Sherman Act, Section 1 (15 U.S.C. § 1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act, Section 2 (15 U.S.C. § 2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act, Section 7 (15 U.S.C. § 18) No person engaged in commerce or in any activity affecting commerce shall acquire directly or indirectly the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.
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Chapter I.C
Exclusionary Conduct

1. INTRODUCTION

Section 2 of the Sherman Act outlaws conduct, joint or by a single firm, to “monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States.” The law directs itself to improper conduct, not the possession of a monopoly. Section 2 does not prohibit firms from having monopoly power in a relevant market or from charging monopoly prices. Rather, it prohibits conduct that improperly maintains or facilitates acquiring, or attempting to acquire, a monopoly.

How to evaluate single-firm conduct under Section 2 poses among the most difficult questions in antitrust law. Appropriate antitrust enforcement must distinguish aggressive competition that benefits consumers, such as most price discounting, from conduct that tends to destroy competition itself, and thus maintains, or facilitates acquiring, monopoly power. The Supreme Court has defined improper “exclusionary” conduct under Section 2 to “comprehend[] at the most 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.” Thus, a crucial distinction in Section 2 enforcement entails whether a firm’s conduct represents competition on the merits or improper “exclusionary” conduct.

To ask whether a firm’s conduct is “exclusionary” is not sufficient to make this determination. After all, companies routinely attempt to “exclude” competitors from the market simply by producing the best quality product at the lowest price. Accordingly, an observation that a particular firm’s conduct “excludes” its competitor does not answer whether the conduct is harmful to competition or just to the firm’s competitor. Antitrust law is concerned with harm to competition, not particular competitors.

In addition, a firm may achieve monopoly power through competition on the merits. Judge Learned Hand long ago pointed out that a “single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. . . . The successful competitor, having been urged to compete, must not be turned upon when he wins.”

The Commission examined whether the substantive standards for evaluating alleged anticompetitive conduct under Section 2 should be revisited, and, if so, whether improvements could best be achieved through legislation or case law development. In recent decades the courts have adopted and applied sound general principles for Section 2 enforcement. These general principles emphasize that appropriate legal rules should identify unreasonably exclusionary conduct, without discouraging aggressive competition that benefits consumers or creating excessive litigation and compliance costs for businesses and problems
of administrability for courts. The use of these principles has assisted courts in developing appropriate tests to identify when certain types of conduct, such as predatory pricing, are unreasonably exclusionary.

Section 2 standards are not fully developed with respect to all types of conduct, however. In particular, the Commission focused on two types of conduct that have been the subject of recent court decisions and ongoing debate. One type of conduct involves the sale of products bundled together at a discount from their prices when purchased separately. Widespread agreement exists that discounts offered for bundled products (for example, “meal deals” combining a hamburger and a soda) often benefit consumers. Economic theories suggest, however, that in certain circumstances a firm may be able to use discounts on bundled products to obtain or maintain a monopoly by excluding rivals, or otherwise harm consumers, on some basis other than competition on the merits. A recent decision by the United States Court of Appeals for the Third Circuit that upheld a finding of Section 2 liability for discounts on bundled products, LePage’s v. 3M, has provoked criticism and argument about the circumstances in which bundled discounts could violate Section 2.5

The second type of conduct involves a firm’s refusal to deal with its rival in the same market. In 1919 the Supreme Court confirmed the right of a firm to make its own decisions about the business entities with which it will deal, absent “any purpose to create or maintain a monopoly.”6 Whether—and, if so, when—a firm’s refusal to deal with its rival may violate Section 2 has long troubled antitrust courts and commentators. The Commission studied this issue in light of the Supreme Court’s recent decision in Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP.7

The Commission also examined the question of whether courts should apply a presumption of market power for patents in tying cases, a question that the Supreme Court has recently resolved, as well as whether such a market-power presumption should be applied to copyrights or trademarks in tying cases.

The Commission’s study and analysis lead it to make the following recommendations.

12. In general, standards for applying Section 2 of the Sherman Act’s broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare.
13. Congress should not amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions in particular cases, in general the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors are generally not improper, even for a “dominant” firm and even where competitors might be disadvantaged.

14. Additional clarity and improvement are best achieved through the continued evolution of the law in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market.

15. Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.

16. The lack of clear standards regarding bundling, as reflected in LePage’s v. 3M, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare.

17. Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.*

18. In general, firms have no duty to deal with a rival in the same market.†

19. Market power should not be presumed from a patent, copyright, or trademark in antitrust tying cases.

* Commissioners Carlton and Garza join this recommendation with qualifications.
† Commissioners Jacobson and Shenefield join this recommendation with qualifications.
2. BACKGROUND

A. General Standards

Section 2 of the Sherman Act forbids “monopolization” and “attempted monopolization” (as well as combinations and conspiracies to monopolize) of any part of the trade or commerce of the United States. The classic statement of unlawful monopolization is found in United States v. Grinnell Corp.:

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market; and (2) 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.

The Supreme Court has defined “monopoly” power as the power to “control prices or exclude competition.” In general, “monopoly” power is treated as “substantial market power.” Modern economics generally defines “market power” as “the ability to raise prices above a competitive level without suffering an immediate and unprofitably substantial loss of sales,” thus emphasizing that the power to control price or exclude competition must have some degree of durability to constitute market power of concern to antitrust law. A plaintiff may prove a defendant’s possession of monopoly power through direct evidence of the defendant’s actual control over price or exclusion of competition within a relevant market, or through indirect evidence, most typically a defendant’s high market share and barriers to entry that make challenge to the defendant’s market position unlikely.

After establishing the defendant’s monopoly power, a plaintiff must prove the monopolist has obtained or maintained its dominant position through unlawful exclusionary or predatory conduct. As the Supreme Court stated in Spectrum Sports, Inc. v. McQuillan, the Sherman Act “directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.” Courts and commentators have often found it easier to identify conduct that is not or should not be unlawful under Section 2 than to identify conduct that Section 2 does prohibit. For example, two of the most commonly cited articulations explain that Section 2 is not violated by either “growth or development as a consequence of a superior product, business acumen, or historic accident” or conduct attributable to “superior skill, foresight and industry.” Attempts to develop more definitive standards have evolved over time.

B. Definitions of “Exclusionary” Conduct

A variety of factors, including changing perspectives on the significance of monopoly power, have influenced courts’ views on the scope of conduct that should be considered potentially exclusionary. In the mid-twentieth century, courts evidenced deep concern about the dan-
gers of monopoly power. The opinion of Judge Learned Hand in *United States v. Aluminum Co. of America* provides the best-known expression of this attitude:

> 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 is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.18

In *Alcoa* the Second Circuit held that a firm with 90 percent of the market for virgin ingot aluminum had violated Section 2 by repeatedly building new capacity to serve new demand in that market, thus discouraging its rivals from expanding their existing capacity or entering with new capacity.19 In the court’s view, “[i]t was not inevitable that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them.”20

The Supreme Court quickly endorsed this expansive view of exclusionary conduct.21 The question of whether the challenged conduct was “inevitable” appeared in other cases as well.22 With such a broad scope of conduct that might be viewed as exclusionary, the government pursued and won several monopolization cases over the next few decades.23 This aggressive view of the law reached its zenith in the 1970s, with proposals from well-regarded antitrust practitioners and scholars that proof of monopoly itself should be sufficient to establish a violation of Section 2.24

Questions about this approach arose with increasing frequency during the 1960s and 1970s, however, as developments in economic analysis spurred antitrust scholars to examine more closely what types of incentives encouraged vigorous competition and how certain business practices might benefit, rather than harm, consumers.25 Commentators questioned the bases of many prior court decisions, including *Alcoa*, asking, for example, whether antitrust law should require a firm with a dominant position not to compete to serve new demand.26 Courts and commentators began to reexamine whether the standards for exclusionary conduct were likely actually to discourage aggressive competition that could benefit consumers.27

One of the first court decisions to evidence this shifting attitude was *Berkey Photo, Inc. v. Eastman Kodak Co.*28 The defendant, Eastman Kodak, sold cameras and held a monopoly in the film market; the plaintiff, Berkey Photo, sold cameras and also competed with Kodak in other photo-related services. When Kodak introduced a new kind of film compatible with only one of Kodak’s cameras, Berkey accused that Kodak had violated Section 2 by failing to give Berkey advance notice of the new product design so that Berkey could develop its own cameras to handle the new Kodak film. The Second Circuit reversed the jury verdict in Berkey’s favor, holding that “a firm may normally keep its innovations secret from its rivals as long as it wishes, forcing them to catch up on the strength of their own efforts after the new product is introduced.”29 The court emphasized that firms’ incentives to innovate rested on the prospect of market success:
It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests. If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavors, this incentive would very likely be vitiated.\textsuperscript{30}

Unlike the Second Circuit’s decision in \textit{Alcoa}, which associated existing monopoly power with deadened initiative and competition, the Second Circuit’s decision in \textit{Berkey Photo} used a wider lens to see how the prospect of market success spurred competition and innovation. This perspective has been preeminent in recent decades.\textsuperscript{31}

Most recently, the Supreme Court expressed the view in \textit{Trinko} that the “prospect of market success” includes the prospect of obtaining monopoly power:

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 attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.\textsuperscript{32}

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. Some disagree, pointing to economic studies that either suggest monopoly affirmatively discourages innovation\textsuperscript{33} or are ambiguous as to whether monopoly power encourages innovation.\textsuperscript{34}

Courts have also increasingly scrutinized the potential for consumers to benefit from precisely the type of conduct once commonly condemned as exclusionary. The theory of predatory pricing, for example, involves a company selling its product at very low prices to force its competitors out of business, and then raising its prices to a supracompetitive level that enables it to recoup its losses and earn monopoly profits. Thus, the first step in a predatory pricing scheme is to sell at low prices—something that generally benefits consumers. As the Supreme Court has observed, if a court erroneously concludes that a firm has engaged in illegal predatory pricing, “the costs of [such] an erroneous finding of liability are high”\textsuperscript{35} because firms may be reluctant to cut prices aggressively if they fear predatory pricing allegations. Overdeterrence could harm consumers.

