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WE PROTECT COMPETITION, YOU PROTECT COMPETITORS*

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ABSTRACT

It is widely stated, in contemporary antitrust circles, that antitrust law protects consumers, not competitors. This article explores two questions: Do these words have a clear and uniform meaning, and is the statement a fair description of what antitrust laws in fact do?

Antitrust laws protect competition. But the laws do not mandate competition; they simply intervene to prevent certain obstructions. This mission may take one or more of three paths: 1) prevent direct harm to consumer welfare by output-limiting acts or transactions, 2) also, protect the openness of markets, and 3) also, put a lid on aggressive competition that might destroy a market of smaller, weaker firms. This article argues that only the third category unabashedly protects competitors. The second category takes a broad view of a dynamic process that "should" not be degraded. It is not designed to protect competitors from competition. But the second category could err on the side of protecting competitors unless the jurisdiction gives serious regard to efficiency justifications, even while the first category could err on the side of perpetuating the power of dominant firms.

INTRODUCTION

It is often said that antitrust law protects competition and consumers; it does not protect competitors. It is further argued that, when particular conduct or a transaction does not exploit consumers, antitrust enforcement against it protects competitors from competition. This was the rhetoric in the aftermath of GE/Honeywell, a merger cleared by the American authorities and prohibited by the European authorities. A chorus of American critics said of the European Commission: You protect competitors; we protect competition [1] .

Nota:

1 See, e.g., George L. Priest and Franco Romani, Antique Antitrust: The GE/Honeywell Precedent, Wall Street J., Europe, June 26, 2001; Donna E. Patterson and Carl Shapiro, Transatlantic Divergence in GE/Honeywell: Causes and Lessons, 16 Antitrust 18, 20 (2001); see notes 41 and 43 infra.

This essay examines the conclusion that if conduct or a transaction is not output-limiting and exploitative of consumers, it must be efficient and antitrust action against it protects competitors. Further, the essay challenges the view that this paradigm (if it isn't output-limiting, it must be procompetitive) has become the accepted standard in the world. The essay proposes that

there are three categories, not two, relevant to considering whether conduct or a transaction harms competition: 1) telescoped above: defining harm to competition in terms of the outcome of particular conduct or transactions: whether output of the relevant product will probably be artificially reduced and prices will rise [2] ; 2) defining competition not only in terms of outcomes but also in terms of openness and access to markets on the merits, and defining harm to competition in terms of degrading or undermining the market mechanism, thus including unjustified exclusionary practices; and finally 3) including within “harm to competition” harm from low prices or other efficient strategies that directly benefit consumers. This essay proposes that only in the latter case can the enforcement be unequivocably labeled “protecting competitors”, and that whether the antitrust law of a pro-market jurisdiction should proscribe exclusionary conduct within category 2 is largely a matter of context and political economy perspective. How to achieve an efficient competition system is not an exact science, and one may rationally conclude that trying to do so by a first principle of trust in open markets is at least as good a bet as trying to do so by a first principle of trust in business.

Nota:

2 This article includes within category 1 all definitions for which probable output limitation is a necessary condition for a violation. It may not be a sufficient condition for a violation. For example, a merger regime may allow producer gains to trump consumer losses. See, e.g. Brian A. Facey and Dany H. Assaf, Monopolization and Abuse of Dominance in Canada , the United States , and the European Union: A Survey, 70 Antitrust L.J. 513 (2002), at 514-19.

Output harms can be effectuated either statically, or by dominant firm strategies that prevent innovations from reaching the market. Normally, however, the latter outcome is too speculative to warrant condemnation of single-firm conduct under category 1.

Category (1) reflects the dominant contemporary U.S. rhetoric. In other countries, “unleveling the playing field” by unjustified exclusionary conduct (category 2) states a respectable claim of anticompetitiveness. Category 2 jurisdictions, however, often exhibit a low level of consciousness of the possibility of slipping easily into category 3. “Leveling the playing field” may mean handicapping firms that use efficient strategies and thus protecting competitors from competition itself. Indeed, it is this very danger that may cause a jurisdiction to dissociate itself from category 2 and to deny that “mere” exclusionary harms by conduct not on the merits can be anticompetitive harms.

This essay proceeds as follows. First, it addresses output-limiting harms – the harms that all agree are harms to competition. It states how, in the author’s view, this formulation came to be adopted into U.S. antitrust law, and notes how jurists who are concerned by dominant firms’ unfair, coercive and bullying conduct tend to push the conduct, rhetorically, into category 1. Second, it addresses the second framework: identifying conduct as anticompetitive because it impairs the openness of markets and degrades the competition mechanism. This category is nicely represented by European competition law. It is reflected also in a number – albeit a dwindling number – of U.S. cases. Third, it addresses the third category: harm from competition, which may be a concern particularly in developing countries, which may feel the need to modulate competition in order to root viable competitive businesses.

Some regard the real debate as a debate only about proof of output limitation, not whether output limitation is the touchstone of competitive harm [3] . When, however, a court’s standard for proof of output limitation is so low that it may condemn conduct even though the chance of reduced output is no better than a remote possibility – as often occurs in exclusionary conduct cases – one must suspect that the ground for prohibition is something other than output limitation.

Nota:

3 See Howard H. Chang, David S. Evans, and Richard Schmalensee, Has the Consumer Harm Standard Lost Its Teeth?, Working paper, AEI-Brookings (August 2002), criticizing a practice of drawing inferences of harm to consumers from harm to competitors. The authors identify necessary elements of proof to sustain an inference of consumer harm in exclusionary practice cases. They argue, moreover, that plaintiffs should be required to show substantial harm to consumers. The authors assume that the courts in two high-profile cases of exclusionary violations (Microsoft and Visa/MasterCard) simply made a mistake in not insisting on necessary proof. This essay suggests that perhaps no mistake was made; there may be an “exclusionary harm” violation where the exclusionary effect is significant and the exclusionary conduct is not an attempt to serve the market and consumers, even though no output effects can be predicted. This essay is about whether there is such a violation, under law.

1. OUTPUT LIMITATION – THE UNITED STATES

Box 1

Harm to competition is harm to efficiency, as represented by artificial limitation of output and rise in price. Apart from cartels, which are facially almost always output-limiting, we must make a microeconomic judgment about the probable output-limiting outcome of each particular transaction.

