothesis is not merely that *potential* monopoly returns promote innovation but also that large firms and monopolies are more innovative than businesses in competitive markets, primarily because they are better able to appropriate the returns from risky investments. See generally Richard M. Brunell, *Appropriability in Antitrust: How Much is Enough?*, 69 ANTITRUST L.J. 1, 1–3 (2001); Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 578 (2007).

²⁰ See ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 86 (2007) [hereinafter AMC REPORT] (“This view—that the prospect of gaining monopoly is an appropriate incentive for competition and innovation—implies that the application of overly stringent antitrust rules for monopolists’ conduct could discourage competition and innovation.”).

²¹ Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 3 (2004).

²² *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945).

To be sure, monopolies built solely on “superior skill, foresight, or industry” have never been condemned, for as Judge Hand also noted, “the successful competitor, having been urged to compete, must not be turned upon when he wins.”²³ But, as Professor Gavil explains, “Antitrust law’s past tolerance of monopoly . . . has at best been grudging.”²⁴ Persistent monopolies have been viewed with suspicion because they are not the expected result of our competitive system. Also, monopoly power makes many exclusionary distribution strategies plausible, allowing monopolists to protect, prolong, and entrench their monopolies.²⁵

A lax approach towards Section 2 enforcement is not justified by a general fear of chilling innovation. Modern economic theory and empirical evidence do not support the Schumpeterian hypothesis that monopoly is more conducive to innovation than competitive markets.²⁶ The quest for *monopoly* does not drive most innovation; what drives most innovation is the quest for competitive advantage and the “threat of being left behind,” which is a function of vigorous competition.²⁷ Moreover, a permissive approach towards exclusionary conduct is at least as likely to chill innovation as to promote it, as rivals or potential rivals of dominant firms are dissuaded from making risky investments by a fear of

²³ *Id.* at 430. Yet it should be recalled that Professors Areeda and Turner long favored a “no fault” monopolization offense (and dissolution) for significant and persistent monopolies, even those based on superior skill, believing that the disincentive effect of such a rule would be minimal. See 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶¶ 614–23, at 35–71 (1978).

²⁴ Gavil, *supra* note 21, at 33; see also Lawrence A. Sullivan & Ann I. Jones, *Monopoly Conduct, Especially Leveraging Power from One Product or Market to Another*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 165, 167 (Thomas M. Jorde & David J. Teece eds., 1992) (“Evil though it may be, monopoly power and even exploitive pricing must be tolerated, so long as the power was innocently gained and is not used in ways yielding even further social harm.”).

²⁵ See William S. Comanor, *Is There a Consensus on the Antitrust Treatment of Single-Firm Conduct?*, 2008 WIS. L. REV. 387, 390 (“[E]ven if market power by itself is not unlawful, it is often a critical element for the successful prosecution of exclusionary conduct.”).

²⁶ See F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 637 (3d ed. 1990) (concluding that competition acts as a stimulus to R&D, up to a point); Baker, *supra* note 19, at 583–86 (discussing empirical studies, which generally contradict Schumpeterian hypothesis); see also F.M. Scherer, *Technological Innovation and Monopolization*, in 2 ISSUES OF COMPETITION LAW AND POLICY 1033, 1068 (W.D. Collins ed., 2008) (review of cases indicates “dominant firms have accumulated far more monopoly power than is necessary to motivate and sustain the most rapid and beneficial rate of technological progress”).

²⁷ As Professor Gavil notes, “[U]nless firms are hopelessly disconnected from the real world, the pipe dream of ‘monopoly’ can hardly be the major incentive that drives most firms to innovate. *Profits*, not monopoly profits, are the principal spur to innovation that ‘attracts business acumen.’” Gavil, *supra* note 21, at 43. It is ironic that at a time when a consensus is developing that overly strong patent rights diminish innovation, *Trinko* and conservative antitrust commentators have trotted out simplistic pro-patent incentive arguments to limit antitrust enforcement against monopolies. See generally Brunell, *supra* note 19 (cataloging such “appropriability” arguments, as well as competition counterarguments).

increased exclusionary conduct, which in turn reduces pressure on dominant firms to innovate.²⁸ Accordingly, based on his review of the evidence, Professor Scherer argues that “[t]he benefit of the doubt in high-technology monopolization matters ought to be resolved in favor of keeping structural and behavioral barriers to innovative new entry as low as possible.”²⁹

Nor is a lax approach justified by a fear of deterring specific procompetitive conduct of dominant firms. There is no evidence that dominant firms have refrained from procompetitive conduct because of a fear of liability or litigation under prevailing Section 2 standards.³⁰ And whatever risk of over-deterrence results from a more restrictive policy towards dominant firms, there is no good reason to believe that the costs of such a policy outweigh the costs of underdeterrence from a lax policy, including the actual exclusion of competitors from monopolized markets and the chilling effect of potential exclusionary conduct on new entry. In short, what is called for is a balanced approach that appreciates the costs of false positives and false negatives.³¹

The prevailing view is that concerted action among competitors is much more dangerous than “unilateral” conduct, and thus enforcement of Section 1 is more important than enforcement of Section 2.³² But it is incorrect to characterize Section 2 as being about unilateral conduct; exclusionary strategies may be implemented by agreement as well as unilaterally. The essence of the Section 2 offense is conduct *by a dominant firm*³³ that extends or entrenches its monopoly power “on some basis other than

²⁸ See Stephen C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 662 (1999); see also Gavil, *supra* note 21, at 40 (“What firm will undertake—and what investor will seriously support—entry into a market occupied by a dominant firm that has already demonstrated its penchant for entry-detering strategies—especially if it has already received the imprimatur of the courts?”).

²⁹ Scherer, *supra* note 26, at 1068. For further discussion of the relationship between Section 2 enforcement and entrepreneurial incentives, see Chapter 6 of this Transition Report.

³⁰ See Gavil, *supra* note 21, at 51 (noting that there “is no data to support the accusation that Section 2 is over-detering some kind of ‘legitimate’ conduct”).

³¹ Professor Gavil suggests that the costs of false negatives has been understated “because it can be so difficult for courts to restore competition once it has been lost . . .” *Id.* at 39. At the same time, the cost of false positives has been overstated because if dominant firms are truly more efficient than their rivals, they have many unquestionably lawful tools with which to compete; “the ‘self-correcting’ market will favor them, and their rivals will fade of their own accord.” *Id.* at 41.

³² See, e.g., *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (referring to collusion as “the supreme evil of antitrust”).

³³ As Justice Scalia noted, “Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist.” *Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J., dissenting).

efficiency.”³⁴ There is nothing in the language of the Sherman Act or its legislative history to suggest that Congress thought that monopolistic abuses were less important than concerted action among competitors, or any a priori reason to think that anticompetitive exclusion is less harmful than anticompetitive collusion.³⁵

B. *Tests for Exclusionary Conduct*

1. General Tests

The agencies should oppose efforts to promote a single proxy for exclusionary conduct under Section 2, such as the profit-sacrifice test, the no-economic sense test, or the equally efficient competitor test. The default framework should be the consumer-welfare balancing test articulated by the D.C. Circuit in *Microsoft*.

The Supreme Court in *Grinnell* identified two elements for the offense of monopolization: monopoly power (“the possession of monopoly power in the relevant market”) and exclusionary conduct (“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”).³⁶ In *Aspen Skiing*, the Court defined the conduct element as “behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.”³⁷ Antitrust enforcers, practitioners, judges, and scholars continue to debate the appropriate standard for determining whether a monopolist’s conduct is exclusionary (and therefore to be condemned) or competitive (and therefore to be applauded), and whether a single standard is appropriate for all types of monopolization claims.³⁸

³⁴ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985).

³⁵ See generally Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 532 (2013) [hereinafter Baker, *Exclusion*] (“The troublesome rhetorical consensus placing exclusionary conduct at antitrust’s periphery, not at its core, is not just unwarranted; it is damaging.”); Maurice E. Stucke, *Should the Government Prosecute Monopolies?* 2009 ILL. L. REV. 497, 503-04 (noting that penalties for Section 1 and 2 violations are identical, and legislative history shows that drafters were at least as concerned with anticompetitive conduct by monopolists as with concerted conduct by competitors).

³⁶ *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

³⁷ *Aspen Skiing*, 472 U.S. at 605 n.32 (quoting AREEDA & TURNER, *supra* note 23, ¶ 626b, at 78).

³⁸ See, e.g., Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 312 (2006) (“There is currently great intellectual ferment over the proper antitrust liability standard governing allegedly exclusionary conduct under Section 2 in the United States and Article 82 in Europe.”).

We agree with commentators who suggest that the test for monopolization should be a flexible one,³⁹ and that different tests may be appropriate for different categories of conduct, depending in part on the potential costs of false positives and false negatives associated with the type of conduct.⁴⁰ This was also the view of the Bush II DOJ.⁴¹ However, in the absence of a particularized test, the best default framework is the consumer-welfare balancing test articulated by the D.C. Circuit in *Microsoft*.⁴² The court adopted a rule of reason framework analogous to that used under Section 1, and constructed the following step-by-step analysis: First, the plaintiff may establish a prima facie case by establishing that the challenged conduct has an “anticompetitive effect,” i.e., “harm[s] the competitive *process* and thereby harm[s] consumers.”⁴³ The burden of production then shifts to the monopolist to proffer a “procompetitive justification” for its conduct, that is, “a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal.”⁴⁴ If the plaintiff cannot rebut the defendant’s procompetitive justification, the plaintiff must then “demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.”⁴⁵ The virtue of the *Microsoft* balancing approach, besides its sensible allocation

³⁹ See PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 6.04[J] (4th ed. Supp. 2015) (“The definition of anticompetitive conduct by the dominant firm must be flexible and not too categorical Such an approach is appropriate, for anticompetitive strategic behavior by dominant firms comes in many kinds, many of which may not be known or even anticipated today.”).

⁴⁰ See, e.g., Gavil, *supra* note 21, at 74; Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, The Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 437 (2006); Keith N. Hylton, *The Law and Economics of Monopolization Standards*, in ANTITRUST LAW AND ECONOMICS 82, 105 (Keith N. Hylton ed., 2010).

⁴¹ DOJ SECTION 2 REPORT, *supra* note 9, at 47 (“The Department believes different types of conduct warrant different tests, depending upon, among other things, the scope of the harm implicated by the practice; the relative costs of false positives, false negatives, and enforcement; the ease of application; and other administrability concerns.”). As discussed below, however, we disagree with the Bush II administration’s evaluation of these factors in many contexts.

⁴² *United States v. Microsoft Corp.*, 253 F.3d 34, 58–59 (D.C. Cir. 2001) (en banc).

⁴³ *Id.* at 58. Of course, harm to consumers need not be direct or immediate. Indeed, the paradigm of anticompetitive exclusion is that consumers are harmed indirectly and over the long term by the monopolist’s maintenance or extension of its monopoly power.

⁴⁴ *Id.* at 59.