In addition, courts have carefully examined the likelihood that an alleged exclusionary scheme could succeed. In \textit{Matsushita Electric Industrial Co. v. Zenith Radio Corp.} the Supreme Court joined commentators who had concluded that “predatory pricing schemes are rarely tried, and even more rarely successful.”\textsuperscript{36} The reasons for this skepticism include the speculative nature of the scheme: it requires a firm to forgo definite profits in the short run, in hopes that competitors will leave the market and allow the firm, in the long run, to reap monopoly profits sufficient to make up for its prior losses and provide significant gains for the future.
The improbability of predatory pricing schemes, combined with the certainty that lower prices benefit consumers, persuaded the Supreme Court to select a test that may fail to capture all instances of predatory pricing, but will not incorrectly condemn price discounting.\textsuperscript{37} This test excludes the possibility that above-cost pricing could constitute price predation. The Court cited the difficulty that courts would have determining just how much above cost a defendant’s prices must be to avoid liability for predatory pricing, as well as the Court’s concern that the possibility of such liability would chill aggressive price cutting.\textsuperscript{38}

The adoption of a “safe harbor” in the area of predatory pricing also illustrates courts’ desire to adopt bright-line legal rules that businesses can understand and follow with relatively little difficulty. This issue has become increasingly important as economic understandings of business conduct have become more sophisticated, and courts have struggled to take into account a wide variety of factors that may be relevant to judging the likely competitive effects of a particular business practice. Then-Judge (current Justice) Breyer explained the need for simplifying rules more than two decades ago:

[W]hile technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists’ (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.\textsuperscript{39}

Particularly in the context of Section 2 predatory pricing enforcement—where overdeterrence may deprive consumers of the benefits of aggressive competition—courts have been increasingly willing to adopt potentially underinclusive, but simple and objective cost-based legal rules.

This is not to say, however, that developments in the understanding of monopolizing conduct have all tended to restrict potential liability for such conduct. There have been a number of recent Section 2 cases in which liability was found. Microsoft, for example, is the most prominent Section 2 case in the last decade. In that case the United States Court of Appeals for the District of Columbia Circuit upheld portions of the lower court’s ruling that Microsoft had engaged in various forms of unreasonably exclusionary conduct in maintaining its operating system monopoly.\textsuperscript{40} The court held that the evidence established that Microsoft had engaged in various forms of anticompetitive conduct to prevent its rival, Netscape, from attaining a market position from which Netscape could challenge Microsoft’s monopoly of Intel-compatible PC operating systems.\textsuperscript{41} The case ultimately was settled by consent decree.\textsuperscript{42}
The Federal Trade Commission (FTC) recently investigated and filed complaints against two companies that allegedly achieved monopoly power through unreasonably exclusionary conduct. In *Unocal* the FTC alleged that Unocal falsely represented to a government panel that Unocal’s technologies were nonproprietary, when it knew it held patents on these technologies, and that Unocal thereby was able to obtain monopoly power over certain gasoline formulas dictated by government regulation. The matter was ultimately settled by consent decree in connection with another firm’s acquisition of Unocal.

In *Rambus* the FTC recently held that Rambus illegally monopolized certain technologies required for computer memory. The FTC concluded that Rambus exploited its participation in a standard-setting organization to obtain patents that would cover technologies incorporated into the standards adopted by the organization, without revealing its patent position to other members of the standard-setting organization. As a result, the FTC stated, Rambus was able to “distort the standard-setting process” and unlawfully gain monopoly power in the computer memory industry.

Some degree of controversy has surrounded each of these cases, illustrating the ongoing debate in the antitrust community about the proper role of, and legal standards for, Section 2 enforcement. The Commission discusses some of the issues in this debate below.

### 3. RECOMMENDATIONS AND FINDINGS

As discussed below, the Commission concludes that, compared to legal standards in the mid-twentieth century, the Supreme Court has now adopted and is applying legal standards and rules for Section 2 that are more sensitive to the possible efficiencies of business conduct and more attuned to the potential for consumer harm from overly stringent application of Section 2 standards in some cases. This represents progress.

This Part discusses the general principles underlying Section 2 enforcement below, as well as tests that have been proposed for general use in identifying exclusionary conduct. It then turns to specific observations about the need to develop improved legal standards to evaluate discounts for bundled products and refusals to deal with a rival in the same market.

### A. General Principles for Section 2 Standards

In general, standards for applying Section 2 of the Sherman Act’s broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare.
13. Congress should not amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions in particular cases, in general the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors are generally not improper, even for a “dominant” firm and even where competitors might be disadvantaged.

In recent decades, more often than not, courts have used appropriate caution in assessing single-firm conduct. Courts have relied on general principles, including those that follow, to guide the development and application of rules for Section 2 enforcement. The use of these principles has benefited and encouraged appropriate antitrust enforcement.

Section 2 standards should be clear and predictable in application and administrable. The area of predatory pricing law provides the best example of success in achieving these goals. In *Brooke Group* the Supreme Court established an objective, cost-based test that first requires a predatory pricing plaintiff to prove that the alleged predatory prices are below an appropriate measure of the defendant’s costs. This rule is relatively clear, predictable, and administrable. The Court’s test further requires predatory pricing plaintiffs to demonstrate that the defendant “had a reasonable prospect, or, under Section 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.” This part of the test not only ensures that a Section 2 violation is found only if consumer welfare can be harmed, but also enhances administrability for the courts by allowing summary disposition of claims where market circumstances—such as easy entry—preclude the possibility of recoupment.

The Supreme Court has taken other steps as well to enhance the administrability of predatory pricing litigation. In *Matsushita* the Court affirmed summary judgment for the defendant, refusing to allow the case to go to trial based on ambiguous evidence, which included rebates and other price-cutting activities that the plaintiff alleged tended to prove a conspiracy to suppress prices. The Court explained that “cutting prices in order to increase business often is the very essence of competition.” To avoid summary judgment, the Court required the plaintiffs to produce evidence that “tends to exclude the possibility” that the challenged conduct was permissible competition that did not involve a conspiracy. This comparatively clear and administrable rule has enabled courts to avoid costly and extensive litigation based solely on evidence from which inferences of permissible competition and anticompetitive joint conduct were equally plausible.
Section 2 standards should be designed to minimize overdeterrence and underdeterrence, both of which impair long-run consumer welfare. At least two observations underlie this general principle. One is that business practices typically offer more efficiencies and, thus, benefits to consumer welfare, than recognized in the early-to-mid-twentieth century. A second observation is that aggressive competition on the merits may resemble unreasonably exclusionary conduct. As discussed earlier, for example, price discounting may appear the same as predatory pricing.

These observations have given courts a better understanding that, like underdeterrence, overdeterrence also can harm consumer welfare. Thus, it is important to consider whether proposed legal rules are likely to chill procompetitive conduct or create unintended consequences. For example, the Supreme Court has observed that “[i]t would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.”

The recognition of potential consumer harm from overdeterrence has led courts to try to avoid “false positives”—that is, finding Section 2 liability for a firm that has not engaged in unreasonably exclusionary conduct, but instead was simply competing aggressively on the merits. Nonetheless, it remains important to avoid underdeterrence that results in “false negatives”—that is, failing to condemn anticompetitive conduct—when the challenged conduct typically provides few or no benefits to consumer welfare and does not resemble competition on the merits. In an ideal world, of course, legal rules would avoid both underdeterrence and overdeterrence. In practical reality, however, such precision is often difficult to achieve. Thus, courts may need to make a trade-off between accuracy and the risks of either chilling procompetitive, or encouraging anticompetitive, conduct.

B. Further Development of Section 2 Standards

1. Continued Case Law Development in the Courts

14. Additional clarity and improvement are best achieved through the continued evolution of the law in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market.

As noted earlier, the Supreme Court defined improper “exclusionary” conduct under Section 2 to “comprehend[] at the most 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.” This articulation improves on earlier analysis asking
whether the conduct at issue was “inevitable,” but it begs the question of what specific types of conduct in what circumstances should be considered “competition on the merits.” This issue has precipitated much debate and discussion.

The appropriate legal standards should continue to evolve in the courts, with continuing sensitivity to the need to avoid chilling procompetitive conduct and undue enforcement costs. The federal enforcement agencies should use appropriate opportunities to aid development of the law. The FTC and the Antitrust Division of the Department of Justice (DOJ) are currently soliciting comments and holding hearings on Section 2 standards, and the FTC is co-chairing the International Competition Network Unilateral Conduct Working Group, which plans to conduct an in-depth study of the issue over the next several years. The Commission is hopeful that those research efforts will prove useful.

2. Tests for Particular Types of Conduct or a Single Test for All Conduct

Many commentators are skeptical that any one legal standard should be used to evaluate the wide variety of different types of conduct that may be challenged under Section 2. Others, however, have urged the use of a single test. Two proposals—the “no economic sense” and “profit sacrifice” tests—have their genesis in the predatory pricing test, which implicitly defines “competition on the merits” as pricing that is above an appropriate measure of the defendant’s costs. Those and other proposals are discussed below.

“No Economic Sense” Test. The DOJ has advocated the use of a “no economic sense” test, which asks “whether, on the basis of information available to a firm at the time of the challenged conduct, the challenged conduct would have made economic sense even if it did not reduce or eliminate competition.” The test condemns conduct only when its anticompetitive objective is unambiguous because the conduct would not have been undertaken “but for” the prospect of obtaining or maintaining monopoly power. Although the DOJ has advanced this test in several cases, including Microsoft, Dentsply, and Trinko, no court has ever adopted it.

Proponents contend the test is consistent with existing case law and “can be administered effectively by courts and businesses alike” because the test essentially focuses on the economic rationality or profitability of the defendant’s conduct from the defendant’s perspective at the time the defendant decides whether to undertake a particular course of conduct. Although this test may not capture all anticompetitive single-firm conduct, pro-
ponents believe underinclusiveness is preferable to requirements for complex evidentiary judgments.68

Others counter that the test can fail to capture substantially anticompetitive conduct by focusing exclusively on the profitability of the conduct for the defendant. Thus, the test fails to examine the challenged conduct’s effects on consumer welfare, critics assert.69 The test exculpates conduct that offers some minimal efficiencies—that is, that makes some economic sense—even where the conduct may cause disproportionately great anticompetitive effects.70 In addition, in exclusive dealing cases the application of the “no economic sense” test is arguably unintelligible because exclusive dealing “makes economic sense” for the defendant “precisely through the mechanism of exclusion.”71 “In most cases, there is no way to separate the economic benefit to the defendant from the exclusionary impact on rivals.”72 This criticism suggests the test may be overinclusive as well as underinclusive.