For many years, in the United States, harm to competition meant harm to the competitive process; for example, by lessening rivalry among market actors or interfering with the natural flow of competition by exclusionary practices. Conduct was condemned if it created a "clog on competition"; e.g. by excluding firms from access to markets otherwise open to them [4] . Also, combinations of competitors not to compete (cartels) were condemned on grounds that competitors must be governed by markets; they may not govern markets [5] . Thus, the law condemned both exclusionary and exploitative restraints. Indeed, the Clayton Act was amended in 1914 to make clear, in the wake of the ambiguous Standard Oil decision [6] , that the law condemns exclusionary restraints [7] .

Nota:

4 E.g., Standard Oil Co. of California v. United States , 337 U.S. 293 (1949).

Nota:

5 E.g., Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941) 466 (competitors may not take the market into their own hands, whether or not output is limited). Before the 1980s, this socio-political rationale for condemning cartels was much more visible than a rationale based on loss of consumer surplus.

Nota:

6 Standard Oil Co. v. United States , 221 U.S. 1 (1911).

Nota:

7 Clayton Act, § 3. See Eleanor M. Fox, The Modernization of Antitrust – A New Equilibrium, 66 Cornell L. Rev. 1140, 1148-49 (1981).

By the mid-1970s, decisional law had gone to great lengths in proscribing conduct that excluded and set back competitors. The law spanned all three of our categories – output-limiting conduct, unjustified exclusionary conduct, and strategies (competitive though they might be) that threatened to eliminate less efficient firms. While most of the case law fell into categories 1 and 2, one could not ignore the precedents against conduct that, today, we would recognize as hard competition. Thus, in Utah Pie [8] , the Supreme Court intervened to protect targeted but sustainable low price competition against the incumbent dominant frozen pie maker, and in Brown Shoe, [9] the Supreme Court prohibited a merger because, among other things:

Nota:

8 Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

Nota:

9 Brown Shoe Co. v. United States , 370 U.S. 294 (1962).

> "Testimony in the record [...] demonstrates that a strong, national chain of stores can insulate selected outlets from the vagaries of competition in particular locations and that the large chains can set and alter styles in footwear to an extent that renders the independents unable to maintain competitive inventories. [Another] significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers." [10]

Nota:

10 Id. at 344. This passage was followed by the famous line that although

the Clayton Act protects competition, not competitors, "we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result..." Id.

Reacting against just such imperatives (prohibition of procompetitive mergers), the 1980s ushered in an era of conservatism, under the leadership of President Ronald Reagan. Ronald Reagan had run for president on a promise to get government off the back of business. Antitrust was target number 1. The antitrust "handicap" had to be removed. But how could the nation cut back the antitrust laws without a repealer vote of Congress (which would not succeed)? How far could the law be contracted, and by what rhetoric and what concept? One concept nicely fit the mission – a concept that would minimize antitrust as far as possible while still acknowledging its existence. The solution was a rule of non-intervention, unless market conduct was provably inefficient in the sense of artificially reducing output and raising price [11] . Moreover, markets and business conduct were assumed to be efficient. This approach was associated with the Chicago School . Cartels would, naturally, be the one clear target of the law. Dominant firm strategies would almost never violate the law. Mergers would carry the strong presumption of efficiency; but at the tip of the high-concentration, high-barrier iceberg, oligopolistic mergers could be just like cartels. Practices that had an effect of foreclosing competitors would almost never be illegal; if the purportedly foreclosed competitors were efficient, they could maneuver around the restraint. All they needed was ingenuity, and they could fight back and make the market more competitive.

Nota:

11 See BORK, Robert. The Antitrust Paradox: A policy at war with itself (1978): "Antitrust must content itself with the identification of attempts to restrict output and let all other decisions, right or wrong, be made by the millions of private decision centers that make up the American economy". Id. at 123.

The 1980s victory of the Chicago School was more a victory of economic libertarianism and political conservatism than of maximization of a microeconomic welfare function. "Consumer welfare" was the label given for the raison d'etre of the new regime, but it obscured the fact that the real first principle was non-intervention. Consumer welfare operationalized as aggregate consumer surplus provided a benchmark that was a check against antitrust enforcement. It stood for the admonition that antitrust law would not be invoked unless a particular challenged practice decreased aggregate consumer surplus. Given the presumption of market and business efficiency, it seldom did.

In its own right, however, as time has told, a consumer welfare paradigm is not necessarily a rule of non-intervention. "Consumer welfare" and "output limitation" became words that anchored the conversation of antitrust. They became necessary to the antitrust discourse; but the concept is not essentially a libertarian one. Eventually it took on an elasticity. Thus, the Court of Appeals for the Seventh Circuit was able to proclaim in Toys "R" Us that when the popular toy retailer (TRU) pressured the big toy makers to shift the supply of the hot toys that TRU had popularized from no-frills warehouse clubs to TRU alone, TRU had effected an output limitation to the warehouse clubs [12] . Taking a much narrower view of the meaning of output limitation, Justice Antonin Scalia proclaimed that a producer's cutoff of a well-performing discount distributor in combination with a complaining full price distributor presumptively did no antitrust harm, because "just cutting off a discounter" does not provide a price signal around which producers can cartelize, and without a cartel there could not have been an output limitation [13] .

Nota:

12 Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000) (vertical aspect only; no such proof was necessary for the theory of manufacturers' boycott). TRU provided a full line of toys, helped to pioneer hot toys, and priced low, but its prices were not as low as the no-display warehouse clubs. One might see the shift in business pattern as efficiently and permissibly keeping the TRU price higher than the warehouse price so that TRU could continue its merchandising services. See also United States v. Visa U.S.A. Inc., 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001) (MasterCard/Visa's policy of exclusivity with banks "limited the output" of American Express) (appeal pending).

Nota:

13 Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988) (holding not illegal per se manufacturer's cut-off of discounter pursuant to agreement with higher priced retailer).

See also California Dental Association v. FTC, 526 U.S. 756 (1999) (declaring that Dental Associations' code of ethics condemning simple price-discount advertising and quality and comfort advertising may not have lessened output of dental services and may have increased it, by giving the public a higher level of trust in the honesty of the profession).

