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The handling of cases under the rubrics “monopolization,” “single-firm conduct,” or “abuse of dominance” continues to be debated by the competition policy community. This debate, as evidenced by the Antitrust Division’s Sept. 2008 single-firm conduct report, followed by the FTC responses and its astonishing subsequent withdrawal (on which more below), is not restricted within the United States. The European Union has published Guidance Papers on standards for exclusionary conduct under Article 82, and the Canadian Competition Bureau recently issued draft guidelines for prosecuting conduct under the abuse of dominance provisions of Sec. 79 of its *Competition Act*.

Almost any significant antitrust case will engender controversy over the facts, e.g., damages resulting from cartel conduct or market definition for mergers. The controversy over single-firm conduct runs deeper. Much of this contention arises because the direct focus of the conduct, harm to rivals, is also the byproduct of vigorous competition. Despite everyone having learned to utter the mantra “protect competition, not competitors,” we find a line drawn between two sides. To caricature the bifurcation only slightly, one side (which I’ll call the skeptics) would set the burden of proof very high, with harms to competitors presumptively competitive. The other side (here called the activists) finds enforcement lax, is more willing to protect competition by protecting competitors.

I propose to resolve the controversy by positing that both sides are right—but within separate categories of monopolization cases. One category includes cases where the alleged harm to competition arises because of a present monopolist acting “too competitively,” doing too much to attract consumers now so as to create and exploit a strategic advantage allowing it to maintain its monopoly into the future. The standard example is predation, where current low prices putatively lead to high prices later. Bundling has a similar flavor, where a monopolist might continue its monopoly by adding products or features to its offerings in order to deter entry down the road.

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For these services, the skeptics should rule the day. Enforcement against this category of conduct runs a strong risk of deterring the lower prices, higher quality, and novel products that competition is there to provide. The flip side is that the likelihood of harm is small because these theories rely on highly idiosyncratic strategic environments. For example, the modern theory of predatory pricing rests on a monopolist believing that potential entrants think it's crazy—operationally defined as preferring market share to profits—and would charge low prices to maintain that reputation.

With high costs of error and low likelihood of success, the bar to prosecution should be high. The “below cost” test of *Brooke Group* could usefully be interpreted as stating that a practice, e.g., a low price, should not be illegal unless it is inconsistent with *any* competitive setting. The “profit sacrifice” or “no business sense” test is similar, defining a practice as illegal only if it makes money *only* if monopolization is successful. Although this implies that a dime of potential profit—or charging a price a dime above cost—should be a defense against millions of dollars in alleged harm, it is arguably warranted to ensure that competitive conduct is not chilled.

But not all single-firm conduct is in this category. The second category arises with practices where a dominant share of competitors in complement markets, such as distribution or retailing, are induced to deal with only one upstream supplier, e.g., through market-wide exclusive dealing contracts. The harm arises because competition among the complement providers is suppressed, as if they had merged. This forces upstream rivals to rely on less competitive or desirable providers, ultimately raising prices to consumers. The similarity to mergers means that tests more akin to the Horizontal Merger Guidelines, rather than a *Brooke Group*-like profit sacrifice test, are appropriate: Does the practice cover a dominant share of a relevant complement market (e.g., shelf space), and does the practice raise the price that must be paid for that complement?

These practices, which I've elsewhere referred to as “complement market monopolization,” should be the bailiwick for the activists. Not only are the appropriate standards more akin to those for other horizontal practices, but these cases are also not at all rare. Moreover, this approach applies for any inducement, not just an exclusive dealing contract—where rivals have to cover the costs of breach—but bundled or loyalty rebates, where rivals have to cover the costs of foregone discounts. The Antitrust Modernization Commission approach, essentially to apply *Brooke Group* to the marginal discount price, is thus inappropriate.

Each side thus gets its piece of the action. The skeptics appropriately should impose a high bar on strategic cases resting on deterring future entry by acting too competitively in the present. The activists get exclusion cases, in which complement market monopolization creates market power in a new market (shelf space, distribution)

that would have been competitive but for the practice. Of course, all suggestions that rest on bifurcation need to be tempered by the fuzziness of the dividing line; one need look no further than the increasingly blurry distinction between *per se* and rule of reason Section 1 cases. Moreover, enthusiasm for the exclusion cases may be tempered by recognizing that a prior monopoly makes harm less likely; the cases are strongest when the only barrier to entry is the practice itself.

All that conceded, this distinction between predation-like cases and complement market monopolization offers a useful path to understand why some, but not all, cases merit skepticism and that others do not—and how we could apply familiar horizontal tools to monopolization cases seemingly beyond their reach.

I noted above that the recent decision of the Antitrust Division to withdraw its Section 2 Report was “astonishing.” I say that not as one who agreed with it in great detail. Last fall, *GCP* published my critique of the Report, based largely on its failure to identify and exploit these distinctions between strategic conduct directed at end-users and practices targeted at intermediate good suppliers with the goal of suppressing competition among them.² The astonishing aspect of the withdrawal to me was that after having spent thirty years in the antitrust community, much of which was spent on the Division staff, I can think of no other instance in which one administration so quickly and radically repudiated the efforts of its predecessor.

This is not to say that antitrust has been any more immune from criticism and change within the agencies than it has in the greater legal, economic, and business communities. As new learning has surfaced, the Division had incorporated it. Needless to say, there have always been disagreements, not just famously between attorneys and economists, but often within those groups. It has also been the case that some Assistant Attorney Generals have been more focused on litigation and others interested primarily in policy. But throughout all of that, the Division maintained a strong ethic of professionalism, with calls made on how the merits were dispassionately seen. Those of us lucky to work there could barely recognize the partisan, political worlds in which our colleagues in other parts of the government routinely operated—a contrast I saw first-hand when spending a year on the Council of Economic Advisers’ staff.

My concern with the withdrawal of the report is thus not about content; as a critic on the record, I might agree with the views of the new kids on the block. My concern involves timing, tactics, and the appearance of a lack of intellectual consideration. The Division’s withdrawal of the Section 2 Report, before the new staff could finish unpacking its boxes, risks indicating that the Antitrust Division is losing

² Brennan, Timothy, *The Complement Market/Final Consumer Distinction: Exclusion & Predation in the U.S. Department of Justice Section 2 Report*, 10(1) *GCP MAGAZINE* 1-12 (Oct. 2008) available at <http://www.globalcompetitionpolicy.org/index.php?id=1408&action=907>.

that special status.³ The cost is not only that the businesses that plan on a stable competition policy regime would now have to face uncertainty and changes following election cycles. Over the long haul, becoming a political agency could make the Division less able to recruit and retain the top-flight analysts who have done so much, usually behind the scenes, to make antitrust the progressive, successful, and until now, professional enterprise it has been. I do think I'm right in advocating a focus on complement markets that the Section 2 Report largely missed, but on the matter what the withdrawal of the Report could mean, I would be delighted to be wrong.

³ Lest this appear to be a partisan comment, I should say that I was and continue to be a very strong supporter of President Obama.