“Profit Sacrifice” Test. The “profit sacrifice” test is closely related to the “no economic sense” test. One variant asks whether the defendant has sacrificed immediate profits as part of a strategy whose profitability depends on the recoupment of those profits through the exclusion of rivals.73 Although it has not specifically adopted this test, the Supreme Court has asked this question in refusal-to-deal cases, noting, for example, that the defendant in Aspen “was willing to sacrifice short-run benefits and goodwill in exchange for a perceived long-run impact on its smaller rival.”74 Another variant asks “whether the allegedly anti-competitive conduct would be profitable for the defendant and would make good business sense even if it did not exclude rivals and thereby create or preserve market power for the defendant.”75

As with the “no economic sense” test, proponents maintain the “profit sacrifice” test is easy to administer and provides clear guidance to businesses, thereby increasing the likelihood that businesses will engage in procompetitive conduct that other legal tests might misconstrue as anticompetitive.76 The test does not condemn all conduct that might reduce welfare overall, but proponents judge the test to be preferable to “market-wide balancing tests.”77

Opponents apply basically the same criticisms to the “profit sacrifice” test as to the “no economic sense” test. In particular, one commentator argues the test is “both too broad and too narrow.”78 The test is too broad, this critic contends, because it could condemn a firm “invest[ing] heavily in designing a better mousetrap that, once marketed, will ruin rivals or significantly limit their sales.”79 The test is too narrow, he asserts, “because some exclusionary practices don’t involve sacrifice at all.”80 He agrees the test is dispositive in predatory pricing cases, however, and also finds the test “quite helpful in cases involving unilateral refusals to deal.”81

Less Efficient Competitor Test. Judge Richard A. Posner has proposed that an unreasonably exclusionary practice is one that is “likely in the circumstances to exclude from the defendant’s market an equally or more efficient competitor.”82 Proponents see value in this
test, but caution that it, too, may be too narrow “where the dominant firm is able to keep the output of rivals inefficiently low by engaging in practices that confer no significant social benefits.” Others point out that exclusion of an inefficient rival may harm consumer welfare if the rival is excluded before it reaches minimum efficient scale, or if the less efficient rival has been keeping prices in the relevant market below the monopoly level. Critics also raise concern that the test may be very difficult administratively. Nonetheless, commentators and courts have found this test useful in evaluating bundled discounts or rebates.

Balancing Test. In its Microsoft decision, the D.C. Circuit employed a balancing test, which examines both competitive effects and efficiencies, to assess claims under Section 2. That test requires a plaintiff first to establish that the monopolist’s conduct had an “anticompetitive effect.” That is, it must harm the competitive process and thereby harm consumers. Once the plaintiff establishes a prima facie case, to avoid liability the defendant must provide 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.” If the defendant makes this showing, then the plaintiff either must rebut the claim of procompetitive benefits or show that the anticompetitive harm nevertheless “outweighs” those benefits. Proponents point out this is the basic rule of reason test that courts have applied for many years, and continue to apply, in Section 1 and Section 2 cases. They contend that use of this test is necessary to answer the basic question of whether the challenged conduct, on balance, harmed consumer welfare.

Opponents criticize this test as too complex and difficult to administer. They argue that, because businesses will be uncertain of how their course of conduct might be judged, they will be reluctant to undertake procompetitive conduct. Proponents respond that other tests, including the “no economic sense” and “profit sacrifice” tests, are equally complex and less accurate.

As this brief review of possible tests for evaluating conduct under Section 2 suggests, they each seek to identify conduct that harms consumer welfare. Some tests place greater value on the avoidance of chilling procompetitive conduct and undue enforcement costs than on ensuring that the test captures all or most instances of anticompetitive conduct. Others emphasize the importance of focusing on consumer welfare effects and contend that accuracy can be achieved without perverse influences on firms’ incentives or undue enforcement costs.

Thus far, no consensus exists that any one test can suffice to assess all types of conduct that may be challenged under Section 2. The current test for predatory pricing, for example, works well in that context, but problems have been identified with the application of its progeny—the “no economic sense” and “profit sacrifice” tests—in some other contexts. The more extensive inquiry mandated by the Microsoft balancing test may be appropriate in some circumstances, but, as exemplified by the case of predatory pricing, is not necessarily war-
ranted or desirable for all types of conduct challenged under Section 2. Some contend that the best approach is to develop different tests for different types of conduct.  

As courts, antitrust agencies, and commentators continue to refine the antitrust standards for conduct challenged under Section 2, a focal point for their assessment should be whether a particular test is the one most likely to protect consumer welfare in the context of the type of conduct at issue. To answer this question will require, among other things, an evaluation of whether a particular test is likely to overdeter procompetitive, or underdeter anticompetitive, conduct. Particular attention should be given to long-run, as well as short-run, consumer interests. For example, any Section 2 test for refusals to deal with a rival should reflect proper consideration of consumers’ long-run interests in maintaining firms’ incentives to invest in valuable competitive assets— incentives that could be significantly diminished by forced sharing of assets with a rival in particular circumstances.

C. Specific Areas of Concern—Bundled Discounts and Refusals to Deal with a Rival in the Same Market

1. Discounts on Bundled Products

16. The lack of clear standards regarding bundling, as reflected in *LePage’s v. 3M*, may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare.

“Bundling” entails the sale of two or more products as a package. Bundled products may be sold only in a package or as part of a package and separately as well.  

Despite the ubiquity of bundling, there is a paucity of case law addressing the practice. One prominent and recent appellate decision is *LePage’s v. 3M*, in which the Third Circuit, sitting en banc, condemned bundled rebates as a violation of Section 2. Because the court failed to evaluate whether 3M’s program of bundled rebates represented competition on the merits, its decision offers no clear standards by which firms can assess whether their bundled rebates are likely to pass antitrust muster. Therefore, the Third Circuit’s decision is likely to discourage firms from offering procompetitive bundled discounts and rebates to consumers.
The proconsumer benefits and possible anticompetitive harms of bundled discounts, the LePage’s decision, and various proposals for legal standards that will deter unfounded claims that bundled discounts violate Section 2 are discussed below. A test that compares incremental revenues with incremental costs, as described below, offers the most promising source of an economically sensible and administrable safe harbor for bundled rebates or discounts.

a. Consumer Benefits, and Theories of Harm, from Bundled Discounts

Product bundling and bundled discounts are widespread throughout the U.S. economy. Fitness clubs may offer their sessions separately or as a package at a discount; a furniture retailer may offer a bed and two dressers separately or together as a bedroom set at a discount; retailers may bundle free parking with a purchase in their stores. Other examples abound.

Businesses may offer bundled products for a variety of reasons. Firms can use bundling to save costs in distribution and packaging, to reduce transaction costs for themselves and their customers, and to increase reliability for customers. Selling products as a package may reduce a manufacturer’s costs, and the manufacturer may pass these cost reductions on to purchasers as bundled discounts. Instead of advertising, firms can use bundled discounts to increase demand. When a retailer reduces the number of its suppliers to save costs, multiproduct manufacturers may offer multiproduct discounts to keep the retailer’s business. A firm selling a product in one market may employ a bundling strategy as a means of encouraging consumers in another market to try a new product. In some cases, bundling can help a firm enter a new market and compete with established firms. As one witness explained:

Cable companies attempt to compete with telecommunications companies by offering bundles of digital telephone service, high speed internet service, and digital cable. Telecommunications companies have responded by offering discounts if consumers bundle their phone service with DSL and with satellite television . . . . The resulting bundle versus bundle competition will likely continue to drive down prices, increasing consumer welfare.

These types of bundling can result in bundled discounts or rebates that significantly lower prices to consumers. One witness noted that “virtually everyone who submitted a paper tends to agree that bundling is pro-consumer. It is a way of discounting; it’s a way of waging competition.” Moreover, the fact that firms without market power often offer bundled discounts suggests that efficiencies, not schemes to acquire or maintain monopoly power, typically explain their use.

Nonetheless, recent economic literature has suggested three theories by which, in certain circumstances, bundled discounts could be unreasonably exclusionary.
form of predatory pricing; (2) as *de facto* tying; and (3) as exclusionary conduct that deters entry.\textsuperscript{113} If bundled discounts were used as a form of predatory pricing, a dominant firm might eliminate competition by forcing its competitors to sell at unprofitably low prices.\textsuperscript{114} Under standard predatory pricing law, for this strategy to be plausible, the predator must be able to recoup its investment in below-cost pricing by using its increased market power to capture monopoly profits in the long run.\textsuperscript{115}

In the case of *de facto* tying, while consumers are free to buy components separately, the components are priced to make it more attractive to buy the bundled components together.\textsuperscript{116} Under this theory, the prices of the components are actually increased, including the stand-alone price of the monopolized good.\textsuperscript{117} Thus, instead of receiving a discount, consumers are actually paying more for the bundled products.\textsuperscript{118}

Finally, a dominant firm selling multiple products might use bundled discounts to deter entry or otherwise foreclose competition by firms that do not sell multiple products. By providing bundled discounts that reduce the price (net of discounts) of the competing good, a competitor that sells only that good may not be able to compete effectively if it does not also sell the monopoly good.\textsuperscript{119} Suppose, for example, each of two manufacturers produces product A at a cost of $10 per unit. The manufacturer that earns monopoly profits in related product B, which it produces at a cost of $10 per unit but sells for $20, can bundle A and B and sell the bundle for $28. The manufacturer that produces only A, however, cannot sell product A for $8 without losing money.

There was disagreement among witnesses before the Commission as to the plausibility of these strategies, the conditions necessary to make them plausible, and the optimal legal standards to assess such anticompetitive risks. All appeared to agree, however, that further empirical study would benefit enforcement and policymakers. In addition, whatever legal standards are adopted should be sufficiently clear to enable companies to conform their conduct to the law, be administrable by the courts, and avoid chilling procompetitive discounting.

