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***The Development and Communication of
Competition Law Standards
Applicable to Single-Firm Exclusionary Conduct:
A Perspective Based on US Experience***

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The Development and Communication of Competition Law Standards
Applicable to Single-Firm Exclusionary Conduct:
A Perspective Based on U.S. Experience

I appreciate the opportunity to share some of the views and experiences of the US Department of Justice on the tremendously important issue of competition law standards for single-firm conduct that harms competition (what I will often refer to here as “single-firm exclusionary conduct”). This is an area of competition law that has seen tremendous recent debate in Europe, the United States, and elsewhere in the world. As we all know, the European Commission has been engaged in a lengthy process aimed at producing guidelines for the application of Article 82. Meanwhile, across the Atlantic, the Department of Justice and the Federal Trade Commission have been conducting extensive hearings to consider the many complex issues posed by legal standards under Section 2 of the Sherman Act. And, of course, as time moves on, these standards continue to evolve as courts apply the underlying statutory framework in the context of particular enforcement actions – both private and governmental.

I will focus on four lessons that the US experience offers in this area. First, despite some significant challenges, competition law *should* address single-firm conduct that harms competition. Second, in the single-firm setting, where the costs of incorrect, hard-to-apply, or ambiguous standards are likely to be high, competition law should tread carefully, and there is a particularly acute need for standards that provide useful guidance to businesses and their counselors. Third, the US experience shows that enforcement agencies, working within the framework of a flexible set of core statutory provisions, can use various forms of guidance both to shape the underlying legal standards and to affect the behavior of private parties. And, fourth, US experience also suggests several important attributes of effective single-firm conduct standards – standards aimed at protecting the competitive process without sacrificing beneficial competition in the process.

I. Competition law should address potentially anticompetitive single-firm conduct

First let me emphasize that we in the United States believe strongly that legal standards governing single-firm conduct are an important component of a comprehensive and effective competition law regime.

Such standards have been part of US antitrust law for more than 100 years. Section 2 of the Sherman Act was a one-sentence statutory provision enacted in 1890 to prohibit “monopolization” and “attempted monopolization”. As interpreted by the courts over the past century, these offenses have two basic elements:

- (a) the firm must have a very high degree of durable market power, referred to as “monopoly power”, or, in an attempt case, it must have the “dangerous probability” of achieving that power; and
- (b) the firm must have maintained or achieved, or must be threatening to achieve, such power in a manner that is illegitimate, in the sense that it is inconsistent with innovation, skill, hard work, luck, or hard-fought competition on the merits.

The first of these requirements – monopoly power – has never been defined with precision. It connotes the power unilaterally to control price for some substantial period of time, and it is typically associated with market shares above 70 percent combined with significant barriers to entry.

The second of these requirements (i.e., point (b) above) has presented one of the most vexing issues in all of US antitrust jurisprudence. In early cases the requirement was often referred to as the “willful” acquisition or maintenance of monopoly power, as distinct from having monopoly “thrust upon” the firm. Modern cases recognize that all firms strive for dominance, and courts thus require that the striving be shown to be illegitimate. These cases tend to refer to the plaintiff’s need to prove that the defendant engaged in “exclusionary or predatory” conduct that harmed competition without contributing to competition on the merits.

Although these well-established elements leave many questions unanswered, I note two important implications of this legal test. First, Section 2 does not condemn mere *possession* of monopoly power, resulting for example from a firm’s success in developing a product that catches the consumer’s fancy. A corollary is that the law also does not condemn the *exploitation* of monopoly power acquired legitimately: thus, a firm that has developed a wildly successful product – and perhaps even obtained a valid patent covering the innovation – can charge whatever it wishes and may choose not to share the profits with distributors or assist others in developing a competing product.