Post-Chicago economics, which relaxes certain Chicago School assumptions of efficiency and robustness of markets and firms, suggests a greater range for output limitation through exclusionary practices than does Chicago School theory. See Barry Nalebuff, Bundling, Tying and Portfolio Effects, DTI Economics Paper nº 1 (Department of Trade and Industry , UK , Feb. 2003).

By the end of the twentieth century there was a range for maneuver by U.S. enforcers and jurists in claiming that exclusionary conduct did or did not meet the test of diminishing consumer welfare and therefore did or did not deserve to be called "anticompetitive". At one end of the spectrum stood the U.S. Federal Trade Commission during the Clinton administration, under the leadership of Robert Pitofsky. Serious market exclusions, especially coercive exclusions, caught the attention and concern of the Clinton FTC. A paradigmatic case was the proceeding against Intel, the dominant supplier of the microprocessing chip that is the nervous system of most personal computers. When sued by certain of its customers for infringing their intellectual property, Intel had cut them off from the flow of technical information they needed to incorporate the Intel chip into their hardware. The FTC prevailed upon Intel to settle the proceedings by agreeing to foreswear discriminatory cutoffs [14] . Also typical were the FTC proceedings in and order against Toys "R" Us, noted above, which enjoined TRU from coercing its suppliers (e.g. of Barbie Dolls and GI Joes) to limit the hot toys they supplied to the warehouse clubs [15] , as well as FTC decrees in telecommunications and media mergers and alliances which required merging firms to give nondiscriminatory market access to competitors [16] , According to the Federal Trade Commission, "openness, diversity and freedom" were the lynchpins of these measures [17] .

Nota:

14 See Intel Corp., FTC Docket No. 9288, consent to cease and desist, Aug. 3, 1999 , summarized at CCH Trade Reg. Rep., [Transfer Binder 1997-2001] ¶ 24,575. But compare Intergraph Corp. v. Intel Corp., 195 F.3d 1346 (Fed. Cir. 1999).

15 Toys "R" Us, Inc., FTC Docket No. 9278 (cease and desist order), summarized at Trade Reg. Rep. (CCH) [Transfer Binder 1997-2001] ¶ 24, 516, aff'd, 221 F.3d 928 (7th Cir. 2000); America Online, Inc. and Time Warner, Inc., FTC Docket No. C-3989, (consent order to cease and desist, Apr. 17, 2001, summarized at Trade Reg. Rep. (CCH) [Transfer Binder 1997-2001¶ 24,835; Time Warner, Inc., FTC Docket No. C-3709 (consent order to cease and desist, Feb. 3, 1997), summarized at Trade Reg. Rep. (CCH) [Transfer Binder 1993-1997] ¶ 24,104; see also FOX, Byron E.; FOX, Eleanor M. Mergers That Impair Market Access. In: Corporate Acquisitions and Mergers, ch. 11 (2003).

16 See Fox & Fox, supra. See also STUCKE, Maurice E.; GRUNES, Allen P. Antitrust and the Marketplace of Ideas. 69 Antitrust L.J. 249 (2001).

17 Statement of FTC Chairman Robert Pitofsky, quoted in FTC Press Release, "FTC Approves AOL/Time Warner Merger with Conditions," available at http://www.ftc.gov/opa/2000/12/aol.htm. See Stucke and Grunes, supra, 252-56.

At the other end of the spectrum were the antitrust minimalists who would withhold antitrust intervention in the absence of credible proof that conduct would increase market power, limit output, and raise price [18] .

Nota:

18 Some members of this school questioned even the most stalwart of the Supreme Court decisions. For example, Lorain Journal condemned a monopolist newspaper that refused to deal with any of its advertisers who patronized a new local radio station. 342 U.S. 143 (1951). This holding was questioned on grounds that the radio station remained profitable; the boycott might not have been output-limiting. See MURIS, Timothy J. The FTC and the Law of Monopolization. 67 Antitrust L. J. (2000) 693, at 715.

The Supreme Court, meanwhile, has firmly supported the proposition that harm from competition (category 3) can never be a violation of U.S. antitrust law [19] , has firmly stated that "mere" unfairness to a competitor does not present an antitrust problem [20] , and perhaps has given Delphic support to the proposition that if conduct or a transaction does not fit category 1 (output-limiting) it is probably procompetitive; i.e., category 2 merges with category 3. The only anticompetitive harm is an output-limiting harm. Any other antitrust enforcement protects competitors [21] .

Nota:

19 See, e.g., Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

20 See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

21 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., supra. The courts have made this point especially strongly in cases of low pricing and product design change. But see, as to other foreclosing conduct, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992) at 480 n. 29 (power gained even through natural and legal advantage can give rise to liability if "a seller exploits his dominant position in one market to expand his empire into the next"); Conwood Co. v. United States Tobacco Co., 290 F. 3d 768 (6th Cir. 2002), cert. denied, – U.S. – (2003) (dominant snuff manufacturer's exclusion of competitor by dirty tricks was illegal); Fishman v. Estate of Wirtz, 807 F. 2d 530, 563 (7th Cir. 1986) (there is a right to compete to be the monopoly facility, even if consumers are indifferent as to who owns the facility; "[a] healthy and unimpaired competitive process is presumed to be in the consumer interest") (Judge Easterbrook dissented on grounds of no output limitation and thus no harm to consumers).

If this position is not yet clear, the Antitrust Division of the U.S. Department of Justice and Federal Trade Commission hope to make it so. In their brief as Amici Curiae on petition for certiorari in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko [22] , the agencies urge the Supreme Court to reject the theory of monopoly leveraging – using monopoly leverage in one market to gain an advantage short of monopoly power in a second market – even by a telecommunications company that controls the essential local loop. The agencies write that the Sherman Act is not an abuse of dominance act; "[it does not prohibit] 'the 'abuse' of one's dominant position'" [23] .

Nota:

22 305 F. 3d 89 (2d Cir. 2002), cert. granted, – U.S. – (2003).