⁴⁵ *Id.* This type of balancing approach has been used by other courts, see, e.g., *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 191–96 (3d Cir. 2005), and by the FTC, see *In re Rambus, Inc.*, FTC Dkt. No. 9302, at 30–31 (Aug. 2, 2006), <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>; see also Deborah Platt Majoras, Chairwoman, Fed. Trade Comm’n, *The Consumer Reigns: Using Section 2 to Ensure a Competitive Kingdom* 11 (June 20, 2006) (stating that *Microsoft* was a “sensible ‘weighted’ balancing approach”). Numerous scholars and practitioners have endorsed such an approach. See, e.g., Salop, *supra* note 38, at 329–35; Gavil, *supra* note 21, at 21–23; Jonathan M. Jacobson & Scott A. Sher, “No Economic Sense” Makes No Sense for Exclusive Dealing, 73 ANTITRUST L.J. 779, 799–800 (2005).

of burdens of proof and its allowance for consideration of both anticompetitive effects and procompetitive benefits, is that it places the focus on effects in the marketplace and considers all relevant evidence of the monopolist's strategy.⁴⁶ In contrast, the no-economic-sense and profit-sacrifice tests focus on the monopolist's intent, but judged solely by evaluating the profitability of its conduct against a hypothetical non-exclusionary benchmark (i.e., what its profits would be absent any exclusionary effect).⁴⁷

The Bush II DOJ endorsed *Microsoft* as providing “a useful procedural framework for distinguishing exclusionary from competitive acts,” but rejected the balancing aspect in favor of a more stringent “disproportionality” test, whereby conduct violates Section 2 only if its “likely anticompetitive harms *substantially* outweigh its likely procompetitive benefits.”⁴⁸ As Assistant Attorney General Varney explained, “the disproportionality test reflect[s] an excessive concern with the risks of overdeterrence and a resulting preference for an overly lenient approach to enforcement.”⁴⁹

2. Exclusive Dealing

The agencies should treat a monopolist's exclusive dealing that reasonably appears capable of making a significant contribution to maintaining its monopoly power as presumptively anticompetitive, subject to rebuttal that actual or potential anticompetitive effects are unlikely or are prevented by procompetitive benefits to consumers.

⁴⁶ We agree with Professor Baker that a truncated rule of reason analysis may be appropriate in cases when conduct tends to foreclose rivals and lacks any plausible efficiencies. In such cases, the exclusionary conduct may be condemned without a detailed analysis of anticompetitive effects when the defendant is a monopolist or near-monopolist, or competition from all significant actual or potential rivals is foreclosed, regardless of the market share(s) of the excluding firm(s). See Baker, *Exclusion*, *supra* note 35, at 548; cf. A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L. J. 375, 392 (2006) (“Conduct that creates market power and has no efficiency benefit can be condemned as naked exclusion . . .”).

⁴⁷ The DOJ Section 2 Report concluded that the profit-sacrifice test “raises serious concerns and should not be the test for section 2 liability,” while the no-economic sense test may “sometimes be useful in identifying certain exclusionary conduct,” but should not be a necessary condition for liability. DOJ SECTION 2 REPORT, *supra* note 9, at 42-43. We agree. The Report also rejects the equally efficient competitor test as a general matter, but concludes it “can be a useful inquiry and may be best suited to particular pricing practices.” *Id.* at 45. Insofar as the test is interposed as a *requirement*, it is inappropriate for several reasons, including the fact that exclusion of less efficient rivals can harm competition and consumers. See discussion of conditional pricing practices, *infra*.

⁴⁸ DOJ SECTION 2 REPORT, *supra* note 9, at 36, 45 (emphasis added).

⁴⁹ Christine A. Varney, Ass't Atty. Gen., Antitrust Div., U.S. Dept. of Justice, Vigorous Antitrust Enforcement in this Challenging Era, Remarks as Prepared for the U.S. Chamber of Commerce (May 12, 2009), <https://www.justice.gov/atr/speech/vigorous-antitrust-enforcement-challenging-era>.

Exclusive dealing is a paradigmatic means by which a monopolist can deny rivals inputs or customers and thereby bolster its monopoly power.⁵⁰ As a result of exclusive dealing, the ability or incentive of foreclosed rivals to compete can be reduced, which allows the monopolist to maintain supracompetitive prices.⁵¹ Foreclosure need not be total nor exceed any particular market-share threshold in order to be anticompetitive or actionable under Section 2.⁵² Exclusive dealing can also have procompetitive benefits, which is why it is analyzed under the rule of reason under Section 1 or 2.

One current controversy is the evidentiary burden a plaintiff must meet to establish that exclusive dealing has an anticompetitive effect. For example, must the plaintiff prove that but for the exclusive dealing, prices would have been lower? In the FTC's recent *McWane* case, Commissioner Wright in dissent urged a standard requiring "clear evidence of anticompetitive effect" in order for the government to make a *prima facie* case.⁵³ The Eleventh Circuit, agreeing with the Commission and the court's sister circuits, expressly rejected this heightened standard of proof. Rather, the Eleventh Circuit adopted a standard that merely requires proof that the conduct "reasonably appears to significantly contribute to maintaining monopoly power."⁵⁴ Other circuits, including the D.C. Circuit in *Microsoft*, have adopted an even more lenient standard, requiring only that the conduct "reasonably appears *capable* of making a significant contribution to maintaining monopoly power."⁵⁵ This relaxed

⁵⁰ See *Jefferson Parrish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring) ("Exclusive dealing can have adverse consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods, or by allowing one buyer of goods unreasonably to deprive other buyers of a needed source of supply.").

⁵¹ See generally Krattenmaker & Salop, *supra* note 2. The economics of exclusive dealing and theory of raising rivals' costs are not in dispute. See, e.g., *In re McWane, Inc.*, FTC Dkt. No. 9351 (2014), 2014 WL 556261, *48 (FTC 2014) (Wright, Commissioner, dissenting) (correctly citing raising rivals' cost theories, but mistakenly suggesting that competition can only be harmed if rival cannot achieve minimum efficient scale); DOJ SECTION 2 REPORT, *supra* note 9, at 136-37.

⁵² Numerous cases hold that exclusive dealing may violate Section 2 even though it does not satisfy the "substantial foreclosure" requirement of Section 1. See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir. 2001); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 197 (3d Cir. 2005). This makes sense because foreclosure has greater potential to harm competition in monopoly markets. See *McWane, Inc. v. FTC*, 783 F.3d 814, 836 (11th Cir. 2015), *cert. denied*, 84 U.S.L.W. 3323 (U.S. Mar. 21, 2016) (No. 15-706).

⁵³ *In re McWane*, 2014 WL 556261, at *51. Commissioner Wright was skeptical that anticompetitive harm had been established given the absence of a showing of price effects, but allowed that such a showing was not necessarily required. See *id.* at *52. He urged a heightened standard of proof because of the "state of empirical economic literature demonstrating that [vertical] restraints rarely harm competition." *Id.* at *46. However, there is no empirical literature demonstrating that exclusive dealing by monopolists rarely harms competition. See Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong With Antitrust's Right*, 80 ANTITRUST L.J. 1, 18 (2015).

⁵⁴ *McWane*, 783 F.3d at 837.

⁵⁵ *Microsoft*, 253 F.3d at 79 (quoting 3 PHILLIP E. AREEDA & HEBERT HOVENKAMP, ANTITRUST LAW ¶ 651c, at 78 (1996)) (emphasis added) (ellipsis omitted); see also *Taylor Publ'g Co. v. Jostens Inc.*, 216 F.3d 465, 475 (5th Cir. 2000); *Morgan v.*

standard of proof is appropriate because if the monopolist's exclusive dealing raises barriers to entry or expansion by rivals, and lacks cognizable efficiency benefits, there is no reason it should be tolerated.⁵⁶ "To require that § 2 liability turn on plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive actions."⁵⁷ By the same token, if the defendant establishes that the exclusive-dealing arrangement has efficiency benefits for consumers, the ultimate burden of proof appropriately remains on the plaintiff to show probable net anticompetitive harm.

3. Conditional Pricing Practices

The agencies should reject cost-based safe harbors for conditional pricing practices (loyalty and bundled "discounts"), and treat such practices as presumptively anticompetitive when they help preserve, extend, or exploit a monopolist's market power, subject to rebuttal that anticompetitive effects are prevented by procompetitive benefits to consumers.

Conditional pricing practices involve agreements under which a seller provides a "discount" to a buyer that agrees to purchase some high percentage of its requirements for a particular product from the seller (a loyalty discount) or to purchase a second product from the seller (a bundled discount). Loyalty and bundled discounts can raise anticompetitive concerns similar to those raised by exclusive dealing and tying arrangements.⁵⁸ Indeed, loyalty and bundled discounts by dominant firms are easily structured to produce de facto exclusive or partial exclusive dealing. For example, "first dollar" or "retroactive" loyalty rebates are rebates applied to all the purchases made by a customer during a period, provided a specified market-share threshold is maintained, not just to those in excess of the threshold. This can make it very costly, if not impossible, for rivals to compete for a portion of the customers'

Pander, 892 F.2d 1355, 1363 (8th Cir. 1989); Southern Pac. Commc'ns Co. v. Am. Tel. & Tel. Co., 740 F.2d 980, 999 n.19 (D.C. Cir. 1984); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983) (Breyer, J.).

⁵⁶ In evaluating likely effects, the Eleventh Circuit properly found the evidence of anticompetitive intent to be "particularly powerful." *McWane*, 783 F.3d at 840. Conservative critics tend to minimize such evidence, to the point that Commissioner Wright not only discounted it in assessing whether *McWane* was guilty of monopolization, but also in rejecting the FTC's attempted monopolization theory, as to which intent is critical. *See* *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). Inexplicably, Commissioner Wright saw "no benefit in using the offense of attempted monopolization to prosecute conduct that might be viewed as exclusionary ex ante but turned out not be ex post . . ." *In re McWane*, 2014 WL 556251, at *64. The benefit, of course, is to deter conduct that is intended to cause harm and has no social benefit.

⁵⁷ *Microsoft*, 253 F.3d at 79.

⁵⁸ *See generally* EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 404-14 (2d ed. 2011). It is worth noting that Section 3 of the Clayton Act expressly includes conditional discounts and rebates within its ambit. *See* 15 U.S.C. § 14 (2012) (unlawful to make a sale, "or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition" that buyer not use or deal in the goods of the seller's rival where the effect "may be to substantially lessen competition or tend to create a monopoly").

demand beyond that permitted by the specified market-share threshold. A rival must not only match the monopolist's prices on the sales it can reasonably contest, but compensate the customer for its lost rebates on all of the customers' purchases from the monopolist.⁵⁹ The rebate is effectively a "tax" the rival must pay to compete for a customer's volume in excess of that permitted by the market-share threshold. Likewise, a bundled rebate amounts to a tax that single-product sellers must pay in the amount of the customer's lost rebates on the monopoly product. As a result, a rival may be foreclosed from significant portions of the market, and such foreclosure (or raised costs) may harm consumer welfare by reducing competitive pressure on the dominant firm. Accordingly, like exclusive dealing and tying, loyalty and bundled discounts should be unlawful when they help preserve, extend, or exploit a dominant firm's market power and the exclusionary conditions are not justified by a counter-vailing procompetitive benefit.⁶⁰

The next administration should not support cost-based safe harbors for loyalty discounts or bundled discounts by dominant firms, whether the price-cost test is of the "traditional" *Brooke Group*⁶¹ variety or the "discount attribution" type.⁶² As an initial matter, it may be a misnomer to refer to bundled or

⁵⁹ For example, the market share threshold might be 90% for a customer with a demand for 10 units. If the customer purchases two units from a rival of the monopolist, which is beyond the 10% (one unit) permitted by the threshold, it will lose rebates on the eight units it continues to purchase from the monopolist.