\textbf{b. The Third Circuit’s LePage’s Decision}

In \textit{LePage’s} the Third Circuit, sitting en banc, upheld a jury verdict that 3M had violated Section 2 through its program of bundled rebates. Plaintiff LePage’s and defendant 3M competed in sales of transparent tape. LePage’s alleged that 3M used its monopoly in its Scotch-brand tape to gain a competitive advantage in private-label transparent tape by offering higher rebates—that is, lower prices—when purchasers, such as office superstores, bought certain amounts of products across a number of 3M’s product lines (including Scotch tape)\textsuperscript{120} or increased the amount of Scotch tape purchased in proportion to 3M’s private-label tape.\textsuperscript{121} If an eligible buyer met certain targets across all of the product lines, a rebate of up to 2 percent was applied to all of its purchases from 3M. Conversely, if the buyer failed to meet any one of the targets in each product line, the 2 percent rebate for all purchases
would be rescinded. LePage’s alleged that such rebates gave buyers the incentive to purchase either 3M’s Scotch tape or 3M’s private-label tape, instead of LePage’s private-label tape.

3M responded that its pricing was above cost, no matter how cost was calculated, and that, following the Supreme Court’s decision in *Brooke Group*, above-cost pricing could not give rise to antitrust liability. The court specifically rejected 3M’s argument, stating that “a monopolist will be found to violate Section 2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification.” The court upheld the jury’s finding that 3M had no legitimate business justification, in part because no evidence showed that the amount of 3M’s savings from bundling its products equaled the amount that 3M had given its customers through bundled rebates. In explaining why such bundled rebates harmed consumers, the court stated that the “principal anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer.”

c. Criticisms of LePage’s

The fundamental criticism of the Third Circuit’s decision is that it did not assess whether 3M’s bundled rebates constituted competition on the merits. The court focused on the claimed harm to LePage’s, including its loss of market share in the market for transparent tape and its loss of efficiencies in manufacturing. But, as one critic points out, that a monopolist’s conduct weakens a rival is not sufficient to trigger liability under Section 2. “Price cutting may result . . . in some competitors being driven out of business, a result that is tolerated as a natural product of legitimate competition when an exit is the product of an inability to compete efficiently on the merits.” Lower prices may harm a rival but benefit consumers.

The Third Circuit did not require LePage’s to prove that it could make tape as efficiently as 3M and therefore that 3M’s conduct had excluded an equally efficient rival. In fact, 3M and LePage’s both agreed that 3M was a more efficient, lower-cost producer of transparent tape than LePage’s. Nor did the court require LePage’s to prove that, regardless of LePage’s ability to operate efficiently, 3M’s conduct would have excluded a hypothetical competitor that was as efficient as 3M. The court did not even consider 3M’s assertion that its bundled pricing was above cost, no matter how cost was calculated—an assertion that LePage’s did not dispute. Thus, it is unclear what would have been sufficient to convince the court that 3M was competing on the merits, rather than on some basis other than efficiency, with its bundled rebates. The decision is too vague and is therefore likely to chill welfare-enhancing bundled discounts or rebates.
d. Possible “Safe Harbors” for Bundled Discounts

Given the likelihood that most bundled discounts or rebates benefit consumers, many have proposed a safe harbor for bundled discounts that clearly constitute competition on the merits. One proposal, relevant to the use of bundled discounts as de facto tying arrangements, would ask what proportion of buyers accepted the bundled discount. If all or almost all buyers accepted the bundled discount, then it should be evaluated under tying law; if a substantial proportion of buyers rejected the bundled discount, it should be deemed legal.136

Other proposals relate to the possible use of bundled discounts or rebates in a manner analogous to predatory pricing. One type of safe harbor would also operate as a screen, requiring plaintiffs pursuing a Section 2 challenge first to establish that the bundled prices at issue fell below an appropriate measure of the defendant’s cost.137 If a defendant’s costs are properly defined, “below-cost pricing, unlike pricing at or above that level, carries with it the threat that the party so engaged will drive equally efficient competitors out of business, thus setting the stage for recoupment at the expense of consumers.”138 Prices below an appropriate measure of cost would be a necessary, but not sufficient, condition for liability.139 In addition, plaintiffs would be required to establish that the defendant could recoup the profits it sacrificed through bundled discounts,140 as well as establish actual or probable harm to competition.

Proposals differ on the appropriate measure of the defendant’s costs, although most involve some type of comparison between the defendant’s costs and revenues.141 One approach, comparable to the approach adopted by a decision in the Southern District of New York,142 would allocate all discounts attributable to the entire bundle of products to the competitive product, and then ask if, after reallocation of those discounts, the competitive product is sold at or above incremental cost.143 If the competitive product is being sold at or above incremental cost after allocation to it of all bundled discounts, then the bundle would fall within the safe harbor. If not, then the plaintiff would need to demonstrate a likelihood that the defendant could recoup the short-term losses. Put another way, this test would find potential liability under Section 2 if the defendant’s incremental price of the competitively supplied good is less than the defendant’s incremental cost of producing it.144

By comparison, one witness proposed that bundled discounts be evaluated under a modified Brooke Group standard that would reject bundling claims whenever the defendant’s total revenues derived from the entire bundle exceeded the total of the average variable costs to produce all of the products in the bundle—essentially, a total revenue versus total cost approach.145 The witness argued this test was appropriate because it would allow a dominant firm to offer a bundled discount “that effectively lowers the price of a supracompetitively priced good.”146 Others see significant problems with the test. They contend the test ignores the effects of bundling insofar as it permits bundled discounts where a monopolist lowered its price in a competitive market below the monopolist’s average variable cost for the competitively priced product.147 Another witness suggested that courts should prorate
the total discount and allocate an equal share to each of the products in the bundle, then ask whether any product was sold below incremental cost.\textsuperscript{148} In deciding which test to apply, some would ask whether a firm has near monopoly power in a well-defined market, and whether any competing firm can match the defendant's discounts across all product lines.\textsuperscript{149}

These and other proposed tests raise various issues, as the federal antitrust agencies recognized in recommending that the Supreme Court decline to grant certiorari in \textit{LePage's} to allow further development in the case law and economic analysis.\textsuperscript{150} One witness noted that competitors less efficient than a dominant firm might still constrain the dominant firm to price below a monopoly level.\textsuperscript{151} Thus, a test asking whether a bundled discount could exclude a hypothetical equally efficient competitor would not capture instances in which a bundled discount enabled a dominant firm to exclude a less efficient rival that had in fact benefited consumers by constraining prices.\textsuperscript{152} Others concede that, just as above-cost predatory pricing could occur, above-cost predatory bundled discounts could occur.\textsuperscript{153} Nonetheless, they believe that a safe harbor for above-cost bundled discounts “provides valuable clarity to the business community and reduces the number of false positives, which would otherwise discourage procompetitive discounting.”\textsuperscript{154} Moreover, some courts have concluded that “only price cutting that threatens equally or more efficient firms is condemned under Section 2.”\textsuperscript{155} They explain that “[t]he antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices (which penalize the consumer) so that less efficient competitors can stay in business.”\textsuperscript{156}

e. Conclusion

17. Courts should adopt a three-part test to determine whether bundled discounts or rebates violate Section 2 of the Sherman Act. To prove a violation of Section 2, a plaintiff should be required to show each one of the following elements (as well as other elements of a Section 2 claim): (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition.\(^*\)

\(^*\) Commissioners Carlton and Garza join this recommendation, but are concerned that the first screen in the three-part test would still require many pricing schemes where exclusion is not at issue to receive further scrutiny under the second and third parts of the test. Bundled discounts that do not pass the first screen in the Commission’s proposed test can be used to price discriminate with no exclusionary effect on competition. Failure to recognize that price discrimination is a motive for mixed bundling implies that the incremental revenue is not correctly calculated by the Commission’s proposal. Commissioner Carlton elaborates on these points in his separate statement.
The first screen in the recommended three-part test would establish that bundled discounts should be subject to scrutiny under Section 2 only if they could exclude a hypothetical equally efficient competitor. This standard would permit bundled discounts that could exclude a less efficient competitor, even if the less efficient competitor had provided some constraint on pricing of the competitive product. The difficulties of assessing such circumstances, the lack of predictability and administrability in any standard that would capture such instances, and the undesirability of a test that would protect less efficient competitors, however, counsel against the adoption of a screen that protects less efficient competitors.

Importantly, the first screen would provide sufficient clarity to enable businesses to determine whether a particular bundled discount would be “screened out” from further scrutiny under the second and third parts of the tests. In this sense, the first screen could operate as a “safe harbor” and thus ameliorate the chilling of procompetitive bundled discounts that now exists. The first screen is also sufficiently administrable for courts to apply, although the Commission acknowledges it could be difficult to apply in circumstances where the alleged competitive product is separate from the other products in the bundle. This issue arises with other proposed tests as well, however.

The first screen is not perfect; it could reserve for further scrutiny bundled discounts with no anticompetitive exclusionary effects. Thus, it is crucial to apply the second and third parts of the test. Under the second part of the test, a plaintiff would need to prove that the defendant was likely to recoup its losses from its use of the challenged bundled discount or rebate. This would typically require a plaintiff to show that entry into the relevant market is not easy and therefore is unlikely to undermine the defendant’s ability to recoup its losses. Like the first screen, this portion of the test also might be considered a “safe harbor” for defendants in relevant markets where entry is easy. Under the third part of the test, a plaintiff would have to establish actual or probable harm to competition. Use of the Commission’s proposed three-part test would bring the case law on bundled discounts into line with the reasoning of *Brooke Group*.

The Commission also encourages additional empirical economic research in this area. The courts, the antitrust agencies, and antitrust practitioners generally would benefit from a more thorough and empirically based understanding of the likely competitive effects of bundled discounts in a variety of settings.
2. Refusals to Deal with a Rival in the Same Market.

