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A key element in a claim for actual or attempted monopolization is that the defendant used improper means to acquire, maintain, or attempt to acquire monopoly power. The cases use a plethora of adjectives to describe this improper behavior—including "exclusionary," "predatory," and "anticompetitive"—but do not provide a general, workable definition that distinguishes the behavior that Section 2 of the Sherman Act condemns from that which it tolerates or even encourages. The cases provide several rules that permit the evaluation of particular types of conduct (e.g., predatory pricing), but they do not articulate an overarching theory that reconciles these conduct-specific rules, informs how they should be applied, and governs the lacunae where no such rule applies.

To some legal and economic commentators, the articulation of an all embracing rule that defines exclusionary conduct has become the Holy Grail of antitrust law, or at least of Section 2. Thoughtful articles have advocated myriad competing tests, but no test has emerged as a consensus choice. Moreover, equally thoughtful commentators have suggested that different species of conduct should not all be governed by the same test for distinguishing the exclusionary from the benign. Given this background, the position that

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the Department of Justice ("DOJ") would take on this issue was eagerly awaited—especially because many of the strongest advocates of the competing tests participated in the hearings that culminated in the DOJ's recent report.[1]

The DOJ Report evaluated the five leading general rules for identifying exclusionary conduct, and while it found some of them of value in specific contexts, it rejected each of them as an all-purpose test under Section 2. I begin by summarizing the DOJ's evaluation of these tests and conclude by commenting on and appraising the implications of the DOJ's conclusions.

The **effects-balancing** test would balance the pro- and anticompetitive effects of conduct and condemn any conduct for which the latter dominated. The DOJ acknowledged the logic of comparing pro- and anticompetitive effects, because doing so goes to the heart of the antitrust exercise. It nonetheless found the effects-balancing test wanting for reasons that animate many of the recommendations in the report. The DOJ was concerned with the administrability of the test. Because the test is so fact-specific, and because the facts can be so difficult to ascertain, it would be difficult for firms to make judgments about the legality of their conduct at the outset and for courts to accurately assess the conduct after the fact. The DOJ emphasized that "[t]he Supreme Court has realized that a search for every possible anticompetitive effect can do more harm than good" and has adopted safe-harbor rules (such as the *Brooke Group* test for predatory pricing) despite recognizing that some conduct with a net anticompetitive effect might fall within the safe harbor.

[1] U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 129 (2008).

Here, as elsewhere in the report, the DOJ eschews an attempt to condemn every possible anticompetitive act where the cost of doing so would be to increase the possibility of false positives and to deter competitively benign conduct that a firm feared might be found to be exclusionary. The DOJ's concern about chilling competitively benign conduct was magnified by its fear that short-run static effects would be given more weight that long-run dynamic effects because they were more readily identified and quantified. Assistant Attorney Thomas O. Barnett, citing the work of Nobel laureate Robert Solow, has argued that the overwhelming driver of economic growth is dynamic innovation (e.g., developing the integrated circuit) rather than short-run efficiency (e.g., insuring that integrated circuits are sold at or close to their marginal cost). Not surprisingly, therefore, the DOJ report endorses and rejects proposed rules for evaluating conduct with a keen eye toward whether they will inhibit long-term dynamic efficiency in their attempt to root out short-term static inefficiency.

The DOJ Report also rejected the **profit-sacrifice** test, which would condemn conduct that is less profitable than alternative conduct that would have less of an exclusionary effect. The theory underlying the test is that the firm is giving up profit to buy exclusion, which makes sense only if it thereafter recoups the foregone profits through monopolistic pricing. The DOJ was once again concerned with false positives, noting that virtually all investments involve a short-term profit sacrifice. It was also concerned that plaintiffs might imagine countless hypothetical courses of action that were arguably more profitable than the actual conduct, placing defendants at risk that a court (or jury) would find one of them possible, and thus find that the test had been violated. Because of these concerns, the DOJ flatly rejected this test.