⁶⁰ As with tying, bundled discounts may have exclusionary effects or enable a dominant firm to better exploit its market power by facilitating forms of price discrimination. See Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 450-55 (2009). Insofar as such exploitation may not be actionable under § 2, it is actionable under § 1. See discussion of tying, *infra*. Also, loyalty discounts can lead to higher prices, even in the absence of exclusion of rivals, when they involve a commitment by the incumbent to maintain a higher "list" price for customers that do not agree to the loyalty condition. In that event, both the incumbent and the rivals have less of an incentive to cut prices offered to "disloyal" buyers. See Einer Elhauge & Abraham L. Wickelgren, *Robust Exclusion and Market Division Through Loyalty Discounts*, 43 INT'L J. INDUS. ORG. 111 (2015).

⁶¹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

⁶² Under a traditional *Brooke Group* predatory-pricing test, the question is whether a monopolist's incremental revenues exceed its costs on the full range of sales at issue. Under a "discount attribution" test, all discounts are attributed to either the "competitive" product—in the case of bundled discounts—or the contestable demand—in the case of single-product loyalty discounts. The recent joint agency workshop on conditional pricing practices suggested a wide consensus among economists that analyzing such practices under a predatory-pricing approach is misguided. See *Conditional Pricing Practices: Economic Analysis and Legal Policy Implications* (June 23, 2014) [hereinafter *Conditional Pricing Practices Workshop*], <https://www.ftc.gov/news-events/events-calendar/2014/06/conditional-pricing-practices-economic-analysis-legal-policy> (transcript and speakers' presentation slides); see also Joshua D. Wright, Comm'r, Fed. Trade Comm'n, *Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts*, Remarks at the Bates White 10th Annual Antitrust Conference at 20 (June 3, 2013), http://www.ftc.gov/sites/default/files/documents/public_statements/simple-wrong-or-complex-more-accurate-case-exclusive-dealing-based-approach-evaluating-loyalty/130603bateswhite.pdf 20 ("[L]oyalty discounts elicit the same concerns about raising rivals' costs that 'total' exclusive dealing does and, for that reason, ought to be analyzed under the same legal rubric as exclusive dealing. . . . A court should not focus on whether the defendant's discounting has resulted in prices below cost."). For a comprehensive discussion of why the case law does not support a cost-based safe harbor

loyalty pricing structures as “discounts.” They may often be better understood as imposing “penalties” for failing to comply with the exclusionary conditions. That is why the term “conditional pricing practices” is more apt. As Professor Elhaug points out, “Rather than call them either loyalty discounts or disloyalty penalties, it would be more neutral to call them price differences conditioned on loyalty, because an important question is precisely whether the prices charged to those who refuse to abide by those conditions are above but-for prices (in which case they are really penalties) or below but-for prices (in which case they are really discounts).”⁶³

In any event, even if the “discount” is a true discount,⁶⁴ a predatory-pricing analogy is inapt for many reasons. In the first place, as with explicit exclusive dealing, conditional pricing practices can reduce an entrant’s ability to compete effectively without any sacrifice of profits on the monopolist’s part. Moreover, a fear of false positives does not justify a demanding test based on the reasoning of *Brooke Group*. Unlike predatory pricing, the conduct at issue is not discounting, as such, but the exclusionary conditions that accompany the discounting.⁶⁵ While straightforward discounting is unambiguously good for consumers, at least in the short term,⁶⁶ exclusionary conditions are not.⁶⁷ Indeed, if the

for loyalty rebates structured to produce exclusive dealing, see Comments of the American Antitrust Institute in Connection with Conditional Pricing Practices Workshop (Sep. 22, 2014) [hereinafter AAI Conditional Pricing Comments], https://www.ftc.gov/system/files/documents/public_comments/2014/09/00015-92693.pdf.

⁶³ ELHAUGE, *supra* note 58, at 404. Similarly, with respect to bundled discounts, if the price of the unbundled “monopoly” product is higher than it would have been without the discount program, then the “discount” amounts to a penalty. *See id.* at 409 (“Bundled discounts can have all the same anticompetitive effects as tying whenever the unbundled price for the linking product (the product over which the firm has market power) exceeds the but-for price for that product (the price the firm would charge ‘but for’ the bundling).”)

⁶⁴ This may be difficult to assess because the but-for price is not necessarily the price before the program was implemented. *See* Elhaug, *supra* note 60, at 468 (noting that pre-bundle prices may be higher than but-for prices if costs are declining or the dominant firm’s market power is eroding).

⁶⁵ *See* Brief for the United States as Amicus Curiae at 12, *3M Co. v. LePage’s Inc.*, 542 U.S. 953 (2004) (No. 02-1865) [hereinafter U.S. *LePage’s* Brief] (“[T]he bundling of rebates (as distinct from price reductions that may result) is not necessarily procompetitive.”); Jonathan M. Jacobson, *A Note on Loyalty Discounts* at 2, ANTITRUST SOURCE (June 2010) (“[A] loyalty discount is not a simple price cut. . . . By conditioning the discount on a percentage requirement, the supplier is inducing the customer to take more from the supplier and also to take less from rivals.”).

⁶⁶ Even if bundled or loyalty discounts provide short-term benefits to buyers that accept them, buyers collectively will be harmed in the long term if competition among suppliers is restricted. Yet buyers may agree to the terms or even seek out loyalty rebates because of a collective-action problem. *See* Elhaug, *supra* note 60, at 456; Joseph F. Brodley & Ching-to Albert Ma, *Contract Penalties, Monopolizing Strategies, and Antitrust Policy*, 45 STAN. L. REV. 1161 (1993).

⁶⁷ Moreover, unlike unconditional price cutting, conditional discounts in the form of lump-sum rebates may not benefit ultimate consumers because they do not lower the intermediate purchaser’s marginal costs. *See* Barry Nalebuff, *Exclusionary Bundling*, 50 ANTITRUST BULL. 321, 347 (2005) (explaining that lump-sum rebate is less likely to be passed on to consumers than unconditional price cuts); *cf.* *LePage’s Inc. v. 3M Co.*, 324 F.3d 141, 163 (3d Cir. 2003) (noting that 3M’s rebate programs did not benefit ultimate consumers). Bundled discounts also reduce transparency in pricing and make it difficult

bundling or loyalty conditions themselves benefitted buyers, then it would be unnecessary for the seller to offer discounts to accept them. And restrictions on dominant firm use of bundled or loyalty discounts do not restrict dominant firms from offering unconditional discounts or uniform volume discounts.⁶⁸

Nor can a cost-based test be justified on the basis that if prices are above the monopolist's cost, an equally efficient competitor can match them. First, a firm with a small market share may be an equally efficient competitor for part of the market, yet it may not be able to match the monopolist's loyalty rebates because it cannot realistically compete for all of a customer's business for which the customer receives a rebate—just as an equally efficient single-product firm cannot match a monopolist's bundled rebates because it does not offer the range of products on which the monopolist provides a rebate.⁶⁹ A traditional *Brooke Group* test would exclude equally efficient competitors in these circumstances.⁷⁰ Second, loyalty rebates, like bundled rebates, may prevent a rival from *becoming* an equally efficient competitor by denying it the economies of scale it needs to be equally (or more) efficient.⁷¹ Third, antitrust law ordinarily has not immunized anticompetitive conduct by monopolists when it

for buyers to comparison shop. *See* Nalebuff, *supra*, at 322 (“buyers find it difficult to compare a bundled price with a la carte offerings”).

⁶⁸ Professor Crane points out that market-share discounts have certain advantages over volume discounts, for either buyers or sellers. *See* Daniel A. Crane, *Bargaining Over Loyalty*, 92 TEX. L. REV. 253 (2013). Of course, volume discounts can be structured to be anticompetitive as well. In any event, the real question is whether exclusionary conditions that have anticompetitive effects are reasonably necessary to achieve lower costs or other pro-competitive benefits. For further discussion, *see* AAI Conditional Pricing Comments, *supra* note 62, at 9 n.10.

⁶⁹ Even if a rival is theoretically capable of bidding for all of a customer's business, it may be unduly costly or practically impossible for the rival to avoid foreclosure by outbidding the dominant firm for many reasons, not least of which is the “exclusion value” of the foreclosure to the monopolist. *See* Steven C. Salop, Conditional Pricing Practices and the Two Anticompetitive Exclusion Paradigms at 12, Conditional Pricing Practices Workshop, *supra* note 62 (“Monopolist's ‘exclusion value’ provides incentive to bid higher than equally efficient entrant” for exclusivity) (workshop slides); *see also id.* at 14-15 (where rival entrant needs wide nonexclusive distribution, “coordination problem” among distributors may prevent entry by equally efficient rival).

⁷⁰ That is why the Ninth Circuit in *PeaceHealth* adopted a discount attribution rule for bundled discounts. *See* *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 896-97, 906 (9th Cir. 2008).

⁷¹ *See* ELHAUGE, *supra* note 58, at 411 (“Rivals that are equally efficient (in the sense of having a long run cost curve that is as low as the defendant) might be unable to achieve a price as low as the defendant's costs precisely because the foreclosure has relegated them to the high cost portion of their cost curve.”). Even Judge Posner, a prominent advocate of an “equally efficient competitor” standard, recognizes that exclusion of a competitor that is “less efficient” because it is prevented from attaining economies of scale is an antitrust problem. Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. CHI. L. REV. 229, 240 (2005); *see also* U.S. LePage's Br., *supra* note 65, at 13 n.10 (“Firms with equal costs at any common level of output may have different costs because they produce different levels of output, perhaps as a result of allegedly exclusionary conduct, which calls into question their comparative efficiency.”).

excludes only less efficient rivals.⁷² And this is good policy because even less efficient competitors can provide important checks against the exercise of market power.⁷³ Finally, cost-based safe harbors are problematic because cost-based tests are so difficult to apply in practice.⁷⁴

Although a cost-based test is unhelpful and possibly counterproductive when employed as a screen, a discount-attribution rule may be employed by plaintiffs as one way to establish that bundled discounts or loyalty discounts have an exclusionary effect. More generally, a plaintiff should be able to show that loyalty or bundled discounts have exclusionary effects in the same ways it may show exclusive dealing to be exclusionary. Alternatively, a bundled discount may amount to a *de facto* tying arrangement.⁷⁵

Current treatment in the courts of appeals is mixed. As to bundled discounts, the Ninth Circuit adopted a “discount attribution” price-cost test for claims under § 2 in *Cascade Health*, whereas the Third Circuit rejected any price-cost requirement in *LePage’s*.⁷⁶ The Ninth Circuit left open the possibility that a plaintiff that did not satisfy its discount-attribution rule may still be able to establish a tying violation under § 1 based on the discount, which the Sixth Circuit rejected.⁷⁷ As to loyalty discounts,

⁷² See AAI Conditional Pricing Comments, *supra* note 62, at 8-9 (citing cases).

⁷³ See *id.* at 9 (citing authorities).

⁷⁴ See ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE* 672 (2d ed. 2008) (“Determining whether a dominant firm’s prices are ‘below cost’ . . . has proven to be a challenging task.”); 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 740d, at 200 (4th ed. 2015) (“The difficulties of measuring costs are notorious.”); see, e.g., *United States v. AMR Corp.*, 335 F.3d 1109, 1120-21 (10th Cir. 2003) (rejecting all four tests of variable costs proposed by the government in predatory-pricing case). This difficulty not only makes it hard for courts and juries to determine a monopolist’s costs, increases expenses for litigants, and undercuts the usefulness to businesses of cost-based safe harbors, but it also makes it exceedingly difficult for a plaintiff to succeed. See Robert H. Lande, *Should Predatory Pricing Rules Immunize Exclusionary Discounts?*, 2006 UTAH L. REV. 863, 880 (2006) (using a cost-based test would “snare the parties into the expensive, unpredictable, daunting quagmire” of predatory-pricing litigation “that almost always ends in a finding of legality”).