18. In general, firms have no duty to deal with a rival in the same market.*

The Supreme Court has long held that, “[i]n the absence of any purpose to create or maintain a monopoly, 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.”158 Recently, in Trinko the Supreme Court confirmed there is no general duty to aid rivals under Section 2 of the Sherman Act.159 Rather, the Court characterized its earlier decisions, including Aspen Skiing and Otter Tail, as “limited exception[s]” in which the defendant was found liable under Section 2 for a failure to deal with a rival.160

Although the Court’s decision in Trinko provided some guidance on the factors that might suggest liability for a refusal to deal with a rival, the decision is far from definitive. Businesses need better guidance from the courts on how to avoid antitrust scrutiny for a refusal to deal with a rival. The following briefly reviews the reasoning and guidance that can be gleaned from the Trinko decision, as well as proposals to the Commission on how courts should evaluate refusals to deal with a rival.

a. Refusals to Deal with Rivals Should Rarely, if Ever, Be Unlawful

Refusals to deal with horizontal rivals in the same market should rarely, if ever, be unlawful under antitrust law, even for a monopolist.161 In Trinko the Supreme Court explained:

Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms 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 those economically beneficial facilities.162

Thus, absent a right to refuse to deal with a rival, a firm that lawfully obtained a monopoly through superior acumen, skill, foresight, or industry would find itself forced to share the fruits of its investment with rivals, thereby undermining the value of its lawfully acquired

* Commissioners Jacobson and Shenefield join this recommendation with qualifications. They believe that, if the refusal to deal with a rival in the same market is likely to raise price or reduce output in that relevant market, and is insufficiently supported by legitimate procompetitive justifications, the conduct is appropriately prohibited. A refusal to deal with a customer in an adjacent market (or different level of distribution), unless the customer agrees not to do business with a rival, is analytically the same as exclusive dealing and should be treated under the same principles. A refusal to deal with a rival in an adjacent market may be harmful to consumers if the defendant is using its monopoly power in one market to attempt to monopolize a second market.
monopoly and discouraging others from making similar investments. Because investments in new facilities and assets often enhance consumer welfare, antitrust rules that discourage such activity should be avoided. Forced sharing stultifies the incentives of smaller firms to develop alternatives to the monopolist’s product. Moreover, forced sharing requires courts to determine the price at which such sharing must take place, thereby transforming antitrust courts into price regulators, a role to which they are ill suited. Setting a price too low, for example, could dampen the incentives of monopolists and others to develop substitutes for the monopolist’s product and ultimately disserve the interests of consumers.

In *Trinko*, the Court noted it has been cautious in finding exceptions to the general rule of no duty to aid a rival, precisely “because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.” The Court appeared to link its prior exceptions to two factors: (1) the defendant’s unilateral termination of a voluntary, and thus presumably profitable, prior course of dealing with the plaintiff (*Aspen Skiing*), and (2) the defendant’s refusal to provide to a customer rival the same service that it provided to other customers (retail sales of ski-lift tickets in *Aspen*, power transmission over its network in *Otter Tail*). Questions have been raised concerning the Court’s use of these two factual circumstances as key indicators of a potentially anticompetitive refusal to deal with a rival in the same market. The Court seemed to suggest that either type of conduct might be worthy of scrutiny to assess whether it reflected a willingness to forsake short-term profits to achieve an anticompetitive end. The Court did not clarify that point, however, and it also did not explain what additional factors would be required to establish Section 2 liability in such circumstances.

**b. Further Proposals for Evaluating Refusals to Deal**

The principal approaches advanced at the Commission’s hearings were: (1) a rule of reason test centered on a pricing benchmark; (2) a “no economic sense” or “profit sacrifice” test; and (3) an examination of whether the conduct or pricing at issue is coercive or provides incentives.

*Rule of Reason/“Consumer Welfare Effect” Test.* The purpose of this test is to determine whether the refusal to deal would enable the monopolist to charge supracompetitive prices in any market. If the defendant possessed monopoly power in a relevant market for inputs used by the firm’s rivals, the court would determine whether the defendant’s refusal to sell such inputs—or its insistence on terms so unattractive as to constitute an effective refusal to deal (a “non-negotiable” refusal to deal)—would lead to supracompetitive prices in a market. Because requiring a monopolist to share inputs or facilities with its rivals at any price could destroy a firm’s incentive to develop the capacity to produce such inputs in the first place, this test would require the plaintiff to demonstrate that the rival was willing to pay a *sufficient price* for the monopolized product. The fact finder would ask whether
the rival was willing to pay a price high enough to support an inference that the refusal to sell at that price was exclusionary. The monopolist could rebut a prima facie claim by showing that the refusal was necessary to create efficiencies, and that these efficiencies counteracted any harmful impact of the refusal. The court would then balance the harmful effects of the refusal against the benefits proved by the defendant in a way analogous to the rule of reason analysis that courts employ in the merger and Section 1 contexts.

Objections to this proposal centered on its complexity, the difficulty of determining the proper “non-exclusionary benchmark price,” and questions whether the conduct the standard would condemn as unreasonably exclusionary actually would harm consumer welfare. Some questioned whether there was sufficient evidence of durable monopoly power to support the use of such a complex test instead of a simpler test that could better avoid “false positives.” Witnesses also argued that courts are not rate-making bodies and are ill equipped to determine the “non-exclusion benchmark price” as required by this test. Finally, a determination of harm to consumer welfare would require a determination whether rivals would be able to obtain alternative, cost-effective sources of supply, and other factors that could increase the potential for error in application of the test.

The “Profit Sacrifice” and “No Economic Sense” Tests. As discussed earlier, to establish liability for a refusal to deal with a rival, the “no economic sense” and “profit sacrifice” tests would require proof that the refusal makes “no economic sense” or is unprofitable but for the refusal’s tendency to fortify preexisting market power or help the monopolist acquire new market power. If the refusal does make economic sense absent such a contribution to market power (or the expectation of acquiring market power), the conduct survives Section 2 scrutiny, without additional analysis.

Although proof that a monopolist’s refusal to deal makes no economic sense is a necessary condition for liability under this test, it is not sufficient, and thus the test acts only as a screen. The second step of the inquiry requires a determination that the conduct harmed competition. Thus, under the “no economic sense test,” a plaintiff may prevail by proving four elements: (1) the defendant’s possession of a monopoly over an input; (2) the refusal to sell the input or the sale of the input at a price that significantly disadvantages rivals; (3) the absence of any economic rationale for the refusal, apart from its tendency to maintain or acquire monopoly power; and (4) the maintenance or acquisition of market power as a result of such refusal.

Some have found this test useful in the context of refusals to deal with rivals. Nonetheless, some antitrust practitioners question whether the test can be applied sensibly in all circumstances, given the fine distinction between seeking to exclude competitors by increasing a firm’s sales as opposed to seeking to obtain or maintain monopoly power.

“Coercing” versus “Incentivizing” Conduct. A third proposal focuses on whether the challenged conduct is “coercing” or “incentivizing.” This question is the third, and most important part, of a three-part inquiry under this approach. The first part calls for courts to
determine whether conduct is “excluding” or “exploiting.”\textsuperscript{188} Exploiting conduct is that which may be undertaken by a monopolist as a fruit of its monopoly, and should not give rise to an antitrust claim.\textsuperscript{189} Excluding conduct is conduct that is designed to eliminate rivals, and potentially is actionable.\textsuperscript{190} Second, this approach asks whether the challenged conduct is horizontal or vertical. If the conduct relates only to horizontal dealings among competitors, this approach concludes that antitrust law should rarely (if ever) be concerned with the conduct.\textsuperscript{191} Vertical conduct, however, may be actionable.

If the conduct is excluding and vertical, then the analysis asks whether the challenged conduct is coercing or incentivizing. Coercing conduct occurs when a firm refuses to deal with a (potential) customer because that customer also deals with the firm’s rivals.\textsuperscript{192} By comparison, a firm engages in incentivizing conduct when it continues to deal with a customer, despite that customer’s dealing with the rival, but not necessarily on the same favorable price terms.\textsuperscript{193}

The proponent of this test argues that this proposed distinction is important for three reasons. First, a monopolist is uniquely capable of coercing because of its monopoly status; any firm is capable of engaging in incentivizing conduct (at least to the limits of its “checkbook”).\textsuperscript{194} Second, coercing conduct hurts the customer by issuing a “take it or leave it” choice; incentivizing conduct provides a choice to the customer.\textsuperscript{195} Third, a monopolist’s competitors can respond to incentivizing conduct by providing their own incentive offers.\textsuperscript{196}

Under this test, coercing conduct would be presumptively unlawful, with the presumption overcome only if the defendant could show procompetitive justifications for the conduct.\textsuperscript{197} By comparison, incentivizing conduct would be presumptively lawful.\textsuperscript{198} The only exception would be for price incentives so great that they would constitute predatory pricing under the \textit{Brooke Group} standard.\textsuperscript{199} The test’s author contended it has several advantages because, among other things, it provides companies with clarity as to what conduct is permissible,\textsuperscript{200} and it would harmonize refusal-to-deal analysis with tying law by making unlawful only that conduct that creates the type of coercion that an unlawful tie-in creates.\textsuperscript{201}

c. Conclusion

The Commission endorses the longstanding principle that, in general, firms have no duty to deal with a rival in the same market. To the extent that circumstances exist in which firms may be liable for a refusal to deal with a rival in the same market, the courts should further clarify those circumstances.
3. Intellectual Property in Tying Cases

19. Market power should not be presumed from a patent, copyright, or trademark in antitrust tying cases.

In *Illinois Tool Works, Inc. v. Independent Ink, Inc.* the Supreme Court reversed a decision by the Court of Appeals for the Federal Circuit adhering to previous Supreme Court precedents that provided for a presumption of market power. The Court unanimously held that “a patent does not necessarily confer market power upon the patentee” and that, “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.”

In reaching this decision, the Court reviewed the history of tying law generally and its application in cases involving intellectual property in particular. It explained that the presumption originated in patent misuse cases involving tying of patented and unpatented goods, and that subsequent cases—particularly *International Salt Co. v. United States*—“imported” this doctrine into tying law, in part on the ground that the policy considerations were the same. As a result, the Court had characterized such patent ties as “illegal per se.”