Why is it important for competition law to be able to reach at least some forms of single-firm exclusionary conduct? A modern foundation of competition law is the economic principle that the exercise of durable market power can distort the allocation of resources and harm consumers. Although competition law is not an appropriate mechanism for regulating the pricing, quality and output decisions of firms that possess such power, it *does* appropriately reach the means by which firms *achieve or maintain* that power. There is an international consensus that competition law must address agreements that have, likely will have, or tend almost always to have unreasonably anticompetitive effects. Such agreements would include naked price-fixing agreements, some mergers and acquisitions, and under some circumstances other horizontal or vertical arrangements. However, not all mechanisms that unreasonably enhance or entrench market power involve coordination among separate firms. When a firm with monopoly power acts alone to impede competition – via predatory pricing, for example – competition law should provide a framework for evaluating the competitive consequences of that firm’s behavior.

The important role that competition law plays in policing potentially anticompetitive single-firm conduct is emphasized by several government enforcement actions: the DOJ's cases against *Microsoft*, *American Airlines*, and *Denstply* are a few examples. More recently, the US antitrust agencies have devoted considerable attention to Section 2 in a series of hearings aimed at helping us to advance our thinking with respect to unilateral conduct and to better inform our judgment about when it is appropriate to bring enforcement actions under Section 2.

But the US agencies' views of the significance of single-firm conduct rules should not be judged solely by the number of cases they bring. In the United States, Section 2 is most often enforced by private plaintiffs. The plaintiffs in these cases are often competitors who claim they have been hindered by the alleged monopolist's behavior. The development of legal standards governing single-firm exclusionary conduct in the United States has evolved in significant part through the adjudication by US courts of these private claims. Important recent examples include the *LePage's* case,¹ a Third Circuit decision that addressed bundled rebates, albeit in a manner that failed to provide a constructive legal standard; the *Trinko* case,² a Supreme Court case that addressed a monopolist's alleged refusal to assist a rival; and the *Weyerhaeuser* case,³ where the Supreme Court recently held that an objective price-cost test applies in the context of claims of predatory over-bidding by an alleged monopsonist. The Department, joined by the FTC, participated in these three cases (and many others) as an *amicus curiae*, providing the Supreme Court with its thoughts on the proper legal standard and the appropriateness of the cases as a vehicle for further developing Section 2 law.

Because private enforcement is so robust, it plays an important role in shaping the law and in influencing the behavior of businesses that must comply with the law. As a result, the US antitrust agencies' efforts include not just investigating and bringing single-firm exclusionary conduct cases in appropriate circumstances but also providing guidance to businesses and their counselors and influencing the development of the law in cases brought by private plaintiffs. This is one of the objectives of our single-firm conduct hearings.

II. In the single-firm setting, where the costs of incorrect, hard-to-apply or ambiguous standards are likely to be high, there is a particularly acute need for standards that provide useful guidance to businesses and their counselors

When we in the United States think about proper competition law standards for single-firm exclusionary conduct, we apply the same analytical framework that we apply to other types of conduct that potentially harms competition. Essentially, we ask how the applicable statutory framework can be applied in a manner which is faithful to the text and to legislative intent, and which entails the greatest benefit and lowest costs to the policies of competition underlying the law. The foundational principle – the bare minimum condition – is that the

¹ *LePage's v. 3M*, 324 F.3d 141 (3d Cir. 2002).

² *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

³ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. _ (2007), 127 S.Ct. 1069.

legal standard must not penalize conduct unless it threatens harm to consumers and the competitive process. Choosing a particular market outcome or protecting a particular competitor – even a national champion – cannot be the goal.