23 Brief, December 2002, p. 16, citing 3 Areeda and Hovenkamp, Antitrust ¶652 at 89 (2d ed. 2002).

2. OPEN MARKETS – THE EUROPEAN UNION

Box 2

Harm to competition also includes harm to the competitive process. The best way to protect consumers as well as incentives for producers is to rely on open markets unimpeded by private firm obstructions

A) Introduction

The European Union's treatment of exclusionary practices is sympathetic with a strong thread of the 1960s-1970s' American jurisprudence: Competition laws protect the competitive structure and dynamic of the market. They protect openness of markets, access to markets, and the right of market actors not to be fenced out by dominant firm strategies not based on competitive merits. Protection of the competition process and integrity of the market is likely to promote incentives to compete and to serve both consumers and efficient and progressive market actors, whose interests are symbiotic [24] . Thus, European Competition Commissioner Mario Monti writes:

Nota:

24 See, for the larger-canvas approach – trusting the openness and competitive structure of markets – Giuliano Amato, Introduction and ch. 3 in Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market (1997); Frédéric Jenny, Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation, Chapter 16 in Competition Policy in the Global Trading System: Perspectives from the EU, Japan and the USA (Clifford A. Jones and Mitsuo Matsushita, eds. 2002).

The open-market approach is symbiotic with the market-integration imperative of EC law, and the market-integration desideratum of the WTO.

The open-market approach may be thought to have fairer distributional consequences as well as to create an environment likely to stimulate more creative break-throughs. Thus, Professors Paul Geroski and Alexis Jacquemin have written:

"[D]o would-be entrepreneurs have equal or 'fair' access to the means necessary to attempt a creative breakthrough? Do successful competitors in innovative processes have a 'fair' return for their efforts, or access to a 'fair' mechanism for determining rewards? Reinforcing this, it is the case that distribution and equity issues dominate the evaluation both because market power affects the distribution of economic rewards... and because market power affects the decision of what to produce, which must be evaluated vis-a-vis consumer tastes... All of these would be important considerations even if creatively destructive competition involved a regular turnover of winners; when, however, small asymmetries can be solidified into dominant positions that persist, then the inequities they create become institutionalised, creating long-term problems in the performance of the economic system which cry out for policy attention."

GEROSKI, Paul; JACQUEMIN, Alexis. Dominant Firms and their Alleged Decline. 2 Int'l J. of Indus. Org. 1, 22 (1984).

"[E]nshrined in the Treaty [...] [is] 'an open market economy with free competition'. Since its adoption more than 40 years ago, the Treaty acknowledges the fundamental role of the market and of competition in guaranteeing consumer welfare, encouraging the optimal allocation of resources and granting to economic agents the appropriate incentives to pursue productive efficiency, quality and innovation.

Personally I believe that this principle of an open market economy does not imply an attitude of unconditional faith with respect to the operation of market mechanisms. On the contrary, it requires a serious commitment – as well as self-restraint – by public powers, aimed at preserving those mechanisms." [25]

Nota:

25 MONTI, Mario. European Competition Policy for the 21st Century. In: International Antitrust Law & Policy. 2000 Fordham Corp. L. Inst. ch. 15 at 257 (Barry Hawk ed., 2001) (emphasis in text).

Other competition commissioners have taken a more eclectic view of the basis for the open market principle. Thus, Commissioner Monti's predecessor, Karel Van Miert, wrote:

"The aims of European Commission's competition policy are economic, political and social. The policy is concerned not only with promoting efficient production but also achieving the aims of the European treaties... To this must be added the need to safeguard a pluralistic democracy, which could not survive a strong concentration of economic power."

Karl von Miert, A Pragmatic Approach to Europe 's Competition Policy, Frontier-Free Europe Monthly Newsletter, April 5, 1993 . See also JEBSEN, Per; STEVENS, Robert. Assumptions, Goals, and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union. 64 Antitrust L.J. 443, 450, 458-61 (1996).

The Treaty of Rome establishing the European Communities (1957) contained, from the start, two antitrust articles: Article 85 (now 81) and Article 86 (now 82). Article 82, which prohibits abuse of dominance, was intended to regulate the behavior of dominant firms so that they would not take undue advantage of other market players, including buyers, sellers, and competitors. Indeed, the Treaty itself, in Article 3(1)(g), requires "a system ensuring that competition in the internal market is not distorted" – a mandate that is held to condemn unjustified exclusionary practices because they are exclusionary and thus distort the normal functioning of the market on competitive merits.

B) Abuse of Dominance

In the European Union, under Article 82, dominant firms have special responsibilities. The origin of this duty lies in the fact

that, at the time the original six states (France , Germany , Italy , Belgium , the Netherlands , and Luxembourg) formed the European Communities, statism pervaded the states' economies. State-owned enterprises controlled the mostly national markets. The duty, however, was not limited to state-owned enterprises, and is embedded in the law [26] . Moreover, it is clear from its wording that Article 82 was intended to regulate the conduct of dominant firms and to prevent dominant firms from unfairly using their power, not merely to prevent them from expanding or protecting their power.

Nota:

26 As the Court of Justice said in Michelin v. Commission, Case 322/81, [1983] E.C.R. 3461, regarding exclusive contacts, the dominant firm "has a special responsibility not to allow its conduct to impair undistorted competition on the common market." Id. at ¶ 57.

Exclusionary contracts and practices are a major form of abuse of dominance under the Treaty of Rome. In Hoffmann-La Roche, Roche, the dominant vitamin maker, decided to increase its manufacturing capacity. It procured an agreement with its competitor Merck whereby Merck agreed to buy from Roche its vitamins needs above its own manufacturing capacity. In turn, Roche gave Merck a favorable price. The Court of Justice held the underlying contracts illegal because they "are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market" [27] .

Nota:

27 Case 85/76, [1979] E.C.R. 461 at ¶ 90.

In Tetra Pak [28] , Tetra Pak was the dominant firm in the manufacture of aseptic cartons for packaging milk and juice, and the machines that make them. Some contracts with its customers for aseptic products required the customers to buy non-aseptic machines and cartons, also from Tetra Pak, and some required exclusive dealing. The Court of First Instance held that the contracts were illegal. The Court of Justice affirmed. Tetra Pak's dominant position in the related aseptic market "gave Tetra Pak freedom of conduct compared with other economic operators on the non-aseptic market, such as to impose on it a special responsibility under Art. 86 to maintain genuine undistorted competition on those markets". [29] As the Court of First Instance said:

Nota:

28 Case T-83/91, [1995] E.C.R. II-762 (CFI), aff'd, C-333/94P, [1996] E.C.R. I-5951. The Court of Justice substantially adopted the Court of First Instance's judgment and reasoning.