The Court explained that its reconsideration of the “presumption of per se illegality of a tying arrangement involving a patented product” was appropriate in light of developments since those earlier rulings. Most important, in 1988 Congress “amended the Patent Code to eliminate [the market power] presumption in the patent misuse context.” After considering “the congressional judgment reflected” in this amendment, the Court concluded that ties involving patented products should be treated like other ties, and not be condemned without a showing of market power. The Court also observed that imposing this requirement was supported by “the vast majority of academic literature” addressing the question and by “a virtual consensus among economists” on this matter. Furthermore, it noted, the antitrust enforcement agencies’ Intellectual Property Guidelines provide that the agencies “will not presume that a patent, copyright or trade secret necessarily confers market power upon its owner.”

Consistent with the “virtual consensus” the Court identified in *Independent Ink*, witnesses at the Commission’s hearing (which took place before *Independent Ink* was decided) were united in their opposition to the market-power presumption. Similarly, a number of commenters argued that there should be no presumption of market power from patents or copyrights. Thus this Commission’s witnesses and commenters generally advocated what is now the state of the law.

The Supreme Court decision in *Independent Ink* is clearly correct. For similar reasons, courts should not presume market power from a copyright or trademark in tying cases.
Notes


4 United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.).

5 LePage’s, Inc. v. 3M Co., 324 F.3d 141 (3d Cir. 2003) (en banc).


7 Trinko, 540 U.S. at 398.

8 See 15 U.S.C. § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ”).


12 Id. at 564 (emphasis added).

13 See id. at 564–71; see also United States v. Microsoft Corp., 253 F.3d 34, 57–58 (D.C. Cir. 2001) (monopolization claim supported by direct evidence that a firm can raise prices substantially above a competitive level in a relevant market); United States v. Syufy, 903 F.2d 659 (9th Cir. 1989) (ease of entry dooms monopolization claim); Alcoa, 148 F.2d at 424–26 (market share screen).


16 Grinnell, 384 U.S. at 570–71.

17 Alcoa, 148 F.2d at 430.

18 Id. at 427.

19 Id. at 430–31.

20 Id. at 431 (emphasis added). Judge Hand’s decision in Alcoa, although expansive, rejected the view that monopolization was illegal per se. Id. at 429–30.

21 See American Tobacco Co. v. United States, 328 U.S. 781, 813–15 (1946) (quoting approvingly large sections of Alcoa decision, specifically including Alcoa’s statement that “we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened,” Alcoa, 148 F.2d at 431).

22 For example, in United States v. United Shoe Machinery Corp., where the government challenged the terms on which the largest maker of shoe-making machines leased those machines, the court explained that the defendant “is denied the right to exercise effective control of the market by business policies that are not the inevitable consequences of its capacities or its natural advantages.” United States v. United Shoe Mach. Corp., 110 F. Supp., 295, 345 (D. Mass. 1953), aff’d per curiam, 347 U.S. 521 (1954) (emphasis added).
See generally Gavil, Antitrust Law in Perspective, at 593–99.

See National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General 150–63 (1979); cf. Eleanor M. Fox, Monopoly and Competition; Tilting the Law Towards a More Competitive Economy, 37 Wash. & Lee L. Rev. 49, 55–62 (1980) (advocating an approach to monopolization doctrine whereby proof of monopoly would itself establish liability under Section 2 and “[w]illfulness or bad conduct would not be a requisite part of the case”). This approach no longer has support. See, e.g., Exclusionary Conduct Transcript at 121 (Pitofsky) (Sept. 29, 2005) (Section 2 should not ban obtaining monopoly power through superior skill, foresight, and industry).

See Chapter I.A of this Report.


Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).

Id. at 281.

Id. The Federal Circuit has held, and other cases have suggested, however, that, absent any product improvement or reduced costs, a deliberate effort to create incompatibility with a rival’s product violates Section 2. See C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1382 (Fed. Cir. 1998). See generally Gavil, Antitrust Law in Perspective, at 627.


Trinko, 540 U.S. at 407.

See, e.g., Kenneth J. Arrow, Economic Welfare and the Allocation of Resources for Invention, in The Rate and Direction of Inventive Activity 609–25 (Richard R. Nelson ed., 1962); see also Jonathan B. Baker, Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation (Feb. 8, 2007), available at http://ssrn.com/abstract=962261; M. Howard Morse, Statement at AMC New Economy Hearing, at 10 (Nov. 8, 2005) (citing economic studies that suggest smaller firms or new entrants without a vested interest in the status quo are more likely to introduce paradigm-shifting innovations); cf. New Economy Transcript at 68–69 (Shapiro) (Nov. 8, 2005) (business documents show competition is “a very powerful force to innovate”).

See Jonathan B. Baker, Promoting Innovation Competition Through the Aspen/Kodak Rule, 7 Geo. Mason L. Rev. 495, 512 (1999) (“As a matter of economic theory, it is impossible to say for certain whether enforcement of the antitrust prohibition against monopolization, which might restrict the conduct of a dominant firm, will on balance enhance or reduce aggregate industry innovation in general.”); see also Richard A. Posner, Antitrust Law 20 (2d ed. 2001) [hereinafter Posner, Antitrust Law] (explaining that empirical studies indicate it is unclear “whether monopoly retards or advances innovation”); American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Exclusionary Conduct, at 8 (Mar. 17, 2006) [hereinafter ABA Comments re Exclusionary Conduct] (“Some disagreement exists among experts as to whether the ability to charge monopoly profits indeed induces risk taking, innovation and economic growth.”); cf. Andrew I. Gavil, Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance, 72 Antitrust L.J. 3, 43 (2004) (“[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.’”) (citations omitted).

36 Matsushita, 475 U.S. at 589.

37 See Brooke Group, 509 U.S. at 226–27.

38 Id. at 223 (Section 2 does not forbid above-cost pricing that preserves a dominant position); Phillip E. Areeda and Donald F. Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 HARV. L. REV. 697, 733 (1975) (proposing that prices above average variable cost be presumptively lawful, and that prices below average variable cost be presumptively predatory); see also Carl Shapiro, Statement at AMC Exclusionary Conduct Hearing, at 4 (Sept. 29, 2005) [hereinafter Shapiro Statement re Exclusionary Conduct]; Gregory J. Werden, Identifying Exclusionary Conduct Under Section 2: The “No Economic Sense” Test, 73 ANTITRUST L.J. 413, 418–20 (2006) [hereinafter Werden, No Economic Sense Test] (explaining how Brooke Group created a “prudential safe harbor” for above-cost pricing).

39 See Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983). One witness expressly endorsed the reasoning of Justice Breyer in Barry Wright. See Exclusionary Conduct Trans. at 10 (Popofsky) (stating that Barry Wright is “perhaps the most important Section 2 case that was ever decided”). Two other witnesses embraced similar reasoning without mentioning the decision. See id. at 55–56 (Rule) (“I think the issue is that: how do you—can you really develop a cost-effective rule for evaluating [the impact of unilateral conduct] in these circumstances?”); Shapiro Statement re Exclusionary Conduct, at 3–4.

40 Microsoft, 253 F.3d at 61–64 (holding restrictions on licenses with computer manufacturers were unlawfully exclusionary); id. at 64–67 (holding that “Microsoft’s exclusion of IE from the Add/Remove Programs utility and its commingling of browser and operating system code constitute exclusionary conduct”); id. at 66–71 (holding agreements with Internet access providers were unlawful, exclusionary devices); id. at 72–74 (holding exclusive-dealing arrangements with independent software vendors and Apple were unlawfully exclusionary); id. at 74–78 (holding certain actions involving Java were unlawfully exclusionary).

41 See id. at 50, 53–54.

42 See Final Judgment, United States v. Microsoft Corp., Civil Action No. 98-1232 (CKK) (Nov. 12, 2002).

43 Complaint, In re Union Oil Co. of Cal., FTC Docket No. 9305 (Mar. 4, 2003).

44 Id.; see also Susan A. Creighton et al., Cheap Exclusion, 72 ANTITRUST L.J. 975, 985–87 (2005) [hereinafter Creighton, Cheap Exclusion].

45 Agreement Containing Consent Order, In re Union Oil Co. of Cal., FTC Docket No. 9305 (June 6, 2005).


47 Brooke Group, 509 U.S. at 222.

48 Id. at 224.

49 See id. at 226.

50 Matsushita, 475 U.S. at 594–95.

51 Id. at 594.

52 Id. at 588.

53 Brooke Group, 509 U.S. at 226–27.


55 See Creighton, Cheap Exclusion, at 981–82.

56 Aspen Skiing, 472 U.S. at 605 n.32 (quoting III PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW 78 (1978)).
See, e.g., Kenneth L. Glazer, Statement at AMC Exclusionary Conduct Hearing, at 11 (Sept. 29, 2005) [hereinafter Glazer Statement]; R. Hewitt Pate, Statement at AMC Exclusionary Conduct Hearing, at 1 (Sept. 29, 2005) [hereinafter Pate Statement]; Robert Pitofsky, Statement at AMC Exclusionary Conduct Hearing, at 9 (Sept. 29, 2005) [hereinafter Pitofsky Statement]. Mr. Rule, the sole witness who recommended repeal of Section 2, recognized that repeal was unlikely. Charles F. (Rick) Rule, Statement at AMC Exclusionary Conduct Hearing, at 15 (Sept. 29, 2005) [hereinafter Rule Statement re Exclusionary Conduct]. He accordingly made ten suggestions for courts to consider in deciding Section 2 claims that would not be effectuated through legislative change. Id. at 16–17.


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, 437 (2006) [hereinafter M.S. Popofsky, Defining Exclusionary Conduct]; see also Exclusionary Conduct Trans. at 158–59 (Pitofsky); Shapiro Statement re Exclusionary Conduct, at 3.

Pate Statement, at 2.

Id.; see also Werden, No Economic Sense Test.

Werden, No Economic Sense Test, at 413.

The DOJ alleged that Microsoft’s conduct to protect its operating system monopoly was exclusionary because it “would not make economic sense unless it eliminated or softened competition.” See ABA Comments re Exclusionary Conduct, at 10; Brief for Appellees, United States v. Microsoft Corp., Nos. 00-5212, 00-5213 (D.C. Cir. Feb. 9, 2001).