In the single-firm setting, there are several other considerations that bear upon the proper legal standards. It is one thing to say that the test should be whether “competition” or “consumer welfare” is harmed, but it is quite another to convert this goal into an effective enforcement regime. Unlike naked horizontal agreements to restrain trade, for example, much single-firm conduct is vigorously pro-competitive and should be encouraged. Competitive striving – whether through the introduction of new or improved products, enhancements to quality, innovative distribution schemes, or aggressive price competition – brings significant benefits to consumers. Moreover, 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”.⁴ As a result, as US courts observed in the middle of the last century, competition law should not turn on those who, through dint of hard work or hard competition, manage to succeed and thereby secure dominant positions in their fields.⁵

Compounding the problem, it is notoriously hard to distinguish between the means of legitimate competition and those of “illicit exclusion”. Part of the problem is that the conduct itself is hard to distinguish – the same act can be either pro-competitive or anticompetitive, depending on the circumstances. It is thus impossible to enact rules that hinge legality solely on the type of conduct the dominant firm undertakes. Another part of the problem is that the evil we are concerned about (harm to competition) ordinarily arises only as an indirect result of rivals being disadvantaged and leaving the market – but this is as much a hallmark of vigorous competition as of monopolization. There is thus a significant risk that single-firm conduct rules that are too general – such as an admonition that dominant firms “shall not harm competition” – will be impossible to understand and apply with precision. Even if we could safely conclude that enforcers or adjudicators will never apply such rules incorrectly to falsely condemn pro-competitive conduct (although in the United States such “false positives” do occur), such a rule would still cause harm by creating uncertainty on the part of firms engaging in the rough and tumble of daily competition. Without knowing where the line of legality is drawn, they will pull back so as to avoid inadvertently crossing it. In the process, they will inevitably pull their competitive punches and refrain from engaging in the kinds of vigorous competition that would otherwise have benefited consumers.

The “chilling” problem would be reduced if all single-firm conduct could be treated like a major merger or similar corporate transaction – a significant one-time event in the life of the firm that is generally susceptible to resource-intensive *ex ante* review by competition authorities. But single-firm exclusionary conduct takes myriad forms. Businesses make decisions about their competitive strategies on an ongoing basis. They would neither tolerate

⁴ *Trinko*, *supra* note 2, at 407 (2004).

⁵ See *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945) (“The successful competitor, having been urged to compete, must not be turned upon when he wins.”).

nor expect competition authorities to pre-screen those decisions and provide, as the agencies usually do for mergers, the sort of enforcement signal that (in cases where the agency does not intend to challenge the behavior) gives the parties comfort that they are free to proceed with little enforcement risk. Businesses must instead make their own calculations of legal risk and channel their behavior accordingly, based on what they and their counselors can discern from the available resources – the statutes, case law, enforcement patterns, and other communications – about where the line of legality is drawn.

The imperative in the single-firm conduct setting of structuring legal rules that provide sufficient practical guidance to avoid “chilling the very conduct the antitrust laws are designed to protect” is reflected in many of the US court’ more recent Section 2 judgments. *Weyerhaeuser* adapted the price-cost test of predatory pricing law to claims of monopsony over-bidding.⁶ And *Trinko* emphasized concerns about chilling pro-competitive conduct in underscoring the narrow circumstances in which a monopolist might have an obligation to deal with its rival.⁷ The same considerations motivate the enforcement agencies in the United States to do what they can to help the law develop in a manner that yields sensible legal standards while simultaneously providing guidance to businesses about how those standards should be applied.⁸

III. The U.S. experience shows that enforcement agencies, working within the framework of a flexible set of core statutory provisions, can use various forms of guidance both to shape the underlying legal standards and to affect the behavior of private parties

In thinking about how an agency can most constructively provide guidance addressing single-firm exclusionary conduct rules without undermining its legitimate enforcement prerogatives, it is useful to consider the experience that US competition agencies have had with guidelines and similar policy statements in many other areas of competition law. Over the past fifteen years, the US Department of Justice and the Federal Trade Commission have jointly issued seven formal sets of guidelines.⁹ Over the preceding quarter century, the Justice Department alone had already issued another eight.¹⁰ We have learned a great deal from that experience. I will first discuss the lessons learned in general terms and then, in the next section, I will address the application of those lessons to guidance for single-firm exclusionary conduct.

⁶ *Weyerhaeuser*, Slip at 12.

⁷ *Trinko*, Slip at 10-11, 14.