29 Id. , Court of First Instance judgment, [1995] E.C.R. II-762, ¶ 122. See also British Airways (Virgin), Case IV/D2/334.780, Commission decision of July 14, 1999, O.J. (L30) (Feb. 4, 2000) 1, prohibiting loyalty rebates because such schemes foreclose the market and thus foreclose access by competitors of the dominant firm. Therefore, they are anticompetitive. A U.S. court took the opposite position in Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256 (2d Cir. 2001), viewing the loyalty rebates as price competition even if they delayed and deterred market entry. Since loyalty rebates are low pricing, the court theorized the case as any other low pricing case, and held that plaintiff had not alleged or presented facts sufficient to support a claim of predatory pricing.

> "The Court of Justice has in particular ruled that, where an undertaking in a dominant position directly or indirectly ties its customers by an exclusive supply obligation, that constitutes an abuse since it deprives the customer of the ability to choose his sources of supply and denies other producers access to the market." [30]

Nota:

30 Tetra Pak, supra note 28, ¶ 137. Tetra Pak and Michelin, supra note 26, were recently cited as "settled case-law" by the Court of First Instance in Tetra Laval BV v. Commission, Case T-502 (CFI Oct. 25, 2002),

http://curia.eu.int.jurisp, ¶ 157 (annulling Commission prohibition of the Tetra/Sidel merger for, inter alia, lack of proof that the merged firm would exercise its leverage, e.g., by tying, bundling, forcing, or loyalty rebates).

The principle by which the European Court condemns exclusionary practices by dominant firms unless justified is often phrased as a dynamic one: the right of market actors (for the benefit of the public) to enjoy access to the market on the merits. It is a principle of freedom of non-dominant firms to trade without artificial obstacles constructed by dominant firms, and carries an assumption that preserving this freedom is important to the legitimacy of the competition process and is likely to inure to the benefit of all market players, competitors and consumers [31] .

Nota:

31 This format for analysis (condemning significantly exclusionary conduct unless justified) reflects the more explicit scheme of Article 81: Contracts that distort competition, in a broad sense, are caught by Article 81(1) and are invalid unless justified under Article 81(3), e.g. as efficient or technologically progressive. See Métropolé Télévision (M6) v. European Commission, Case T-112/99, [2000] All ER (EC) 1.

For exclusionary cases not within the safe harbor of the vertical block exemption, the first point of argumentation is whether the restraint or conduct has a "sealing-off-effect," making access to the market difficult. Stergio Delimitis v. Henninger Bräu AG, [1991] ECR I-935, 21-27. If the answer is affirmative, the restraint is anticompetitive and must be objectively justified. Van den Bergh Foods Ltd., Cases IV/34.073, IV/34.395 and IV/35.436, Commission Decision 98/531 of 11 March 1998 , O.J. L 246/1 (Sept. 4, 1998), appeal pending as Case T-65/98, Van den Bergh Foods Ltd. v. Commission.

The difference of focal point in the EU and the United States has the potential to produce a divergent outcome in the pending EU proceedings against Microsoft, especially regarding the issues of bundling and duty to disclose technical information to facilitate interoperability [32] . In the U.S. Microsoft case, the bundling issue arose under the rubric of tying. District Judge Thomas Penfield Jackson held that Microsoft's conduct in tying its browser to its operating system was illegal per se [33] . The appellate court reversed this holding, stating that packaging applications (including browsers) with platform software can serve consumer welfare; and it remanded the claim to the district court for analysis under the rule of reason [34] . In the aftermath, following a change of administration, the U.S. Department of Justice withdrew the tying/packaging claim rather than retry it [35] . Possibly because it did not wish to win. No claim was made, nor could it have been, that, simply because Microsoft was a monopolist controlling an industry standard, it had a general duty under Section 2 of the Sherman Act to offer applications separately or to disclose sufficient proprietary information to facilitate interoperability of competitors' applications software with Microsoft's operating system. Indeed, the appellate court in the U.S. Microsoft case held that even purposeful creation of incompatibilities through product change (i.e. Microsoft's altering Java language in its use with Windows to defeat Sun Microsystems' plans for a cross-platform Java language) does not run afoul of Section 2 of the Sherman Act because it falls into the prophylactically-protected category of innovation [36] .

Nota:

32 The European Commission has charged that Microsoft failed to fulfill its duty to facilitate interoperability by (as reported in the press) "witholding technical information that rivals needed to allow their software to run smoothly with Microsoft's industry-standard Windows operating system" and that it "illegally bundled its media-playing software with Windows to undermine competition in the fast-growing new market for online music and video software". See LOHR, Steve; MELLER, Paul. Microsoft Move May Hasten Settlement of European Cases, NY Times, Nov. 28, 2001, at C1; European Commission Press Release IP/01/1232, Commission Initiates Additional Proceedings Against Microsoft, Aug. 30, 2001, available at http://europa.eu.int/rapid/...=gt&doc=IP/01/1232|0|AGED&lg=EN&display=.

33 United States v. Microsoft Corp., 87 F. Supp. 2d 30, 47-51 (D.D.C. 2000), revs'd in part, aff'd in part, remanded in part, 253 F. 3d 34 (D.C. Cir.), cert. denied, 22 S. Ct. 350 (2001). This "pure" tying/packaging claim is to be distinguished from Microsoft's predatorily commingling the code for its browser and its operating system so that the browser could not be removed (and replaced with Netscape's browser) without degrading the operating system. The appellate court affirmed the illegality of the latter strategy.

34 Microsoft, 253 F. 3d at 95-97.

35 Justice Department Informs Microsoft of Plans for Further Proceedings in the District Court, DOJ Press Release, Sept. 6, 2001 .

36 Microsoft, 253 F.3d at 75. See United States v. Microsoft Corp., 147 F.3d 935, 949-50 (D.C. Cir. 1998); see also Independent Serv. Orgs. Antitrust Litig., 203 F.3d 1322 (Fed. Cir. 2000), cert. denied, 121 S. Ct. 1077 (2001). But compare Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997), cert. denied, 523 U.S. 1094 (1998), giving less deference to the intellectual property.