The DOJ argued that the defendant’s policies of not using dealers who distributed the products of rivals “made no economic sense but for their tendency to harm rivals” because the policies were costly to defendant but produced no benefit except reducing competition. ABA Comments re Exclusionary Conduct, at 10; Brief for the United States, United States v. Dentsply Int’l, Inc., No. 03-4097 (3d Cir. May 14, 2004). The DOJ won the case on appeal, but the Third Circuit applied a business-justification test similar to the balancing test applied in Microsoft. United States v. Dentsply Int’l, Inc., 399 F.3d 181, 196–97 (3d Cir. 2005) (citing United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)).

In their amicus brief on the merits, the FTC and the DOJ argued that Trinko’s complaint failed to allege exclusionary conduct because it did not explain how Verizon’s failure to assist rivals “would not make business sense apart from the effect on competition, the pertinent standard here.” Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, No. 02-682, at 7–8 (May 2003) [hereinafter DOJ & FTC, Trinko Amicus Brief].

Pate Statement, at 3; see also Werden, No Economic Sense Test, at 472–73.


Pate Statement, at 8 (stating “while the [no economic sense] test will lead to some false negatives, this criticism has more purchase in the seminar room than in the real world”).


Pitofsky Statement, at 4.


Id.

74 Aspen Skiing, 472 U.S. at 610–11.
77 Melamed, Exclusionary Conduct Under the Antitrust Laws, at 1258.
78 Hovenkamp, Antitrust Enterprise, at 152.
79 Id.; see also ABA Comments re Exclusionary Conduct, at 10 (short-run profit sacrifice cannot be sufficient to find conduct exclusionary, because that would capture procompetitive conduct, such as R&D or purchasing capital equipment, and would thus overdeter procompetitive conduct).
80 Hovenkamp, Antitrust Enterprise, at 152.
81 Id.
83 Hovenkamp, Antitrust Enterprise, at 153 (“[D]efinition works well much of the time and occasionally provides the best analytic tool for determining whether a practice is anticompetitive.”).
84 Id.
85 ABA Comments re Exclusionary Conduct, at 11–12.
86 Id. at 11.
87 See Part 3.C.1 of this Section (discussing bundled discounts).
88 See Microsoft, 253 F.3d at 58–59. The use of a balancing test in evaluating Section 2 claims is not new. For example, the FTC had already used a similar test in 1980. In re E. I. DuPont de Nemours & Co., 96 F.T.C. 653 (1980) (stating that “a balancing approach, which takes due account of rational, efficiency related conduct, is best suited to the task at hand”).
89 Microsoft, 253 F.3d at 58.
90 Id. at 59; see also Eastman Kodak, 504 U.S. at 483 (once plaintiff makes out a prima facie case, “liability turns, then, on whether ‘valid business reasons’ can explain [the defendant’s] actions”) (citing Aspen Skiing, 472 U.S. at 605).
91 Microsoft, 253 F.3d at 59.
92 Jacobson & Sher, “No Economic Sense” Makes No Sense for Exclusive Dealing, at 800; Pitofsky Statement, at 5–6. The FTC endorsed this test in evaluating the type of conduct at issue in Rambus, while specifically rejecting the “profit sacrifice” (or “no economic sense”) test to evaluate such conduct. Opinion of the Commission, In re Rambus Inc., FTC Docket No. 9302, at 30–31 (Aug. 2, 2006) (noting that the “no economic sense” test may be appropriate in some Section 2 cases “where the risk of interfering with vigorous competitive activity is heightened,” but that it is inappropriate when evaluating the type of conduct engaged in by Rambus).
94 Melamed, Exclusionary Conduct Under the Antitrust Laws, at 1257.
Aspen and Kodak Are Misguided (“The key issue is whether one can distinguish when these theories imply a harm to competition as distinct from a harm to a rival.”).

97 See M.S. Popofsky, Defining Exclusionary Conduct, at 437; see also Exclusionary Conduct Trans. at 158–59 (Pitofsky); Shapiro Statement re Exclusionary Conduct, at 3.


100 LePage’s, 324 F.3d at 169.

101 Evans & Salinger, Why Do Firms Bundle and Tie?, at 89; Prof. Timothy J. Muris, Statement at AMC Exclusionary Conduct Hearing, at 2 (Sept. 29, 2005) (Public Comment Regarding Bundling Submitted to AMC on Behalf of USTelecom, July 15, 2005) [hereinafter Muris Statement re Exclusionary Conduct] (“The use of bundles to sell goods or services . . . is ubiquitous throughout the American economy.”).


103 See generally Evans & Salinger, Why Do Firms Bundle and Tie?, at 40–41.


106 Muris Statement re Exclusionary Conduct, at 4.

107 See id. at 3–4.

108 Id. at 2.

109 Exclusionary Conduct Trans. at 110 (Pitofsky).

110 See Evans & Salinger, Why Do Firms Bundle and Tie?, at 41–42; Muris Statement re Exclusionary Conduct, at 2; Exclusionary Conduct Trans. at 102 (Muris).

111 See Shapiro Statement re Exclusionary Conduct, at 17–18 (“One can construct economic models in which a dominant firm selling multiple products can profitably employ multi-product discounts to drive its smaller rivals from the market and then recoup those discounts in the form of higher prices.”). But see Muris Statement re Exclusionary Conduct, at 16–17 (discussing shortcomings of models that purport to show that bundling can produce harms); id. at 22 (“Empirical support for the anticompetitive hypothesis is virtually nonexistent.”).


113 Muris Statement re Exclusionary Conduct, at 12; Rubinfeld, Bundled Rebates, at 254–56.
115 Muris Statement re Exclusionary Conduct, at 12.
116 Id.
117 Id. at 14.
118 Id. This theory relies on the “one monopoly rent” theory not applying to the behavior. See Patrick Greenlee et al., An Antitrust Analysis of Bundled Loyalty Discounts, at 12 (Economic Analysis Group Discussion Paper EAG 04-13, Oct. 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=600799; see also Salop Statement, at 3 (listing circumstances in which one monopoly rent, or “single monopoly profit” (SMP) does not apply).
119 See Rubinfeld, Bundled Rebates, at 256–58; Muris Statement re Exclusionary Conduct, at 16.
120 LePage’s, 324 F.3d at 144–45. The six product lines were: Health Care Products, Home Care Products, Home Improvement Products, Stationery Products (including transparent tape), Retail Auto Products, and Leisure Time. Id. at 154.
122 See LePage’s, 324 F.3d at 170–71 (Greenberg, J., dissenting).
123 See id. at 147 & n.5.
124 Id. at 152.
125 Id. at 164.
126 Id. at 155.
127 Id. at 161–62.
128 Rubinfeld, Bundled Rebates, at 262.
129 Ortho, 920 F. Supp. at 465.
130 See, e.g., Muris Statement re Exclusionary Conduct, at 10 (“The Third Circuit did not require LePage’s to prove that it could make tape as efficiently as 3M . . . .”); Pate Statement, at 14; see also Business Roundtable Comments, at 25.
131 Rubinfeld, Bundled Rebates, at 248.
132 See, e.g., Muris Statement re Exclusionary Conduct, at 10 (“The Third Circuit did not require LePage’s to prove . . . that 3M’s conduct would have excluded a hypothetical equally efficient competitor.”); Pate Statement, at 14.
133 Rubinfeld, Bundled Rebates, at 249.
134 See Muris Statement re Exclusionary Conduct, at 11–12; Pate Statement, at 15–16; Business Roundtable Comments, at 24. But see American Antitrust Institute, Public Comments Submitted to AMC Regarding Exclusionary Conduct, at 25 (July 15, 2005) [hereinafter AAI Comments re Exclusionary Conduct] (concluding that the outcome in LePage’s was “reasonable and predictable”).
135 See Pitofsky Statement, at 2; id. at 8 & n.12 (citing SmithKline v. Eli Lilly, 575 F.2d 1056 (3d Cir. 1978); Ortho, 920 F. Supp. 455 (S.D.N.Y. 1996); LePage’s, 324 F.3d 141 (3d Cir. 2003)).
136 See Exclusionary Conduct Trans. at 39 (Tom); Muris Statement re Exclusionary Conduct, at 23–27; Exclusionary Conduct Trans. at 52 (Popofsky); id. at 110–11 (Pitofsky); Shapiro Statement re Exclusionary Conduct, at 18; Business Roundtable Comments, at 24–25; International Bar Association, Antitrust and Trade Law Section, Public Comments Submitted to AMC, at 19 (Sept. 26, 2005) [hereinafter IBA Comments]. Professor Salop expressed concern that monopolists could circumvent a cost-based test by manipulating the benchmark against which such a test was applied. See Exclusionary Conduct Trans.
at 72. Nonetheless, he seemed to endorse such a test as a matter of theory. See id.; see also id. at 81–82 (Salop).

138 Ortho, 920 F. Supp. at 466.
139 See Pate Statement, at 17 (price-cost test should operate as a necessary but not sufficient condition for liability); Shapiro Statement re Exclusionary Conduct, at 18.
140 Shapiro Statement re Exclusionary Conduct, at 18; Muris Statement re Exclusionary Conduct, at 20–21; Tom Statement, at 8–9 (endorsing the requirement that the market from which a rival is purportedly excluded be characterized by economies of scale that prevent reentry). Some also have suggested that courts require an additional showing that the purportedly excluded rival could not rationally match the challenged discounts, or that courts allow defendants to adduce proof that the bundle produces benefits not reflected in the defendant’s production costs. See, e.g., IBA Comments, at 20–21 (courts should also ask whether the injured rival can rationally match the challenged discounts); see also Muris Statement re Exclusionary Conduct, at 17 (explaining that bundling that seems to exclude an equally efficient rival may in fact be a means of reducing transaction costs).