⁷⁵ See Elhauge, *supra* note 60, at 468 (“When the linking product’s unbundled price exceeds its but-for price, bundled discounts have the same power effects as ties and thus should be treated like ties by applying a similar quasi-per se rule that bases liability on linking market power unless the defendant proves offsetting efficiencies.”); cf. 10 PHILLIP E. AREEDA ET AL., *ANTITRUST LAW* ¶ 1758b (3d ed. 2011) (package pricing can amount to *de facto* tying arrangement when percentage of separate sales is small). See discussion of tying, *infra*.

⁷⁶ See *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008); *LePage’s Inc. v. 3M Co.*, 324 F.3d 141 (3d Cir. 2003) (en banc).

⁷⁷ See *Cascade Health*, 515 F.3d at 912-16 & n.27; *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 273 (6th Cir. 2015).

the Third Circuit in *ZF Meritor* stated that “the price-cost test applies to market-share or volume rebates offered by suppliers within a single-product market,” but that such a test only applies “when price is the clearly predominant mechanism of exclusion.”⁷⁸ The court held that price is not the predominant means of exclusion when the loss of rebates may be fairly characterized as a penalty for failing to comply with the exclusionary condition, or when the condition bundles contestable and incontestable demand.⁷⁹

4. Refusals to Deal with a Competitor

The agencies should support liability for a monopolist’s refusal to deal with a rival when: (1) such refusal helps preserve or extend its monopoly power; (2) the monopolist discriminates between the competitor and other customers, has previously dealt voluntarily with the competitor, or otherwise demonstrates a predatory intent; and (3) the anticompetitive effects are not prevented by procompetitive benefits to consumers.

In their merits brief in *Trinko*, the DOJ and FTC invited the Court to adopt the typically defendant-friendly no-economic-sense test for judging a monopolist’s refusal to deal with a rival because of the “infrequent pro-competitive benefits and the frequent anticompetitive risks posed by a generalized requirement that firms assist rivals.”⁸⁰ While the Court declined the invitation, it was sympathetic to the Bush administration’s policy arguments and was clearly skeptical of refusal-to-deal claims. The AMC also expressed skepticism of refusal-to-deal theories,⁸¹ although its recommendation on this issue—“[i]n general, firms have no duty to deal with a rival in the same market”⁸²—hardly seems controversial. Of course a monopolist, like other firms, has a *general* right to refuse to deal with its rivals, but the right is not unqualified.⁸³ In its subsequently withdrawn Section 2 Report, the DOJ

⁷⁸ *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 274 n.11, 275 (3d Cir. 2013).

⁷⁹ *Id.* at 277, 278, 282-83; *see also* Einer Elhauge, *The Merit of Meritor* at 3-4, Conditional Pricing Practices Workshop, *supra* note 62 (setting out six factors when price is not clearly the predominant mechanism of exclusion) (workshop slides).

⁸⁰ Brief for the United States and the Fed. Trade Comm’n as Amici Curiae Supporting Petitioner 17, *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682) [hereinafter “U.S. Trinko Merits Brief”].

⁸¹ AMC REPORT, *supra* note 20, at 101 (“Refusals to deal with horizontal rivals in the same market should rarely, if ever, be unlawful under antitrust law, even for a monopolist.”). It is not clear what the AMC intended by its reference to rivals “in the same market.” A rival normally means a horizontal competitor in the same market. Perhaps the AMC meant to distinguish monopoly leveraging situations, where the monopolist in one market refuses to deal with a rival in an adjacent market, but that is a common scenario in refusal-to-deal cases (e.g., *Kodak*, *Otter Tail*, and *MCI*).

⁸² *Id.*

⁸³ In *Trinko*, the Court, quoting *Colgate*, stated, “as a general matter, the Sherman Act ‘does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.’” 540 U.S. at 408. But, in Orwellian fashion, the Court omitted the preface to the

concluded that “unconditional refusals to deal with competitors should not play a meaningful part in section 2 enforcement,” citing administrative burdens, the likelihood of overdeterrence, and the risk of discouraging innovation.⁸⁴ More recently, the FTC has advocated a robust role for Section 2 enforcement against refusals to deal, arguing that Supreme Court precedent supported liability in two cases where the refusal may have blocked all competition, the monopolist was willing to provide access to non-competitors, and the policy concerns with “enforced sharing” identified in *Trinko* were not present.⁸⁵

Trinko suggests that a monopolist’s refusal to deal with a competitor that creates significant exclusionary effects likely to harm consumers may be actionable when it is predatory or, as *Aspen Skiing* and *Kodak* frame it, when the monopolist fails to establish a legitimate business justification for the refusal.⁸⁶ A predatory intent can be presumptively shown by the monopolist’s termination of a voluntary

sentence, which reads “In the absence of any purpose to create or maintain a monopoly, . . .” *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

⁸⁴ DOJ SECTION 2 REPORT, *supra* note 9, at 119-29. By “unconditional” refusals to deal, the DOJ sought to distinguish refusals that are used to compel conduct of other parties, like tying or exclusivity. *Id.* at 119. Of course, refusals where the monopolist is willing to supply the input to non-rivals may be understood as conditioned on the rival ceasing to compete with it. *See infra* note 88.

⁸⁵ *See* Fed. Trade Commission’s Brief as Amicus Curiae, *Mylan Pharms. v. Celgene Corp.*, 2:14-cv-02084 (D.N.J. filed June 17, 2014), 2014 WL 2968348 [hereinafter FTC Mylan Brief]; Fed. Trade Commission’s Brief as Amicus Curiae, *Actelion Pharms., Ltd. v. Apotex Inc.*, No. 1:12-cv-05743 (D.N.J. filed Mar. 11, 2013), *available at* <https://www.ftc.gov/policy/advocacy/amicus-briefs>. Both cases involve a patented drug manufacturer’s refusal to sell samples of its drug to generic manufacturers that would allow those companies to complete the steps required by the FDA to bring a competing generic to market, where the drug was subject to restricted distribution under a program known as Risk Evaluation and Mitigation Strategies (REMS).

⁸⁶ As Professor Baker puts it, “a firm with monopoly power violates Sherman Act § 2 if it excludes rivals from the monopolized market by restricting a complementary or collaborative relationship without an adequate business justification.” Jonathan B. Baker, *Promoting Innovation Competition Through the Aspen/Kodak Rule*, 7 GEO. MASON L. REV. 495, 503 (1999). Professor Salop suggests that a refusal-to-deal or price-squeeze claim should be analyzed under a tightly structured rule of reason that focuses on harm to consumers and takes into account dynamic concerns. *See* Steven C. Salop, *Refusals to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist*, 76 ANTITRUST L.J. 709 (2010).

course of dealing,⁸⁷ or by the monopolist's practice of dealing with customers who are not also competitors.⁸⁸ Of course, a monopolist could defend its refusal on the ground that it would not be technologically or economically feasible to supply the rival, or that the refusal otherwise benefits consumers.

The agencies should treat a price squeeze by a monopolist as a constructive refusal to deal when the monopolist could not have made a profit selling at its retail rates if it purchased inputs at its own wholesale rates.

In *linkLine*, the Court limited the applicability of price-squeeze claims by holding that such claims are actionable only when the elements of a refusal-to-deal claim are satisfied.⁸⁹ Nothing in *linkLine* precludes treating a price squeeze as a *constructive* refusal to deal when the vertically integrated monopolist's prices are such that it could not have made a profit by selling at its retail rates if it had purchased the input at the wholesale rate charged to the rival. The EU follows, and many commentators recommend, such an approach.⁹⁰ When the monopolist fails this "transfer-price" test,⁹¹ an equally efficient

⁸⁷ As the FTC has noted, while some lower courts have required a prior course of dealing, the Supreme Court has not. FTC Mylan Brief, *supra* note 85, at 12 ("Trinko recognized the termination of prior dealing as evidence suggesting profit sacrifice, but not an independent element of the claim itself"); see also *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009) (noting the critical factor in *Aspen Skiing* was the defendant's willingness to forsake short-term profit.); Susan A. Creighton & Jonathan M. Jacobson, *Twenty-Five Years of Access Denials*, 27 ANTITRUST, Fall 2012, at 50, 52 ("Fairly read . . . neither *Aspen* nor *Kodak* compels a prior course of dealing screen.").

⁸⁸ Judge Posner has suggested that the "essential feature" of a viable refusal to deal claim is "a monopoly supplier's discriminating against a customer because the customer has decided to compete with it." *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 377 (7th Cir. 1986); see *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1133 (9th Cir. 2004) (noting that discrimination was one of the distinguishing factors in *Trinko* and that it is important because it relates to the court's ability to fashion a remedy and is strong evidence of anticompetitive intent); John Thorne, *A Categorical Rule Limiting Section 2 of the Sherman Act: Verizon v. Trinko*, 72 U. CHI. L. REV. 289, 298–99 (2005) (arguing that "forced sharing" does not raise investment-deterrence and administrability concerns when the monopolist is already providing the product or service to non-competitors).

⁸⁹ *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 439 (2009) ("A price-squeeze claim may not be brought under § 2 when the defendant has no antitrust duty to deal with the plaintiff at wholesale.").

⁹⁰ See Eur. Comm'n, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C 45) 18-20, ¶¶ 75-90; John Vickers, *Abuse of Market Power*, 115 ECON. J. F244. F250-51 (2005); Elhauge, *supra* note 60, at 466; Salop, *supra* note 86, at 720.

⁹¹ See, e.g., *Ray v. Indiana & Michigan Elec. Co.*, 606 F. Supp. 757, 776–77 (D. Ind. 1984); *Illinois Cities of Bethany v. F.E.R.C.*, 670 F.2d 187, 189 (D.C. Cir. 1981). While *linkLine* rejected the transfer-price test as a basis for standalone price-squeeze liability, i.e., in the absence of a "duty to deal," *linkLine*, 555 U.S. at 454-55, the Court did not address whether the test may be used to establish that a high wholesale price constitutes a constructive refusal to deal, or to show the predatory intent that is an element of establishing a "duty to deal." See Elhauge, *supra* note 60, at 466 ("Linkline held that a price

single-stage rival cannot compete, and the monopolist is sacrificing profits on each of its retail sales because it could earn more money by making those sales to the rival at wholesale.⁹² Thus, the failure to satisfy the test not only suggests an anticompetitive effect, but also presumptively satisfies the predatory-intent element of a refusal-to-deal claim.

The agencies should revitalize the essential facilities doctrine as an independent theory of liability for purposes of injunctive relief.

The essential facilities doctrine arises when rivals are denied access to essential inputs controlled by a monopolist.⁹³ Although treated dismissively by *Trinko*, the doctrine ought to be retained and revitalized as an independent theory of liability for refusals-to-deal in certain circumstances. Injunctive relief (but not damages) should be available when (1) competitor access to infrastructure or networks controlled by a durable monopolist is feasible and essential for competition in adjacent markets that produce important public benefits; (2) an antitrust remedy is the most (or only) practical solution to the denial of access; and (3) incentives to innovate are not likely to be impaired.⁹⁴ It should be available even in the absence of any showing of predatory intent by the monopolist, and regardless of whether the facility has previously been open to third parties.⁹⁵

The innovation-incentives argument for eliminating the essential facilities doctrine or sharply circumscribing liability for refusals to deal—that potential liability will discourage monopolists or their rivals from building facilities in the first place⁹⁶—is overstated and incomplete. *A priori* reasoning cannot

squeeze was not illegal when the downstream price exceeded cost unless the high upstream price amounted to a constructive refusal to deal and the other conditions for a duty to deal were met.”); *see also* Salop, *supra* note 86, at 721 n.50 (suggesting that court’s rejection of transfer-price test was circular).