The DOJ was somewhat more positive about the closely related **no-economic-sense** test, which asks whether the challenged conduct contributed *any* profit apart from its exclusionary effect. Here, the DOJ's concern was more with false negatives than with false positives, fearing that anticompetitive conduct that should be condemned by the antitrust laws might escape condemnation because it generated some miniscule profit apart from its exclusionary effect. Thus, it concluded that the test might work asymmetrically: that passing the test should not place a firm in a safe harbor, but that failing the test will "likely [make it] difficult to defend" the conduct.[2]

The DOJ acknowledged and endorsed the use of the **equally efficient competitor** test in the pricing context, but was loath to embrace it as a general rule. It noted that the premise of predatory pricing case law is that prices at or above relevant cost should not be condemned because an equally efficient competitor could match them. Critics of this rule have noted that a dominant firm can reduce consumer welfare by pricing slightly above its own cost but slightly below the cost of potential entrants. In the predatory pricing context (including the case of bundle pricing), the DOJ concluded that the risk of discouraging low prices—which antitrust law normally seeks—outweighs the false negatives associated with above-cost pricing that actually has an adverse welfare effect. The DOJ declined, however, to extend the test to non-pricing conduct because such conduct does not have a first order effect as plainly pro-competitive as low prices.

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[2] *Id.* at 43.

The DOJ was perhaps most enthusiastic about the **disproportionality** test, under which conduct is condemned if it is likely that its anticompetitive effects substantially outweigh its pro-competitive effects. In essence, this is the effects-balancing test that was discussed above, with a foot placed firmly on the defendant's side of the scale. The DOJ preferred this test to the effects-balancing test because of the smaller likelihood of false positives, which it viewed as outweighing the greater chance of false negatives. Nevertheless, the DOJ did not embrace the test for all purposes, concluding that it should be used only when a specific test for the type of conduct at issue has not been developed. Thus, above-cost pricing that had a significant anticompetitive effect by keeping out nearly-as-efficient competitors would not be actionable, because the safe harbor for above-cost pricing would trump the disproportionality test.

The DOJ's analysis of the five proposed tests for exclusionary conduct raises several issues, three of which I address below.

First, what should one make of the failure to identify a universal test for appraising whether conduct is exclusionary? Some of the advocates of the various general tests proceed on the premise that whether conduct is exclusionary is an objective fact that can be identified so long as one articulates the proper test. In this view, exclusionary conduct is something that exists in nature and the role of antitrust law is to find it. In addition to being aesthetically pleasing, the notion that there is a universal test for exclusionary conduct has the added appeal that it would result in consistent treatment of conduct that could be placed in more than one antitrust pigeonhole. For example, separate tests for refusals to deal and price squeezes can lead to the anomalous result (which the Supreme Court will address this term) that one may get a different result when analyzing a flat refusal to deal than when appraising a willingness to deal but only at a price too high for the plaintiff to pay, despite the substantive equivalence of the conduct. Similarly, bundle pricing can be effectively equivalent to a tying arrangement in certain circumstances, but the conduct may appear acceptable if judged under pricing principles but exclusionary if analyzed under tying principles.

Although the DOJ Report does not discuss the question of whether there should be one all encompassing theory, as opposed to the proposed theories themselves, in much detail, it seems clear that the DOJ parts from the pure one-theory advocates at the initial premise. The DOJ's conclusions reflect the view that the exclusionary conduct that Section 2 prohibits is not something that exists in nature and that antitrust endeavors to find. Rather, it treats exclusionary conduct as something that Section 2 proscribes after identifying it through a set of rules shaped by competing concerns about false positives and false negatives. Thus, the rather pro-defendant equally efficient competitor test is employed to analyze predatory pricing and some bundle pricing because the DOJ subscribes to the Supreme Court's view that it is rarely tried and even less rarely successful (thus suggesting that there will be few false negatives) and because a rule less favorable for defendants could discourage desirable price cutting (thus making the cost of false positives—and the chilling effect of such false positives—very high). In contrast, tests somewhat less favorable for defendants are deemed appropriate when the risk of false negatives is higher and the cost of false positives is lower.[3] In this view, the failure to identify a universal test does not reflect a failure to divine what the test should be. Rather, it reflects the view that there should not be a universal test because the test that is optimal for one type of conduct is suboptimal for other conduct.

The DOJ's reasoning in this regard appears persuasive. The challenge will be to harmonize the various tests, and the decisions about when to apply them, so as to avoid the type of anomalous results described above where the outcome varies according to the characterization of the conduct at issue rather than its substance.