C) Mergers

Mergers, too, may be price-raising, exclusionary, or both. The European Merger Regulation imports the spirit of Article 82 case law into merger jurisprudence in cases of threatened exclusionary effects. When a merger "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded", the merger runs afoul of the Merger Regulation. When a merger creates a market structure that offers leveraging opportunities likely to inflate the share of a dominant or near-dominant firm by empowering it to preempt opportunities of competitors, the merger may be seen as creating or strengthening a dominant position, i.e., creating a situation that facilitates abuse of dominance. GE/Honeywell [37] is an example of this principle. Thus far, at least, the law has been so interpreted [38] .

Nota:

37 Commission decision of July 3, 2001 , Case COMP/M2220, GE/Honeywell, OJ 2001/C331/40, appeal pending, available at http://www.europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf.

38 It is not clear whether the European jurisprudence is changing. The Court of First Instance has recently overturned three merger prohibitions by the Commission; but all reversals were based on insufficiency of evidence to support the Commission's theory or on denials of procedural due process. In the one case in which the merger prohibition was based on creation of leveraging opportunities, Tetra Laval/Sidel, supra note 28, the Court of First Instance accepted the proposition that a merger may enable a firm to leverage its way into dominance. It identified uses of leverage that may constitute an abuse of dominance: tying, bundling, forced sales, and loyalty rebates. It observed, however, that effects of conglomerate mergers are normally "neutral, or even beneficial" for competition; therefore "the proof of anticompetitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects..." See 146, 151, 155-56, 159-61, 218.

General Electric Company is the world's largest producer of large and small jet engines for commercial and military aircraft. It, with a joint venture, supplies more than half of all engines for large commercial jets. The engine market is concentrated. GE Commercial Aviation Services (GECAS) is one of the world's largest aircraft-leasing companies and one of the largest buyers of planes. It buys about 10 percent of aircraft, it and a sister corporation finance the purchase of airplanes, and it is an important launch customer for airplanes. Once an aircraft manufacturer chooses to incorporate a particular supplier's engine and other elements, it normally prefers to continue purchasing the same brand because of efficiencies, such as acquired knowledge and training, as well as replaceability across a fleet. GECAS had in the past exercised its power to pressure aircraft makers to incorporate GE engines. Honeywell International is a leading firm in the production of avionics including navigating equipment, certain nonavionic products, engines for corporate jets, and engine starters.

The European Commission expressed several concerns. First, it said, the merged firm, having a large line of complementary products, would probably engage in product bundling. It was likely to lower the price of the bundle, while charging high prices for parts of the bundle offered separately. The competitors would be unable to lower the prices of their products to the same extent and would eventually abandon the market or market segments, at which time the merged firm would be in a position to raise its prices. Second, GECAS would use its buying and launching platform leverage to cause aircraft makers to shift their business to Honeywell as well as to GE. The deserted competitors would be weakened and would eventually exit from the market or market segment.

Blocking the merger, the Commission said:

> "The combination of the two companies' activities would have resulted in the creation of dominant positions in the markets for the supply of avionics, non-avionics and corporate jet engines, as well as [in] the strengthening of GE's existing dominant positions in jet engines for large commercial and large regional jets. The dominance would have been created or strengthened as a result of horizontal overlaps in some markets as well as through the extension of GE's financial power and vertical integration to Honeywell activities and of the combination of their respective complementary products. Such integration would enable the merged entity to leverage the respective market power of the two companies into the products of one another. This would have the effect of foreclosing competitors, thereby eliminating competition in these markets, ultimately affecting adversely product quality, service and consumers' prices." [39]

Nota:

39 European Commission Press Release IP/01/939, The Commission Prohibits GE's Acquisition of Honeywell (July 3, 2001), available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt+gt&doc=IP/01/939\0\AGED&lg=EN&display=.

The United States , meanwhile, cleared the merger, subject to spin-off of overlapping engine assets [40] . U.S. Assistant Attorney General Charles James said (contrary to the European Commission's own perception) that Europe prohibited the merger because it "would have been procompetitive and beneficial to consumers", and that the Commission "apparently concluded that a more diversified, and thus more competitive GE, could somehow disadvantage other market participants" [41] . The merger was not price-raising by the U.S. agency's calculus [42] ; therefore it must have been efficient [43] .

Nota:

40 See DOJ Press Release, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001), available at http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm.

41 Mergers and Acquisitions: Antitrust Division Chief Reacts to EU decision to Prohibit GE/Honeywell Deal, 81 Antitrust & Trade Reg. Rep. (BNA) 15 (July 6, 2001).

42 But see REYNOLDS, Robert J.; ORDOVER, Janusz A. Archimedean Leveraging and the GE/Honeywell Transaction, 70 Antitrust L.J. 171 (2002).

43 Other U.S. antitrust officials elaborated on an argument that because GE's engines and Honeywell's avionics were complements (aircraft makers need both), the merger would be price-lowering and procompetitive, and that the Commission was protecting the competitors of Honeywell and GE rather than protecting competition. See, e.g., KOLASKY, William J. Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels , Address Before George Mason University Symposium (Nov. 9, 2001), available at http://www.usdoj.gov/atr/public/speeches/9536.htm.

D) Beyond the EU

A rule of law that condemns significant unjustified exclusionary practices [44] is by no means limited to the European Union. Most jurisdictions have such a rule [45] . Even in the United States , courts not infrequently apply such a principle in fact, even while they frequently proclaim that the practice will probably, later if not sooner, limit output and raise prices. The famous Microsoft case is an example. While the Court of Appeals for the D.C. Circuit struck down half of the district court decision against Microsoft, it upheld the other half, finding that Microsoft had maintained its monopoly position by exclusionary conduct, such as contracts with personal computer makers forcing them to refrain from loading the Netscape browser on the Windows operating system in order to get a license for Windows operating system. The court accepted only one theory of monopoly maintenance, and this involved monopolizing the operating system market (not the browser market): Microsoft feared that, if Netscape, through its browser, using Java as a cross-platform language, could get a critical mass of users, it could create middleware that could sit on top of any operating system, wean applications' writers away from Microsoft (since their applications would then work on any operating system), and "commoditize" Microsoft's operating system. The exclusive contracts were one way to try to keep Netscape from attracting the critical mass of browser users it needed to create and commercialize middleware. The critical mass was a necessary – but far from sufficient – condition bringing to the market middleware that consumers would find attractive and buy. If the court thought it needed proof that Microsoft's exclusive contracts were a substantial factor in actually protecting Microsoft's power in the operating system market, it deeply cut corners [46] . All that plaintiffs established was that Microsoft diverted from Netscape an unspecified share of browser usage with no good business reason to do so. Microsoft gained no market power in browsers by using its leverage to shift browser usage to itself. It gained no power in the operating system market. Had it not engaged in its exclusionary tactics, it would probably have lost no power in the operating system market (though it clearly feared the day when this might occur and was buying a cheap though partial insurance policy). But Microsoft's strategies to marginalize potential competitors wherever it could conveniently do so potentially reinforced Microsoft's leading edge in blazing the path to the unknown future in computing (not an output limitation claim). Microsoft unfairly distorted the market and deprived its potential challengers of a possible way to get out ahead in the race. Microsoft reinforced path dependency.