⁹² *See* Salop, *supra* note 86, at 721-24; Vickers, *supra* note 90, at F251. Profit sacrifice and the inability of a *more* efficient rival to compete is particularly apparent when the monopolist charges less at retail than it does at wholesale.

⁹³ *See* Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 443 (2002).

⁹⁴ *See generally* Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1 (2008); *see also* Marina Lao, *Search, Essential Facilities, and the Antitrust Duty to Deal*, 11 NW. J. TECH. & INTELL. PROP. 275 (2013); Stephen M. Maurer & Suzanne Scotchmer, *The Essential Facilities Doctrine: The Lost Message of Terminal Railroad*, 5 CALIF. L. REV. 278 (2014).

⁹⁵ *See* Salop, *supra* note 86, at 735. Professor Salop has proposed a “protected profits benchmark,” based on the well-known efficient component pricing rule, as an administrable means to determine the appropriate terms of access when a market benchmark is not available.

⁹⁶ *See Trinko*, 540 U.S. at 407–08 (“Compelling [monopolists] to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in these economically beneficial facilities.”); *see generally* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*,

determine whether a rule that occasionally requires access—subject to reasonable compensation—diminishes investment in new facilities in general, or reduces investment by the monopolist subject to the requirement in particular. As discussed above, competition itself spurs innovation.⁹⁷ It seems at least equally likely that such a rule will increase overall investment or leave it unchanged given that the terms of access can be set to include a monopoly return,⁹⁸ and rivals that depend on access (as well as the monopolist) will have *greater* incentives to invest and innovate in complementary markets.⁹⁹

The agencies should treat a vertically integrated monopolist’s refusal to sell or license its intellectual property to a downstream competitor the same as a refusal to sell or provide access to physical property.

We do not think separate rules are appropriate for refusals to deal that involve intellectual property.¹⁰⁰ A vertically integrated monopolist’s refusal to sell or license its intellectual property to a downstream competitor should be presumptively lawful, but otherwise doctrinally treated the same as a refusal to sell or provide access to physical property.

5. Predatory pricing

The next administration should look for opportunities to bring predatory pricing cases and encourage courts to develop a structured rule of reason that is more consistent with modern economic thinking about predatory pricing strategies than is current law.

Thirty years ago the Supreme Court observed in *Matsushita*, and then repeated in *Brooke Group*, that “there is a consensus among commentators that predatory pricing schemes are rarely tried, and even

58 ANTITRUST L.J. 841, 851 (1990). For a critique of Areeda’s oft-cited article, see Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 WIS. L. REV. 359.

⁹⁷ See *supra* notes 27-29 and accompanying text.

⁹⁸ See, e.g., Salop, *supra* note 86, at 725-28, 737. If the facility has been built with the aid of public funds, or the monopolist has attained its monopoly illegitimately or under the protection of regulation, then monopoly returns may be inappropriate. See *id.* at 738; see also Eur. Comm’n, *supra* note 90, at 19 ¶ 82 (noting lack of risk of impairing investment incentives when monopoly was “developed under the protection of special or exclusive rights or has been financed by state resources”).

⁹⁹ See Frischmann & Waller, *supra* note 94, at 32–36; Maurer & Scotchmer, *supra* note 94, at 306. As for the incentive of the rival to invest in facilities of its own, if the facility can be reasonably duplicated then it does not qualify as being “essential,” and the very fact that the monopolist has durable monopoly power in the input market tends to suggest that rivals cannot easily enter that market. See Salop, *supra* note 86, at 716.

¹⁰⁰ See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.1 (1995) (“The Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property.”); cf. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2231 (2013) (“patent and antitrust policies are both relevant in determining the ‘scope of the patent monopoly’—and consequently antitrust immunity—that is conferred by a patent”).

more rarely successful.”¹⁰¹ This bromide is manifestly out of touch with modern economic scholarship and should be retired.¹⁰² The agencies should look for opportunities to bring predatory pricing cases, and encourage courts to pay more attention to the plausibility of the alleged predatory scheme and the incremental costs and revenues associated with the scheme.¹⁰³ The agencies should also develop a structured rule of reason that would relax the evidentiary requirements for recoupment¹⁰⁴ and below-cost pricing when the plaintiff presents strong evidence that defendant’s conduct conformed to a plausible predatory strategy.¹⁰⁵

6. Unfair Methods of Competition

The FTC should use its “unfair methods of competition” authority to address anticompetitive conduct by dominant firms that may not be reachable under the Sherman or Clayton Acts.

The FTC’s recent Statement of Enforcement Principles governing its enforcement of the “unfair methods of competition” prong of Section 5 of the FTC Act reflects a relatively conservative approach to its standalone authority by limiting it to conduct that “contravenes the spirit of the antitrust laws and those that, if allowed to mature or complete could violate the Sherman Act or Clayton Act.”¹⁰⁶

¹⁰¹ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993).

¹⁰² See Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L. J. 2239, 2241 (2000) (explaining that “modern economic analysis has developed coherent theories of predation that contravene earlier economic writing claiming that predatory pricing conduct is irrational” and that “the consensus view in modern economics [is] that predatory pricing can be a successful and fully rational business strategy”); DOJ SECTION 2 REPORT, *supra* note 9, at 58 (recognizing the extensive debate surrounding the frequency of predatory pricing but nonetheless concluding that it occurs frequently enough for it to be “necessary to develop rules for distinguishing between legitimate discounting and unlawful predation”); see, e.g., *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005) (reversing summary judgment for defendant on predatory-pricing complaint).

¹⁰³ See Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1720–21 (2013) (arguing that courts are overly dismissive of predatory-pricing claims because they do not fully consider the predatory scheme, including the many ways firms can recoup their losses after below-cost pricing).

¹⁰⁴ See *id.* (arguing that skepticism towards predatory-pricing claims has led to courts developing a recoupment requirement that is almost impossible to meet).

¹⁰⁵ That is the gist of the structured rule of reason proposed by Bolton, Brodley & Riordan, *supra* note 102, at 2262–74. Too often courts get bogged down in the minutiae of determining whether prices are below defendant’s average variable costs, while losing sight of evidence that a monopolist in fact adopted a successful predatory strategy to eliminate or chasten a rival. See, e.g., *Superior Prod. P’ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311, 318–19 (6th Cir. 2015); *United States v. AMR Corp.*, 335 F.3d 1109, 1115–16 (10th Cir. 2003).

¹⁰⁶ Fed. Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf; cf. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (FTC may consider “public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws”).

Under the policy statement, the Commission will use its authority to remedy harm to competition or the competitive process that impairs consumer welfare, taking into account cognizable efficiencies and business justifications. Of course, this is the basic framework of modern antitrust analysis under the Sherman and Clayton Acts, but there are gaps in the law, and the policy statement confirms that the principal use of the FTC's standalone authority is to fill those gaps.¹⁰⁷

One such gap is “monopoly leveraging” situations, where a dominant firm uses its market power in one market to impair competition in a related second market (say, by a refusal to deal), but there is no dangerous probability that the firm will achieve a monopoly in the second market. As Professor Hovenkamp notes, the Supreme Court has rejected this theory of liability under Section 2, but such conduct may be quite harmful, especially “in dominated networks, which are markets that have stringent compatibility, or interoperability, requirements but that also have dominant firms.”¹⁰⁸ Professor Hovenkamp cites the European Commission's case against Microsoft for abusing its dominant position in the desktop operating system market by denying interoperability information to rival servers,¹⁰⁹ and argues that the “‘unfair methods of competition’ language would permit recognition of an action akin to ‘abuse of dominance’ under European law.”¹¹⁰ The FTC's case against Google/Motorola for seeking to exclude implementers of its standard essential patents, in breach of FRAND obligations, fits into this monopoly leveraging paradigm. The FTC alleged that Google/Motorola had monopoly power in technology markets (conferred by standard setting), which it used to raise the costs of rivals in “downstream” markets, including mobile phones.¹¹¹ The *Bosch* case is similar.¹¹²

¹⁰⁷ The statement provides that “the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman Act or Clayton Act is sufficient to address the competitive harm arising from the act or practice.” Fed. Trade Comm'n, *supra* note 106.

¹⁰⁸ Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 883 (2010).

¹⁰⁹ *Id.* at 883-84.

¹¹⁰ *Id.* at 884.

¹¹¹ Complaint, ¶¶ 21, 28, *In re Motorola Mobility LLC, and Google Inc.*, Dkt. No. C-4410, 2013 WL 124100, *4-5 (FTC Jan. 3, 2013). The European Commission found an abuse of dominance in similar circumstances. *See* Case AT.39985, *Motorola–Enforcement of GPRS Standard Essential Patents*, Comm'n Decision (Apr. 29, 2014), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.

¹¹² Complaint ¶ 16, *In re Robert Bosch GmbH*, Dkt. No. C-4377, 2012 WL 5944820, *3 (FTC Nov. 26, 2012).

The monopoly leveraging analogy is inapt when a patent holder with monopoly power opportunistically breaches a standard-setting norm but the patent holder is a non-practicing entity or the conduct is not directed at a rival; in that case, the harm to competition in the downstream markets is not of the raising rivals' costs variety.¹¹³ However, an “unfair methods” theory remains sound because there is harm to competition in the downstream market (supracompetitive royalties paid by implementers, passed on to consumers) and to the competitive process (pro-competitive standard setting).¹¹⁴ More generally, a standalone unfair methods theory is appropriate when unilateral conduct allows, or is likely to allow, a firm or group of firms to achieve, maintain, or enhance market power to the detriment of consumers, on balance, even if it does not lead to monopoly or otherwise satisfy the technical requirements of a Section 2 offense.¹¹⁵ This might include parallel exclusionary conduct¹¹⁶ or facilitating practices that enhance the likelihood of collusive behavior.¹¹⁷

C. Monopolization Remedies

¹¹³ Of course, insofar as the conduct enables the patent holder to obtain its technology monopoly, then there is a straightforward violation of Section 2. See *Rambus Inc. v. FTC*, 522 F.3d 456, 463 (D.C. Cir. 2008).

¹¹⁴ See Analysis of Proposed Consent Order to Aid Public Comment, *In re Negotiated Data Solutions LLC*, File No. 051-0094, 2008 WL 258308, at *7 (FTC Jan. 22, 2008); *Google/Motorola*, 2013 WL 124100, at * 38 (“a breach of a FRAND commitment in the context of standard setting poses serious risks to the standard-setting process, competition, and consumers”); cf. *Rambus*, 522 F.3d at 467 (questioning evidence but not theory of unfair-methods claim). The European Court of Justice recently confirmed that a dominant firm that seeks an injunction in breach of a FRAND commitment is guilty of abuse of dominance. Case C-170/13, *Huawei Techs. Co. v. ZTE Deutschland GmbH*, Judgment of the Court of July 16, 2015 (CJEU). Since *Huawei* involved conduct directed at a downstream rival, there is some dispute as to whether the principles would apply to non-practicing entities, with some arguing that this is merely an exploitative abuse which the Court did not accept as a theory of liability. See, e.g., Sean-Paul Brankin et al., *Huawei: Injunctions and Standard Essential Patents—Is Exclusion a Foregone Conclusion?*, 30 ANTITRUST, Fall 2015, at 80, 82-83. But cf. Margrethe Vestager, Intellectual Property and Competition, Speech Before the 19th IBA Competition Conference, Florence, (Sep. 11, 2015), https://ec.europa.eu/commission/20142019/vestager/announcements/intellectual-property-and-competition_en (“In my view, this obligation [to refrain from seeking an injunction] applies to whoever exercises the patent right in question.”).