Second, the role of dynamic efficiencies merits some comment. As noted above, the DOJ is wary that some expansive tests for exclusionary conduct might, in the interest of avoiding short-term static inefficiency, diminish the long-run dynamic efficiency that it believes to be much more important. This focus on the more elusive but potentially larger dynamic efficiency effects appears commendable, although recognizing the importance of dynamic efficiency does not automatically translate into an operative rule to judge particular conduct. Moreover, one might question whether the DOJ Report is fully consistent in letting dynamic efficiency be trump. For example, in the predatory pricing context the DOJ recognizes that some above-cost pricing might be sufficiently low that it deters desirable entry, but it favors a safe harbor for such above-cost pricing out of a concern of discouraging desirable price cutting. Such price cutting, however, is desirable principally because of its short-term, static effects—the same effects that are

[3] For a detailed exposition of the virtue of basing Section 2 tests for different types of conduct upon the balancing of false negatives and false positives associated with the particular conduct, see Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435 (2006).

given shorter shrift by the DOJ in other contexts. Moreover, the entry that such pricing may deter could, in theory, help to create the dynamic efficiency that the DOJ values so heavily, because the Schumpeterian engine of creative destruction may well operate more vigorously when more competitors have a foothold in the industry.

Finally, it is interesting to speculate about the impact that the DOJ Report is likely to have. If nothing else, it serves as a blueprint for how the current DOJ will enforce Section 2. Depending on the outcome of the upcoming presidential election, and the durability of the populist cry for regulation produced by the current economic turmoil, it may or may not provide insight into the enforcement activities of the DOJ a year from now. One would hope that if the DOJ at some point takes different views, it will be transparent about how its views differ from those in the current report. We do not need a repeat of the sad story of the DOJ's Vertical Enforcement Guidelines, which were promulgated by the DOJ in the early 1980s and then repealed, rather than revised or qualified, a few years later. The same might be said of the FTC's rejection of the DOJ Report. It is clear that the FTC emphatically disagrees with the DOJ, but the precise nature of that disagreement is not clear. This may be the understandable result of the FTC's views being determined by five (or currently four) commissioners, rather than by a single Assistant Attorney General. While it would be ideal to have an itemization of the conclusions in the DOJ Report with which the Commission disagrees, coupled with an articulation of the conclusions that the Commission would draw instead, one can readily envision how there might be very fractured results as varying coalitions of two or three commissioners come together on an issue by issue basis.

One should also consider the implications of the DOJ Report for private actions. Arguably, it has become the ultimate secondary authority to be cited by private litigants in support of their views. While the DOJ has no official favored status in private antitrust actions, it seems very likely that the DOJ Report will be given serious consideration by many courts, just as the market definition methodology of the merger guidelines came to heavily influence courts in private actions even though the guidelines themselves were not binding in any sense. The fact that the FTC has issued, in effect, a general denial of the DOJ Report may deprive it of some of its luster, but absent a clear articulation by the FTC of contrary positions on specific issues (perhaps in amicus briefs that take aim at particular portions of the DOJ Report), the DOJ's impressive tome is likely to carry substantial weight in private actions.

This leads to one final observation. Whatever the influence of the DOJ Report in private actions, it may be that its possible impact on private actions was a significant factor in shaping some of the Report's conclusions. As explained above, in choosing the rule to apply to specific conduct, the DOJ gave great weight to the impact of false positives; it was very reluctant to adopt rules that might discourage pro-competitive conduct, especially if such conduct might create dynamic efficiencies. One can have a false positive, however, only if someone challenges conduct that is in fact desirable, and one can have a chilling effect on desirable conduct only if a firm anticipates that someone might challenge it. If, as in many jurisdictions, the antitrust agencies were the sole or principal source of Section 2 challenges, the DOJ's concern about false positives might be much smaller.

In the United States, however, private parties bring the great majority of Section 2 actions, and such actions are, understandably, driven much more by a calculus of private gain than by an assessment of their net social impact. Thus, the balancing of false positives and false negatives that underlies the DOJ report arose in the context where most Section 2 actions are private. In theory, the risks of false positives would have been different, and thus different tests might have been appropriate, in a world where private cases played a lesser role. It would be ironic indeed if the DOJ Report winds up influencing only the DOJ's enforcement. Only time will tell, but I suspect that the Report will ultimately have a significant role in private actions, either through use in such actions by the private litigants or through the application to such actions of the rules derived in actions where the DOJ, as a party or an amicus, urges courts to embrace the conclusions in the report.