Nota:

44 Whether conduct or a merger with exclusionary potential fulfills even these conditions is not always quickly or easily detected. In GE/Honeywell, the problem may have seemed easy because GE had argued simply that the

merger was conglomerate and therefore could not be anticompetitive. GE offered no efficiency evidence or arguments. The Commission saw the merger as a pure leverage-creating merger; GE had been quick to use its leverage in the past and was gaining leveraging opportunities in new markets. Other analysts argue, however, that mergers of firms that produce complements necessarily have efficiency properties and therefore must be treated hospitably. See note 43 supra.

45 For selected non-EC, non-US authorities that prohibit significant unjustified exclusionary practices, see NutraSweet [1990], 32 Can. Patent Rep. 3d 1 (Canada); Toshiba Elevator, Judgment of July 30, 1993 (Toshiba Elevator Technos K.K. v. K.K. Tsuzuki Appraisal Office), Osaka KÇsai [Osaka High Court] Jurisuto (1032), Oct. 15, 1993, at 101 (Jasper). The German Law Against Restraint of Competition (GWB) contains various express provisions against abuse of dominance by unfair hindrance of competitors. GWB §26. See also UNCTAD Model Code, note 54 infra.

46 See Chang, Evans and Schmalensee, supra note 3.

In Microsoft, the court observed that various contracts foreclosed Netscape from browser users. In each case, the court characterized proof of foreclosure as proof of anticompetitive effects, and it allowed Microsoft to rebut liability by proof of outweighing procompetitive effects (which Microsoft was unable to do in almost all instances), but not by proof that the (partial) foreclosure was not output-limiting. See Microsoft, 253 F. 3d at 56-78.

In other cases as well, contemporary U.S. law protects against harm to the dynamic aspects of the competition process, and in one particular situation – use of government processes to exclude competitors, the current FTC leadership advocates that it should do so. An example of the first situation is FTC v. Indiana Federation of Dentists [47], wherein the Indiana Dentists concertedly resisted the insurance companies' request that the dentists submit x-rays with insurance claims so that the insurers could determine the necessity of certain dental procedures. The Supreme Court affirmed an FTC injunction against the Federation, observing that the dentists' action was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market... The Federation is not entitled to pre-empt the workings of the market by deciding for itself that its customers do not need that which they demand" [48] . A reflection of the second observation – use of government processes closes off avenues for competition and thereby harms competition – may be found in the 2002 Handler lecture by Timothy Muris, Chairman of the FTC [49] .

Nota:

47 476 U.S. 447 (1986).

48 Id. at 461-62. See also cases cited in note 21 supra.

The law against use of market power to coerce buyers to accept tied goods is of course another example of the open-market approach, but that law is under pressure for exactly the reasons mustered in support of category 1: coerced tie-ins do not necessarily confer more market power; they are "merely" a use of market power. See concurring opinion of Justice O'Connor in Jefferson Parish Hosp. Dist. nº 2 v. Hyde, 466 U.S. 2, 32 (1984). Likewise, the U.S. law against leveraging by a dominant firm (use of power in one market to get advantages not on the merits in a second market) is under pressure and may be clarified in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, supra note 22.

49 Timothy J. Muris, Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy, Dec. 10, 2002 , New York , NY , available at http://www.ftc.gov/speeches/muris/handler.htm.

What is the harm in protecting competitors' opportunities to compete on the merits without proof that the dominant firm's exclusionary strategies will probably limit output? The biggest worry – according to defenders of a category-one-only offense – is that category two cases can slip easily into category three: the court may be enlisted to protect competitors against competition itself.

3. FAIR COMPETITION – A DEVELOPING COUNTRY PERSPECTIVE

Box 3

Harm to competition might also include harm to the competitive dynamic among small and perhaps indigenous firms.

[If this is so, antitrust enforcement protects competitors from competition itself.]

Some jurisdictions define "anticompetitive" yet more broadly than the European Union and the United States . Some define "anticompetitive" to embrace methods of competition that they perceive to be unfair. An unfair competition component of competition policy may be anathema to policy markers in mature market jurisdictions, especially certain Western jurisdictions, because such a conception can protect competitors from competition itself and, from the point of view of the developed world, application of this point of view has no payoff except to the protected competitors [50] .

Nota:

50 This is not necessarily so in the developing world. By one theory, too much competition too soon might impair development. Moreover, it might aggravate distributional inequities, interfering with a balance important to enhance development. See Joseph Stiglitz, Globalization and its Discontents (2002); Frédéric Jenny, Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation, Chapter 16 in Competition Policy in the Global Trading System: Perspectives from the EU, Japan and the USA (Clifford A. Jones and Mitsuo Matsushita, eds. 2002).

In Indomaret [51] , the Indonesian competition commission enjoined a large supermarket from expanding into venues of traditional small stores, to protect against destruction of traditional local communities. The Commission may have perceived that the social costs to the people as citizens of the local communities were greater than the gains from low prices and variety realized by the people in their role as consumers, especially in this time of transition, social unrest, and recent memory of riots [52] .

Nota:

51 P.T. Indomarco Prismatama, 03/KPPU-L-1/2000.

52 The Business Supervisory Commission (the KPPU) found that Indomaret "does not observe the principle of balance in accordance with the principle of economic democracy in promoting healthy competition between the interests of business enactors and public interests," and ordered it "to cease its expansion in traditional markets, in which it is directly facing small-scale retailers, in the context of realizing balance in the competition between large-scale, medium-scale and small-scale business enactors..." Id. , relief, ¶ 2.