¹¹⁵ See Steven C. Salop, Guiding Section 5: Comments on the Commissioners 3-4 (Nov. 2, 2013), <http://scholarship.law.georgetown.edu/facpub/1275>.

¹¹⁶ See Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182, 1243-44 (2013). Also, traditional types of Section 2 offenses, such as predatory pricing, might entail lower standards of proof when brought by the FTC under Section 5. See 2 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 302, at 36 (4th ed. 2014) (arguing that predatory pricing may violate Section 5 even if prices are not below cost, or that definition of cost may be more expansive than under Section 2).

¹¹⁷ Commentators have long endorsed the use of Section 5 to attack facilitating practices, notwithstanding the hurdles erected by some courts for establishing such a violation. See, e.g., 2 AREEDA & HOVENKAMP, *supra* note 116, ¶ 302, at 33-34. Recent examples of these type of cases include invitations to collude and information exchanges absent proof of agreement.

The agencies should seek to employ structural remedies in appropriate cases, continue their increased use of equitable monetary remedies, and support legislation to allow both agencies to obtain civil penalties in Section 2 cases.

An appropriate remedy in a Section 2 case should “terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.”¹¹⁸ In *Microsoft*, the most significant monopolization case in the last thirty years, the consent judgment ultimately obtained by the DOJ¹¹⁹ failed to achieve these remedial goals or have any effect on the monopolized operating-systems market.¹²⁰ But beyond *Microsoft*, it is widely perceived that behavioral or conduct remedies frequently do little to change the operation of markets, may create perverse incentives, are difficult to administer, and often amount to no more than a slap on the wrist.¹²¹ By contrast, structural remedies do not require long-term monitoring and are relatively efficient.¹²² Structural relief has had notable successes in Section 2 cases, including the

¹¹⁸ *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968); *see also* *United States v. Microsoft Corp.*, 253 F.3d 34, 103 (D.C. Cir. 2001) (adding that remedy “must seek to ‘unfetter a market from anticompetitive conduct’” (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 577 (1972))).

¹¹⁹ DOJ and the state plaintiffs originally requested and obtained a structural remedy that would have required Microsoft to divest its operating systems business from its applications business, but the D.C. Circuit reversed the district court’s remedial order. Following a change in administrations, DOJ negotiated a consent decree limited to behavioral requirements. *See generally* ANDREW I. GAVIL & HARRY FIRST, *THE MICROSOFT ANTITRUST CASES* (2014).

¹²⁰ *See id.* at 239-49, 278 (“our conclusion is that the remedies did not succeed”); Carl Shapiro, *Microsoft: Remedial Failure*, 75 ANTITRUST L.J. 739, 761 (2009) (“The Final Judgment has done nothing significant to affirmatively restore competition. Thus, in my view, the remedy in the most prominent antitrust case of our era has failed.”); HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 298 (2005) (“At this writing, there is little reason to believe that the consent decree that the government negotiated with Microsoft will achieve any of [the] goals [stated by the D.C. Circuit]. If so, the *Microsoft* case may prove to be one of the great debacles in the history of public antitrust enforcement, snatching defeat from the jaws of victory.”).

¹²¹ *See* Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 86–87 (2009) (explaining that one of the reasons the DOJ may have failed to bring a single monopolization case during the Bush Administration was because “the structural or behavioral remedies they could have obtained would generally have been unwise or ineffective”); Thomas O. Barnett, Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *What to Do After Catching the Tiger by the Tail*, Presentation at the ABA Conference on Monopolization Remedies 3 (June 4, 2008), <http://www.usdoj.gov/atr/public/speeches/233884.pdf> (“It is not easy to craft what is typically a behavioral remedy that will achieve its desired objectives, avoid unintended harm, and be administrable.”).

¹²² *See* John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement* 11–12 (AAI White Paper, Nov. 3, 2011), http://www.antitrustinstitute.org/sites/default/files/AAI_wp_behavioral_20remedies_final.pdf (explaining the benefits of structural remedies, specifically in merger cases); GAVIL & FIRST, *supra* note 119, at 279 (“The surest way to restore competition is to change a monopolist’s incentives. Sometimes only restructuring a monopolistic firm will achieve that.”).

breakup of AT&T during the Reagan administration.¹²³ Even the Bush II DOJ ultimately recognized that “structural remedies remain an important part of the government’s remedial arsenal,” although it suggested an excessively high standard for imposing them.¹²⁴

In order to deter monopolistic abuses, monetary sanctions in government monopolization cases should also be given more consideration. As Professor Calkins explained, the United States had “a strange system for punishing persons who commit civil antitrust violations.”¹²⁵ In contrast to the European Union and many other foreign jurisdictions where the civil fine is the tool of choice, in the United States,

a federal government civil enforcement action typically ends with an injunction, usually by consent, that prevents future violations, and it is assumed that private and state damages actions will extract sufficient money from the wrongdoer to compensate victims and adequately deter other violations. The government plays the role of the volleyball setter, leaving for others the more glamorous (and lucrative) spiking.¹²⁶

¹²³ In *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.C. Cir. 1982), *aff’d sub nom.* *Maryland v. United States*, 460 U.S. 1001 (1983), the court approved the divestiture of the local Bell operating companies to remedy AT&T’s monopolization of the long-distance and equipment markets. In ordering this structural remedy, the court commented that it would be difficult to draft a conduct-remedy injunction “that would be both sufficiently detailed to bar specific anticompetitive conduct yet sufficiently broad to prevent the various conceivable kinds of behavior that AT&T might employ in the future” and that it was preferable to avoid burdening the judiciary with “the unending task of vigilance and oversight” required for such a complex conduct remedy. *Id.* at 168. Of course, the court’s rejection of strict line-of-business restrictions on the operating companies sought by DOJ resulted in the kind of regulatory oversight by the court that the divestitures were designed to avoid.

¹²⁴ DOJ SECTION 2 REPORT, *supra* note 9, at 158. The Section 2 Report would have required a showing that the “violation has a “clear, significant causal connection to a defendant’s acquisition of monopoly power,” that “alternative remedies would not satisfactorily achieve the remedial goals or would do so at an unacceptable cost,” and that “the structural remedy is likely to benefit consumers.” *Id.* The causal connection requirement, which comes from *Microsoft*, *see* 253 F.3d at 106–07, is hard to explain if the purpose of the divestiture is remedial, i.e., is necessary to prevent the recurrence of the anti-competitive conduct, rather than punitive. It is particularly inexplicable in *Microsoft* given that the divestiture would not have dissolved Microsoft’s operating system monopoly. While opponents of structural relief often view corporations anthropomorphically (referring to divestiture as the corporate “death penalty”) or zoomorphically, *see* Barnett, *supra* note 121, at 10 (“unless you have established that the tiger should never have existed in the first instance, you have not established a basis for shooting it”), a sober analysis suggests that corporate divestiture is a common “tool of the business world and can be used to further public policy just as it is used to further corporate ends.” Peter C. Carstensen, *False Positives in Identifying Liability for Exclusionary Conduct: Conceptual Error, Business Reality and Aspen*, 2008 WIS. L. REV. 295, 319–20 (2008) (rejecting corporate death penalty analogy “[g]iven the flexibility of the market to structure and restructure corporate organizations”).

¹²⁵ Stephen Calkins, *Civil Monetary Remedies Available to Federal Antitrust Enforcers*, 40 U.S.F. L. REV. 567, 570 (2006).

¹²⁶ *Id.*

However, as Professor Elhauge points out, “the adequacy of private actions seems increasingly dubious, especially in monopolization cases.”¹²⁷ Private lawsuits generally provide insufficient deterrence in Section 2 cases because excluded competitors, even if they succeed, can recover only their lost profits, which will be less than any monopoly overcharges incurred by direct or indirect purchasers. And purchaser or consumer actions must surmount many hurdles (e.g., standing, antitrust injury, and class certification).¹²⁸ Moreover, perhaps the most pernicious effect of monopolistic conduct—the exclusion of potential entrants and retarding the pace of innovation—cannot be readily measured and thus compensated in private actions.

Under the Obama administration, the government began to change course to some extent by adopting a more aggressive use of equitable monetary relief in monopolization and other cases. In 2010, the DOJ sought disgorgement in a civil case for the first time in the Antitrust Division’s history. In a settlement, KeySpan disgorged \$12 million in profits it received by engaging in a derivative “swap” agreement that allowed it to earn revenues from a competitor’s sales in violation of Section 1 of the Sherman Act.¹²⁹ The court approved the settlement, explaining that “disgorgement comports with established principles of antitrust law,” and is consistent with the idea that “[a] consent decree should, among other things, “deprive the antitrust defendants of the benefits of their conspiracy.”¹³⁰ The DOJ also obtained disgorgement from Morgan Stanley in connection with the same violation,¹³¹ and from others in two subsequent cases.¹³² Assistant Attorney General Bill Baer stated that, in cases in

¹²⁷ See Elhauge, *supra* note 121, at 83.

¹²⁸ See Fed. Trade Comm’n, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820, 45822 n.13 (Aug. 4, 2003) [hereinafter FTC 2003 Policy Statement] (finding no evidence “indicating that existing remedies routinely achieve [adequate deterrence] goals”). For further discussion of obstacles to effective private enforcement, see Chapter 8 of this Transition Report.

¹²⁹ *United States v. KeySpan Corp.*, 763 F. Supp. 2d 633, 636-37 (S.D.N.Y. 2011).

¹³⁰ *Id.*

¹³¹ See *United States v. Morgan Stanley*, 881 F. Supp. 2d 563 (S.D.N.Y. 2012) (disgorgement of \$4.8 million). There was no prospect of meaningful equitable relief against either KeySpan or Morgan Stanley, and the prospect for private remedies was dim.

¹³² In 2014, the DOJ obtained disgorgement of \$1.15 million in settlement of a case in which an acquiring firm allegedly violated Section 1 by shutting down the acquired firm’s plant during the merger investigation. See Proposed Final Judgment and Competitive Impact Statement, *United States v. Flakeboard Am. Ltd.*, No. 3:14-cv-4949, 79 Fed. Reg. 70555-03 (Nov. 26, 2014) (also obtaining civil penalty for violation of Hart Scott Rodino Act). In 2015, the DOJ reached a settlement requiring disgorgement of \$7.5 million in gains resulting from an anticompetitive joint venture in violation of Section 7 of the Clayton Act. See Proposed Final Judgment and Competitive Impact Statement, *United States v. Twin America, LLC*,

which private treble damage actions do not “make consumers whole and deprive wrongdoers of ill-gotten gains, . . . we will use the tools at our disposal, including disgorgement, to ensure that illegally obtained monies are not kept.”¹³³

The FTC also became more aggressive towards the use of equitable monetary remedies in competition cases. In 2012, the agency withdrew its 2003 policy statement on the issue¹³⁴ because it had “creat[ed] an overly restrictive view of the Commission’s options for equitable remedies.”¹³⁵ The FTC’s old position was that disgorgement and restitution were only appropriate remedies in “exceptional cases.”¹³⁶ It had articulated three factors it would consider in determining whether to seek monetary equitable relief: whether the violation is “clear,” whether there is a reasonable basis for calculating the remedial payment, and whether other remedies are likely to fail to accomplish fully the purposes of the antitrust laws.¹³⁷ The Commission now views the first and the third factors as “constraints on the Commission beyond the requirements of the law.”¹³⁸ While the Commission indicated that the policy statement

No. 12-cv-8989, 80 Fed. Reg. 16427-01 (Mar. 27, 2015) [hereinafter *Twin America CIS*]. In a private case against *Twin America*, plaintiffs had obtained a \$19 million settlement, but defendants’ profits from the violation exceeded that amount.