141 See Shapiro Statement re Exclusionary Conduct, at 18; IBA Comments, at 18–19; see also M. Laurence Popofsky, Statement at AMC Exclusionary Conduct Hearing, at 11–13 (Sept. 29, 2005).
142 See Virgin Atlantic, 69 F. Supp. 2d at 580 n.8 (describing Ortho as holding “that there would be an antitrust violation if the competitive product in the bundle were sold for a price below average variable cost after the discounts on the monopoly items in the bundle were subtracted from the price of that competitive product”) (citing Ortho, 920 F. Supp. at 467–69).
143 See Shapiro Statement re Exclusionary Conduct, at 18; Tom Statement, at 9.
144 See Muris Statement re Exclusionary Conduct, at 23 (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 749 (2005 Supp.)).
145 See Muris Statement re Exclusionary Conduct, at 13, 20–27. Under this approach, courts would “allow bundled discounts as long as the price of the bundle exceeds the sum of the separate costs of the constituent elements. Put another way, if the total price of the bundle exceeds the total cost of its constituents (taking into account the efficiencies directly attributable to bundling), the firm has not engaged in predatory bundling.” Id. at 13.
146 See id. at 24.
147 Exclusionary Conduct Trans. at 60–61 (Salop).
148 See id. at 110–11 (Pitofsky).
149 Muris Statement re Exclusionary Conduct, at 24 (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, III ANTITRUST LAW, ¶ 749, at 184).
150 Upon the Court’s invitation to express the views of the United States, the Solicitor General recommended that the Court deny certiorari in LePage’s. Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, 3M Co. v. LePage’s Inc., No. 02-1865, at 19 (May 2004) (stating that “at this juncture, it would be preferable to allow the case law and economic analysis to develop further and to await a case with a record better adapted to development of an appropriate standard”).
151 Salop Statement, at 5 (“Entry by higher cost (even clearly less efficient) competitors can provide competition to a monopolist and cause prices to fall and output to rise, which increases consumer welfare and allocative efficiency.”).
152 See id.
153 See, e.g., Shapiro Statement re Exclusionary Conduct, at 18.
154 Id.
155 Ortho, 920 F. Supp. at 469.
The recommended three-part test is proposed here for challenges to bundled pricing practices, and its purpose, as the text explains, is to avoid deterring procompetitive price reductions. The Commission is not recommending application of this test outside the bundled pricing context, for example in tying or exclusive dealing cases. The Commission did not undertake to study tying and exclusive dealing issues more generally.


Trinko, 540 U.S. at 407–09.

See Exclusionary Conduct Trans. at 161 (Pitofsky); Glazer Statement, at 4; Rule Statement re Exclusionary Conduct, at 16–17 (refusals to deal should be lawful per se); Shapiro Statement re Exclusionary Conduct, at 13–16 (advocating per se legality except where there has been a prior course of dealing); see also Exclusionary Conduct Trans. at 157–58 (Pate) (appearing to endorse rule of per se legality for refusals to deal even when there has been a prior course of dealing).

Trinko, 540 U.S. at 407–08.

See id. at 407 (“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 attracts ‘business acumen’ in the first place.”); see also Shapiro Statement re Exclusionary Conduct, at 12.

See Rule Statement re Exclusionary Conduct, at 17 (investment in “development and deployment of technological innovation should be viewed as an efficiency justification, and never a threat to consumer welfare”); Shapiro Statement re Exclusionary Conduct, at 4 (advocating the use of a safe harbor for investment in “new and superior production capacity” and “unadorned product improvement”).

Shapiro Statement re Exclusionary Conduct, at 11; Herbert Hovenkamp, Federal Antitrust Policy, § 7.5b (3d ed. 2005) (forced sharing “undermines the competitive market process of forcing firms to develop their own sources of supply”); Trinko, 540 U.S. at 408; DOJ & FTC, Trinko Amicus Brief, at 17 (“A firm that has the right to utilize an input from an incumbent—or that can claim that right through litigation—may have a reduced financial incentive to develop the input itself.”).

Shapiro Statement re Exclusionary Conduct, at 12; Rule Statement re Exclusionary Conduct, at 14; see Trinko, 540 U.S. at 408 (“Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited.”); see also AT&T v. Iowa Utils. Bd., 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part) (“Even the simplest kind of compelled sharing, say, requiring a railroad to share bridges, tunnels, or track, means that someone must oversee the terms and conditions of that sharing.”).

Shapiro Statement re Exclusionary Conduct, at 11–12; Rule Statement re Exclusionary Conduct, at 14.

Trinko, 540 U.S. at 408.


Trinko, 540 U.S. at 409–10.

See Salop Statement, at 5.

See id. at 2, 5–6.

See id. at 7 (“T]he integrated firm generally should be entitled to earn a return on input sales commensurate with whatever market power it has achieved legitimately. A return on this investment in the input technology also may be needed to maintain adequate investment incentives.”); see also Shapiro Statement re Exclusionary Conduct, at 12; Glazer Statement, at 5.
Salop Statement, at 7.

See id. at 6–7.


See Pate Statement, at 10–12; Melamed, Exclusive Dealing Agreements, at 387 (A “static market-wide balancing test . . . would still pose a daunting challenge to any decision maker and would place a costly and often impossible burden on the defendant when deciding in real time how to conduct its business.”).

See Pate Statement, at 3, 8–12 (arguing that courts can readily administer the “no economic sense” test, and it is easier to administer than the “consumer welfare effects” test); Shapiro Statement re Exclusionary Conduct, at 12 (experience with regulation “makes me doubt that the courts are well placed to control unconditional refusals to deal by imposing price caps and regulating the terms on which dominant firms deal.”).

See generally Pate Statement, at 10.

See id. at 2–12 (defending the “no economic sense” test and criticizing the “consumer welfare effects” test); Melamed, Exclusive Dealing Agreements, at 376, 411–12 (advocating the “profit sacrifice” test for all Section 2 claims); Werden, No Economic Sense Test, at 415–22. Moreover, the DOJ and the FTC recently advocated such a test in an amicus brief filed in the Trinko case. See DOJ & FTC, Trinko Amicus Brief, at 7, 15–20.

See Exclusionary Conduct Trans. at 163–64 (Pate).

Melamed, Exclusive Dealing Agreements, at 391 (the “sacrifice” or “no economic sense” test includes an inquiry into whether the conduct does or will in fact protect or enhance a firm’s monopoly power); see DOJ & FTC, Trinko Amicus Brief, at 14 (“A sine qua non for any claim of monopolization or attempted monopolization is conduct that ‘reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power.’” (quoting III PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 651F, at 83–84)); see also United States Telecom Association, Public Comments Submitted to AMC Regarding Refusals to Deal, at 11 (July 15, 2005) [hereinafter USTA Comments re Refusals to Deal] (endorsing requirement of proof of harm as part of a “no economic sense” test); John E. Lopatka & William H. Page, Monopolization, Innovation, and Consumer Welfare, 69 GEO. WASH. L. REV. 367, 387–92 (2001) (arguing that proof of actual consumer harm should be a necessary condition for establishing a violation of Section 2); Timothy J. Muris, The FTC and the Law of Monopolization, 67 ANTITRUST L.J. 693 (2000) (contending that proof of actual anticompetitive effect should be a sine qua non of any Section 2 case); cf. Brooke Group, 509 U.S. at 224–26 (holding that some prospect of recoupment is a necessary element of predatory pricing claim, without regard to apparent rationality (or not) of the defendant’s pricing).

See Melamed, Exclusive Dealing Agreements, at 389–90; USTA Comments re Refusals to Deal, at 10–12; IBA Comments, at 10–11; see also DOJ & FTC, Trinko Amicus Brief, at 15–20; cf. AAI Comments re Exclusionary Conduct, at 15–16 (absence of legitimate business justification as a necessary condition for refusal-to-deal liability).

See, e.g., Pate Statement, at 2; see also DOJ & FTC, Trinko Amicus Brief, at 7, 15–20.

See, e.g., Exclusionary Conduct Trans. at 27–30 (Rule); M.S. Popofsky, Defining Exclusionary Conduct, at 464; see also Steven C. Salop, 73 ANTITRUST L.J. 311, 373 (2006).

See Glazer Statement, at 1.

Id. at 1–2.

See id. at 2.

See id.
See id. at 4.

See id. at 6–7 (citing Lorain Journal Co. v. United States, 342 U.S. 143 (1951); United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005)).

Glazer Statement, at 7.

Id. at 8.

Id.

Id. at 9.

Id.

Id. at 9–10.

See id.


Id. at 1293.


Illinois Tool Works, 126 S. Ct. at 1288–89.

Id. at 1289 (quoting United States v. Columbia Steel Co., 334 U.S. 495, 522–23 (1948)).

Illinois Tool Works, 126 S. Ct. at 1290.

Id.

Id. at 1291.

Id. at 1291 n.4, 1292.

Id. (quoting Dep’t of Justice & Federal Trade Comm’n, Guidelines for the Licensing of Intellectual Property, § 2.2 (1995)).

New Economy Trans. at 38 (witnesses appeared “unanimous in saying that the mere fact that you have a patent shouldn’t give the presumption of market power”; see also James J. O’Connell, Statement at AMC New Economy Hearing, at 3 (Nov. 8, 2005) (“[T]here should not be a presumption of market power in tying cases when there is a patent.”) (citing Brief for the United States as Amicus Curiae Supporting Petitioners, Illinois Tool Works Inc. v. Independent Ink, Inc., No. 04-1329, cert. granted, 73 U.S.L.W. 3729 (June 21, 2005)); Carl Shapiro, Statement at AMC New Economy Hearing, at 7–8 (Nov. 8, 2005) (“[m]any patents are “of limited commercial significance” and “many copyrights merely allow their owners to differentiate their products” from others); Richard J. Gilbert, Statement at AMC New Economy Hearing, at 10 (Nov. 8, 2005) (“There should be no presumption that a patent or copyright is a source of market power in tying cases or in other antitrust contexts.”).

See Motion Picture Association of America, Inc., Public Comments Submitted to AMC, at 3–4 (July 15, 2005) (stating that “[t]he great weight of analysis and opinion” opposes the presumption, citing numerous authorities); American Intellectual Property Law Association, Public Comments Submitted to AMC, at 1–3 (July 25, 2005) (urging that this Commission recommend congressional action to eliminate the presumption if the Supreme Court does not do so); Computer & Communications Industry Association, Public Comments Submitted to AMC Regarding New Economy, at 12 (July 20, 2005) (a presumption is “unnecessary”).