In an illuminating essay presented at the Japan Fair Trade Commission's 50th Anniversary Competition Symposium, Kyu-Uck Lee stated the case for a fairness component in competition law [53] :

Nota:

53 Kyu-Uck Lee, A "Fairness" Interpretation of Competition Policy with Special Reference to Korea's Laws, in The symposium in Commemoration of the 50th Anniversary of the founding of the Fair Trade Commission in Japan, Competition Policy for the 21st Century, at 61 (KFTC 1997) (on file with author).

> "Competition is the basic rule of the game in the economy. Nevertheless, if the outcome of competition is to be accepted by the society at large, the process of competition itself must not only be free but also conform to a social norm, explicit or implicit. In other words, it must also be fair. Otherwise, the freedom to compete loses its intrinsic value. Fair competition must go in tandem with free competition. These two concepts embody one and the same value. This may be the reason that competition laws of several countries such as Korea and Japan clearly specify 'fair and free competition' as their crown objective.
>
> [I]n a developing economy where, incipiently, economic power is not fairly distributed, competition policy must play the dual role of raising the power, within reasonable bounds, of underprivileged economic agents to become viable participants in the process of competition on the one hand, and of establishing the rules of fair and free competition on the other. If these two objectives are not met, unfettered competition will simply help a handful of privileged big firms to

monopolize domestic markets that are usually protected through import restrictions. This will then give rise to public dissatisfaction since the game itself has not been played in a socially acceptable, fair manner." [54]

Nota:

54 Id. at 61-62. Other formulations by developing countries include legislation against restrictive business practices, such as outlined in the 1980 UNCTAD Code. The restricted business practices enumerated therein are either exploitative of buyers or suppliers or exclusionary of firms without power. The code-like prohibition of categories of conduct, such as exclusive dealing and tying, even tempered as it is by a reasonableness defense as a nod to the industrialized countries, is simpler and easier to administer; an important quality in a world of scarce enforcement resources. See Model Law on Competition, UNCTAD, TD/RBP/CONF. 5/7 (UN 2000). To many developing nations, restrictive business practices, now called anticompetitive practices, are harms to competition.

See generally as to Asian countries' laws that prohibit unfair as well as anticompetitive restraints, Symposium, APEC Competition Policy and Economic Development, 1 Washington University Global Studies L. Rev. 1-506 (2002); in particular, articles on the laws or draft laws of China, Indonesia, Japan, Korea, Taiwan, and Thailand.

We might continue to label rules that protect firms from competition itself "anticompetitive" even if we may appreciate their justice and even their contribution to efficiency in countries that must develop competition. Professor Lee's comments remind us that definitions have cultural and normative content. What is harm to competition is not pure, scientific, and absolute.

V. Harms to Competition – A Graphic Summary

We return, then, to the initial perspective defined largely by U.S. and EU perceptions: there are two principal views as to whether serious, unjustified exclusions by dominant firms may be "anticompetitive" even if no output effects can be reasonably predicted. By one point of view, the categories of harm to competition may be depicted thus:

Table A

HARM TO COMPETITION		HARM TO COMPETITORS
1	2	3
Limitation of output	Also, blocking of competition on the merits with no market justification; degrading the competition mechanism	Exclusion of firms by hard, efficient competition
Mostly cartels, monopolistic and duopolistic mergers; post Chicago School analysis widens the range to certain monopolistic strategies.[55]	For U.S., includes many burden-shifting cases where there is no reason to believe that the challenged conduct will limit output; e.g. *Indiana Federation of Dentists*; *Microsoft*. For EU, includes most cases of abuse of dominance; e.g. *Hoffmann-La Roche*, *Tetra Pak*.	*Indomaret* *Brown Shoe* (vertical aspects) *Utah Pie*

Nota:

55 Few cases of price predation, including predation by fidelity rebates, could confidently be placed within column 1. The conditions under which price predation will succeed in increasing market power and limiting output are demanding, and consumers are likely to gain from failed predation, at least if the target of the predation remains a viable player or the market is realistically contestable. In theory, an alleged price predation case could come within any of the three columns, depending on the facts. But because costs of error in condemning low prices are high, U.S. courts generally perceive the problem of price predation along lines of Table B, infra. They adopt a similar perspective for predation by product design. They are less concerned, however, by unjustified foreclosing practices (which do not have intrinsic pro-consumer qualities); thus, the set of U.S. exclusionary cases not involving price or

product design predation that fall within column 2.

From the point of view of welfare economics, however, which would identify whether particular conduct or transactions will increase or decrease aggregate consumer or total wealth, the middle column (2) would not be recognized. Either conduct harms consumers or its prohibition harms consumers. From the point of view of policymakers who prefer minimal antitrust intervention, column 2 is ephemeral and the danger of slippage into column 3 is so great that the better part of wisdom is to ignore column 2 and to label as "protection of competitors" enforcement against any conduct that does not qualify for column 1 [56] .The categories of conduct may then be depicted thus:

Nota:

56 Thus, Judge Robert Bork said in Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F .2d 210, 221 (D.C. Cir.), cert. denied, 479 U.S. 1033 (1987): "If it is clear that Atlas and its agents by eliminating competition among themselves are not attempting to restrict industry output, then their agreement must be designed to make the conduct of their business more effective. No third possibility suggests itself." Similarly, Professor Bork said in The Antitrust Paradox (1978): "Improper exclusion" is always deliberately predatory and inefficient, which is rare; otherwise, the exclusion is the product of superior efficiency. "There is no 'intermediate case' of exclusion..." Bork, supra at 160.

Table B

HARM TO COMPETITION (HARM TO CONSUMERS)	HARM TO COMPETITORS
1	2
Harm to competition means: this transaction or conduct is inefficient because it limits output and raises prices.	Antitrust enforcement against this conduct will protect competitors and harm consumers.

CONCLUSION

Are there two columns or three? Does/should antitrust protect only against output-limiting outcomes, or does it (should it) bet on open markets and freedom of access on the merits? This essay does not provide an answer. Jurisdictions decide, based on their history, culture, context, and the set of risks and potentials they prefer.