¹³³ Statement of Bill Baer, Asst. Att’y Gen., Antitrust Div., Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, United States Senate, Hearings on “Oversight of the Enforcement of the Antitrust Laws” (March 9, 2016), *available at* <https://www.justice.gov/opa/file/831686/download>.

¹³⁴ *See* Fed. Trade Comm’n, Withdrawal of the Commission Policy Statement on Monetary Equitable Remedies in Competition Cases, 77 Fed. Reg. 47,070-02 (Aug. 7, 2012) [hereinafter *FTC 2012 Withdrawal Statement*].

¹³⁵ *Id.* According to the Commission, it had sought disgorgement only twice in the nine years after the policy statement was issued.

¹³⁶ *FTC 2003 Policy Statement*, *supra* note 128, at 45,8221 (“[W]e do not view monetary disgorgement or restitution as routine remedies for antitrust cases. In general, we will continue to rely primarily on more familiar, prospective remedies, and seek disgorgement and restitution in exceptional cases.”).

¹³⁷ *See id.*

¹³⁸ *FTC 2012 Withdrawal Statement*, *supra* note 134, at 47,071. As to the first factor, the Commission noted that “clarity” of the violation is not an element that is considered by courts; novel violations may be more egregious than “clear” ones; and disgorgement is not intended to punish wrongdoing. *See id.*; *FTC v. Cephalon, Inc.*, 100 F. Supp. 3d 433, 440 (E.D. Pa. 2015) (holding that a showing of a clear violation is not a prerequisite to seeking disgorgement); *see also* Elhauge, *supra* note 121, at 82 (arguing that there is no justification for a clarity requirement for disgorgement but not for damages). A good example that highlights the problem with a clarity requirement is a pay-for-delay settlement entered into before *Actavis* rejected the scope-of-the patent test. Such a settlement wouldn’t have necessarily been a clear violation, but is a good candidate for disgorgement when the payment and the ill-gotten gains are substantial and hence blatantly anticompetitive. *But cf.* Separate Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright, *FTC v. Cephalon, Inc.* (May 28, 2015), https://www.ftc.gov/system/files/documents/public_statements/645501/150528cephalonohlhausenwright1.pdf (approving disgorgement remedy in pre-*Actavis* pay-for-delay case only because conduct would have violated the scope-of-the-patent test).

would “continue to inform our future consideration of the use of monetary equitable remedies,” it was withdrawing the statement “to clarify that the Commission will assess the use of those remedies on the basis of relevant law.”¹³⁹ The Commission now believes, and we agree, that “[b]ecause the ordinary purpose and effect of anticompetitive conduct is to enrich wrongdoers at the expense of consumers, competition cases may often be appropriate candidates for monetary equitable relief.”¹⁴⁰

Since this policy change, the FTC has obtained disgorgement as a remedy in two cases. In April 2015, the FTC reached a settlement with Cardinal Health that required the company to pay \$26.8 million in ill-gotten gains from illegally monopolizing the low-energy radiopharmaceuticals market through exclusive dealing.¹⁴¹ The settlement marked the first time the agency had obtained disgorgement in over a decade. And in May 2015, the FTC reached a settlement in a pay-for-delay case that required Cephalon to disgorge \$1.2 billion in ill-gotten gains, the largest equitable monetary relief in the FTC’s history (including consumer-protection cases).¹⁴² The FTC is also seeking disgorgement in two other pay-for-delay cases.¹⁴³

¹³⁹ FTC 2012 Withdrawal Statement, *supra* note 134, at 47,071.

¹⁴⁰ *Id.* at 47070. We also agree with the FTC that disgorgement and restitution “are not appropriate in all cases,” but we see no reason for the FTC’s position that standalone Section 5 cases should be categorically excluded. *Id.* at 47,071 & n.6. For example, standard-setting abuse that results in ill-gotten gains may be a good candidate for disgorgement. *See* Elhauge, *supra* note 121, at 85 (given absence of a Section 2 remedy, “without equitable monetary remedies, such misconduct could not be effectively deterred”). Furthermore, while the policy statement was an advance when it was adopted, we disagree with Commissioners Wright and Olhausen that its withdrawal and the Commission’s reliance on “existing case law” leaves companies without meaningful guidance. *See* United States v. KeySpan Corp., 763 F. Supp. 2d 633 (S.D.N.Y. 2011) (explaining that disgorgement remedy is part of a court’s inherent equitable powers dating back to the English courts of chancery and the Judiciary Act of 1789).

¹⁴¹ Statement of the Fed. Trade Comm’n, *In re* Cardinal Health, Inc., File No. 101-0006 (Apr. 17, 2015) [hereinafter FTC Cardinal Health Statement], https://www.ftc.gov/system/files/documents/public_statements/637781/150420cardinalhealthcommstmt.pdf.

¹⁴² Statement of the Fed. Trade Comm’n, *FTC v. Cephalon* (May 28, 2015) [hereinafter FTC Cephalon Statement], https://www.ftc.gov/system/files/documents/public_statements/645491/150528cephalonstatement.pdf. While the number is large, it is less than one third the additional revenue Cephalon admitted it obtained from the six years of delayed generic entry. *See* First Amended Complaint ¶ 4, *FTC v. Cephalon, Inc.*, No. 2:08-cv-02141 (filed Aug. 12, 2009).

¹⁴³ *FTC v. Endo Pharms. Inc.*, No. 2:16-cv-01440 (E.D. Pa. filed March 30, 2016); *FTC v. Abbvie Inc.*, No. 2:14-cv-05151 (E.D. Pa. filed Sep. 26, 2014). Each of the four cases in which the FTC has recently sought disgorgement or restitution involved a violation of Section 2. Commissioner Wright contended that disgorgement should not be used for exclusive dealing or other “unilateral” conduct that has plausible efficiency justifications, for fear of deterring potentially efficient conduct. *See* Dissenting Statement of Commissioner Joshua D. Wright, *In re* Cardinal Health, Inc., FTC File No. 101-0006 (Apr. 17, 2015), *available at* <https://www.ftc.gov/public-statements/2015/04/dissenting-statement-commissioner-joshua-d-wright-cardinal-health-inc>. But taking disgorgement off the table for categories of exclusionary conduct makes no sense because the conduct may well not have any efficiency justification in a particular instance (as the majority of the

We applaud the government’s stepped up use of disgorgement in Section 2 and other cases where anticompetitive conduct “resulted in a demonstrable consumer harm” and enabled “substantial ill-gotten gains.”¹⁴⁴ We also commend the FTC’s efforts to direct disgorgement to compensate the victims of the anticompetitive conduct,¹⁴⁵ whereas the DOJ has not yet undertaken such efforts.¹⁴⁶

Civil penalties would be a useful addition to the agencies’ enforcement arsenal in Section 2 cases.¹⁴⁷ Authority to impose civil penalties would require a legislative change, but a civil penalty has the distinct advantage of being available when the monopolist has not succeeded in causing harm (e.g., a failed attempt to monopolize), or where the full extent of the harm it caused is difficult to prove. Moreover, civil penalties could underscore the seriousness with which the government views the offense and hence serve as an important deterrent in a way that disgorgement of ill-gotten gains, restitution, or

Commission concluded in *Cardinal Health*), ill-gotten gains can be measured net of any efficiency benefits, and private remedies may be particularly inadequate in Section 2 cases. See *supra* note 128 and accompanying text.

¹⁴⁴ FTC Cardinal Health Statement, *supra* note 141, at 5; see Twin America CIS, *supra* note 132, at 16430 (“actual and substantial consumer harm”).

¹⁴⁵ See FTC Cardinal Health Statement, *supra* note 141, at 2 (disgorgement to be “paid into fund that will be used to compensate affected customers”); FTC Cephalon Statement, *supra* note 142, at 4 (settlement fund “will provide redress to purchasers who overpaid for Provigil as a result of Cephalon’s illegal conduct”). Importantly, the Commission continues to seek to avoid duplicative recovery. See FTC 2003 Policy Statement, *supra* note 128, at 45,823. In *Cephalon*, it did this by providing that the disgorgement fund would be used as a source to satisfy settlements or awards in related damage actions by private or government purchasers. In *Cardinal Health*, there were no private suits and none seemed likely given statute-of-limitations hurdles.

¹⁴⁶ The DOJ has questioned its own authority to direct funds to victims, but its questioning is misplaced. In *KeySpan* and *Morgan Stanley*, the DOJ suggested that the filed-rate doctrine supported disgorgement because it likely barred private damages actions, but also that the doctrine might bar directing disgorged funds to consumer ratepayers. However, it is hard to see how the regulatory-jurisdiction concerns that continue to animate the filed-rate doctrine are any greater when ill-gotten gains are directed to victims rather than kept by the government. Moreover, the DOJ suggested that the Miscellaneous Receipts Act might restrict its ability to direct funds to victims. However, that Act—which requires agents of the government “receiving money for the Government from any source [to] deposit the money in the Treasury,” 31 U.S.C. § 3302(b)—does not restrict the Attorney General’s authority to enter into a settlement, does not by its terms apply to funds that are paid directly to victims, and has never been construed to limit the Executive’s ability to obtain disgorgement or restitution for injured victims. See *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 81-82 (3d Cir. 1990) (while civil penalty must be paid to the Treasury, Miscellaneous Receipts Act did not preclude settlement and/or injunctive relief to create a remedial fund); cf. *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) (Administrator of Office of Price Administrator could obtain equitable decree requiring restoration of illegal gains to victims).

¹⁴⁷ See Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127 (2009) (proposing that civil fines be available in Section 2 cases involving systemic conduct or no efficiency justification); see also DOJ SECTION 2 REPORT, *supra* note 9, at 161-62 (noting that several panelists favored adding civil-fine authority, which may have certain attractive aspects,” but raising concern that total monetary remedies would be unduly punitive and chill procompetitive business conduct).

treble damages cannot.¹⁴⁸ In contrast, a toothless conduct remedy for a pattern of anticompetitive conduct, as in *Microsoft*, may do more to undermine general deterrence than not bringing the case in the first place.¹⁴⁹ Professors Gavil and First advocate for the use of civil fines to supplement, not replace, remedial measures. They suggest that “it might be possible to ‘unfetter’ the market and restore competition by creating incentives that would reduce the fine if certain benchmarks were reached.”¹⁵⁰

In 2007, the AMC rejected calls to give the agencies expanded authority to seek civil fines, on the basis that it did not receive evidence of “significant gaps in the current level of enforcement provided by private plaintiffs seeking damages,” and that to the extent any gaps remain, “they are better addressed through the use of the agencies’ equitable powers.”¹⁵¹ However, the AMC itself noted the gap where there is egregious conduct that results in no injury, and it failed to recognize both the range of cases in which the recoverable harm is likely to be small in relation to the actual or potential harm, and the deterrent advantage of civil penalties over equitable monetary relief. Adding authority for civil fines to the increased use of equitable monetary remedies makes sense because, as Professor First notes, “Given the low level of government monopolization cases, and the difficulties of private litigation, one would be hard-pressed to argue that current penalties are adequately deterring corporations from violating Section 2.”¹⁵²

D. *Other Issues*

1. Tying

The next administration should oppose efforts to overturn *Jefferson Parish*, and support a rule of presumptive illegality for tying by firms with market power.

¹⁴⁸ See First, *supra* note 147, at 149.

¹⁴⁹ To be sure, Microsoft ended up paying roughly \$5.3 billion to settle the private actions arising from the government’s case. See GAVIL & FIRST, *supra* note 119, at 260. While this figure isn’t peanuts, it merely amounts to about 13% of Microsoft’s net income during the four-year period (2003–06) when the settlements were reached, and the payouts presumably were tax deductible. See *id.* at 264 (explaining that even treble damages are tax deductible in the absence of criminal conviction, whereas civil fines are not deductible). Gavil and First conclude that, even when combined with the civil fines (\$638.5 million) paid to other jurisdictions, the amounts paid out by Microsoft were “far less than would be viewed as theoretically optimal to deter Microsoft from socially harmful behavior.” *Id.* at 265.

¹⁵⁰ *Id.* at 275.

¹⁵¹ AMC REPORT, *supra* note 20, at 287–88.

¹⁵² First, *supra* note 147, at 148. We agree with Professor First that civil-fine authority is more appropriate in Section 2 cases than Section 1 cases, where criminal penalties are the norm and arguably might be undercut by the availability of civil fines. See *id.* at 145–47. Of course, the whole discussion of monetary sanctions for Section 2 cases brought by the government is academic if the agencies do not bring Section 2 cases.

Some scholars and commentators have urged that *Jefferson Parish*¹⁵³ be reversed, and its per se rule against tying be abolished.¹⁵⁴ Indeed, some argue that absent a showing of a substantial foreclosure or anticompetitive effect in the tied product market, ties should be per se *legal*.¹⁵⁵ These arguments should be rejected. *Jefferson Parish* is properly characterized, not as a per se rule, but as a structured rule of reason, which requires a showing of market power in the tying product market¹⁵⁶ and which permits a defendant to show procompetitive justifications.¹⁵⁷ To the extent the latter is unclear, courts should expressly allow a defendant to establish a defense that an otherwise unlawful tying arrangement has a procompetitive justification that offsets any anticompetitive harm and that cannot be adequately furthered by a less restrictive alternative.

A rule of reason analysis that would require a plaintiff to demonstrate, in addition to the *Jefferson Parish* factors, foreclosure of a significant share of the *tied* product market is unsound because tying may be used to harm consumers by facilitating price discrimination rather than by excluding competition. In the case of a “price discrimination” tie, while rivals in the tied product market cannot compete on the merits for the purchases subject to the tie, the harm to consumers is independent of the degree of foreclosure in the tied product market. The Supreme Court, in *Jefferson Parish* and elsewhere, has recognized that the “impairment of competition” from tying includes “increas[ing] the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie.”¹⁵⁸ And it makes sense to treat tying by firms with market power to achieve

¹⁵³ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

¹⁵⁴ See, e.g., DOJ SECTION 2 REPORT, *supra* note 9, at 89; David S. Evans, Untying the Knot: The Case for Overruling *Jefferson Parish* (July 2006), http://www.usdoj.gov/atr/public/hearings/single_firm/comments/219224_a.pdf.

¹⁵⁵ See, e.g., Thomas A. Lambert, *Appropriate Liability Rules for Tying and Bundled Discounting*, 72 OHIO ST. L.J. 909, 913-14 (2011).

¹⁵⁶ In addition, a “per se” tying offense requires a showing of two separate products, conditioning, and that a not insubstantial amount of interstate commerce in the tied product is affected. See 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 177 (7th ed. 2012).

¹⁵⁷ See e.g., *Jefferson Parrish*, 466 U.S. at 25 n.42 (considering, but not accepting defense on the facts); see 10 AREEDA & HOVENKAMP, *supra* note 116, ¶ 1760b, at 372-33 (“Today, any justification for tying that is theoretically sound can be considered under Supreme Court precedent.”).

¹⁵⁸ *Jefferson Parrish*, 466 U.S. at 14-15 & n.23.

price discrimination as presumptively unlawful because such ties ordinarily reduce consumer welfare.¹⁵⁹

A case in point is the requirements tie-in that was at issue in *Illinois Tool Works*.¹⁶⁰ Requirements ties, or metering ties, involve the sale of a tied product that is complementary to the tying product and purchased in direct proportion to the tying product's use. Thus, the ink used in a printhead would be a direct measure of the use of the printhead itself. By setting a supracompetitive price on tied sales of the ink, the tying seller is able to engage in price discrimination—charging intensive users of the tying product a higher fee for the bundled products than would be exacted from less intensive users.

Some scholars have defended this price discrimination as a way in which the seller can more efficiently allocate the tying product (setting a low price that widens distribution) while simultaneously increasing overall return. It has also been argued that this higher overall return is a way of fostering innovation in tying product markets involving intellectual property.¹⁶¹ However, other scholarship suggests that requirements ties generally harm consumer *and* total welfare.¹⁶² While perfect price discrimination entails a more efficient allocation of the tying product, such discrimination is impossible to achieve in real world markets in which neither buyer nor seller has perfect knowledge. Moreover, Congress enacted Section 3 of the Clayton Act against the backdrop of dissatisfaction with an early Court decision that tolerated a requirements tie.¹⁶³ Over the past century the Supreme Court has condemned requirements ties in a variety of settings.¹⁶⁴

¹⁵⁹ See generally Einer Elhauge, *Rehabilitating* Jefferson Parish: *Why Ties Without a Substantial Foreclosure Share Should Not Be Per Se Legal*, 80 ANTITRUST L.J. 101 (forthcoming 2016).

¹⁶⁰ *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

¹⁶¹ Benjamin Klein & John Shepard Wiley, Jr., *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L.J. 599 (2004) (arguing that licensing restrictions and tying conduct involving intellectual property should be treated leniently because of the innovation gains that they are likely to bring).

¹⁶² See Einer Elhauge & Barry Nalebuff, *The Welfare Effects of Metering Ties* (Jan. 28, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591577; Barry Nalebuff, *Unfit to be Tied, An Analysis of* *Trident v. Independent Ink*, in *THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION & POLICY* (John Kwoka & Lawrence White eds., 5th ed. 2008); Warren S. Grimes & Lawrence A. Sullivan, *Illinois Tool Works, Inc. v. Independent Ink, Inc.: Requirements Tie-ins and Intellectual Property*, 13 SW. J. L. & TRADE AM. 335 (2007).

¹⁶³ See Grimes & Sullivan, *supra* note 162, at 344.

¹⁶⁴ See the cases cited in Grimes & Sullivan, *supra* note 162, at 344 n.55. As Grimes & Sullivan also note, requirements tying has also been condemned under European competition law. See *id.* at 344.

The deferred purchase of the tied product often works special burdens on the buyers who will not know their own needs and the market conditions at the time of future purchases. Buyers' lack of knowledge and confusion may make it easier for a seller to implement metering through a tie-in (rather than through a direct metering mechanism that is unpalatable to buyers), but this cannot justify the tying conduct. Even if imperfect price discrimination were to increase sales of the tying product by less intensive users, wealth transfer effects harm intensive users, who might also reduce their use of the bundled products because of the excessive charges. In addition, buyers may expend additional resources in search of lower cost alternative suppliers or ways to avoid the tying condition. These and related concerns have led some scholars to advocate a low-tolerance antitrust standard for requirements tie-ins.¹⁶⁵

2. *Kodak*, Market Power and Aftermarkets

The next administration should recognize that information deficiencies and other “consumer protection” market imperfections may give a firm market power, regardless of conventional market-share analysis, and may make markets susceptible to opportunistic conduct with exclusionary and other anticompetitive effects.

The agencies and the courts should take seriously *Kodak*'s¹⁶⁶ post-Chicago insights into how markets characterized by significant information imperfections, post-purchase switching costs, and related factors may be particularly susceptible to opportunistic conduct with exclusionary and other anticompetitive effects. These insights should be applied more liberally to protect competition in aftermarkets and other contexts.¹⁶⁷

Kodak recognizes that information deficiencies and other “consumer protection” market imperfections (such as deception and coercion) may give a firm market power, regardless of conventional market-share analysis.¹⁶⁸ Moreover, *Kodak* implicitly recognizes that “consumer protection” market

¹⁶⁵ See Nalebuff, *supra* note 162; Grimes & Sullivan, *supra* note 162.

¹⁶⁶ *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451 (1992).

¹⁶⁷ See Robert H. Lande, *Market Power Without a Large Market Share: The Role of Imperfect Information and Other “Consumer Protection” Market Failures* (AAI, Working Paper No. 07-06, 2007), <http://www.antitrustinstitute.org/Archives/wp07-06.ashx>; Robert H. Lande, *Chicago Takes it on the Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World*, 62 ANTITRUST L.J. 193 (1993).

¹⁶⁸ *Kodak* had a market share in the equipment market of only 20 to 23%. Even though such a share would not ordinarily give rise to an inference of market power, the Court held that market imperfections could give it market power in the aftermarket for parts and service and that such imperfections could provide the basis for defining a single-brand relevant market (parts or service on Kodak machines).

failures can apply to businesses as well as individual consumers. Where significant information or other market imperfections exist, therefore, the agencies and the courts should be wary of relying on market-share safe harbors or defining markets broadly to include products that are not effective substitutes because, for example, customers may be unaware of them, face high search costs, or are locked into expensive existing systems.

With respect to aftermarkets in particular, when a manufacturer of a durable good has market power in an aftermarket for parts, service, or other complementary products due to imperfect information, high switching costs, or other factors in the foremarket, ordinary tying and monopolization rules should be employed to prevent the exploitation or extension of such power by anticompetitive means. The Sixth Circuit’s recent decision upholding a preliminary injunction in an aftermarket tying case illustrates *Kodak*’s continuing vitality.¹⁶⁹

E. Conclusion

While the Obama administration made some progress in resuscitating Section 2, much remains to be done. Besides the relatively low level of government enforcement, especially at DOJ, many courts remain wedded to dicta in *Trinko* that tends to suggest a very narrow role for prohibiting exclusionary conduct by dominant firms.¹⁷⁰ We agree with Professor Baker’s perceptive conclusion:

The rhetorical relegation of anticompetitive exclusion to antitrust’s periphery must end. The more that exclusion is described as a lesser offense, the more its legitimacy as a subject for antitrust enforcement will be undermined and the greater the likelihood that antitrust rules will eventually change to limit enforcement against anticompetitive

¹⁶⁹ *Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264 (6th Cir. 2015). The court applied *Kodak* to a non-explicit tying arrangement based on differential pricing where “[t]he classic indicators of market power in an aftermarket—high information costs and switching costs—are present,” notwithstanding the sophistication of the customers. *Id.* at 277-78.

¹⁷⁰ *See, e.g., It’s My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 690 (4th Cir. 2016) (rejecting claim brought by local venue operator that Live Nation unlawfully tied national promotion and access to venues in monopoly markets to its local venue that competed against plaintiff, while waxing poetic about how “monopoly power, long considered a red flag in antitrust law, can under certain circumstances be a legitimate advantage,” and that plaintiff’s theory would discourage firms from obtaining the synergies of operating in multiple geographic markets); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1077 (9th Cir. 2013) (rejecting monopolization claim where Microsoft withdrew certain APIs that Novell needed to compete against Microsoft’s office productivity suite allegedly to prevent the growth of popular applications that might threaten Microsoft’s operating systems monopoly; court held that Novell was required to satisfy the profit-sacrifice test to “isolate conduct that has *no* possible efficiency justification,” and it failed to do so because Microsoft’s strategy was profitable in the applications market).

foreclosure when they should not. It is time to recognize that exclusion, like collusion, is at the core of sound competition policy.¹⁷¹

¹⁷¹ Baker, *Exclusion*, *supra* note 35, at 589.