⁸ See Thomas Barnett, “The Gales of Creative Destruction: The Need for Clear and Objective Standards for Enforcing Section 2 of the Sherman Act”, Opening Remarks for the Antitrust Division and Federal Trade Commission Hearings Regarding Section 2 of the Sherman Act (Washington, D.C. 20 June 2006).

⁹ The two agencies jointly issued guidelines or similar policy statements on horizontal mergers in 1992 (revised in 1997), on competition in health care industries in 1994 (revised in 1996), on licensing of intellectual property in 1995, on international operations in 1995, and on collaborations among competitors in 2000. These are all available from the agencies’ websites.

¹⁰ The Department issued guidelines or similar policy statement on mergers in 1968 and 1982 (revised in 1984), on international operations in 1972, 1977, and 1988, on research joint ventures in 1980, and on vertical restraints in 1985.

First, we have learned that guidelines and other formal policy statements can serve many purposes. Their principal goal is to declare the agency's enforcement intentions and to assist the business community in an area in which policy is evolving or simply unclear. Guidelines can reassure the business community by declaring that certain conduct will not be subject to an enforcement action, and they can forewarn the business community by declaring that certain conduct will be subject to an enforcement action. Sometimes the business community has perceived significant risks of antitrust enforcement that were not really there, and we responded with policy statements providing reassurance, especially when we thought that the conduct at issue was apt to be efficient and was being chilled by perceived risks. The objective of providing reassurance was particularly important in the merger field in the 1980s, when merger policy was in transition and moving away from the era of *Von's Grocery*.¹¹ In that case, the government challenged a merger yielding a firm with 7 percent of the market, and the dissenting justice observed that the only apparent consistency in US merger policy was that the government always wins.¹² Reassurance was likewise a key objective of guidelines in the 1980s and 1990s that educated businesses about changing attitudes toward efficiency-enhancing intellectual property licensing restrictions. The 1994 health care guidelines arguably served both objectives: putting participants in this vital industry on clearer notice that the antitrust laws applied to them, while at the same time providing reassurances regarding the broad scope of conduct permitted under those laws.

Although providing guidance to the business community has been a main purpose of competition guidelines in the United States, such policy statements serve other purposes as well. Perhaps most obviously, our guidelines assist practitioners in counseling clients and they help frame the discussion when practitioners appear before the agencies on behalf of their clients. Well-crafted guidelines establish a framework for analysis and a vocabulary for discussion, which tends to make our investigations more efficient as parties conduct analyses of, and focus our attention on, the facts most likely to be dispositive. This has been particularly valuable in merger enforcement, where the time pressures associated with our review are often acute.

Our guidelines are also designed to play a role in the evolution of competition law. In many settings, courts have looked to agency policy statements for guidance and have been willing to follow that guidance where the agencies' policies are well supported by case law, scholarship, or the agency's own well-articulated reasoning. One major success in this regard is the "hypothetical monopolist" paradigm for market definition, which was introduced in the Justice Department's 1982 Merger Guidelines. This simple analytical tool seemed to many at the time to be both a sharp break with case law precedent and a wholly impractical theoretical construct. But over time views changed markedly. For many years now, not just enforcers but counselors and courts in the US – and not just in the US but around the world – have been defining relevant antitrust markets by asking whether a hypothetical monopolist could profitably increase price by a small but significant amount for a non-transitory period. This

¹¹ *United States v. Von's Grocery*, 384 U.S. 270 (1966).

¹² *Id.* at 301 (Justice Stewart dissenting).

success provides a good illustration of how guidelines issued by enforcers can change the law and influence behavior.

Guidelines and similar policy statements can also be useful in communicating with agency staffs. In a large agency, the best way to get everyone on the same page is to do so literally: by putting policies and procedures in writing. This serves two important functions. On the one hand, the process of writing down policies usefully frames unanswered questions, exposes ambiguities, and generally focuses the attention of an agency's policy makers. On the other hand, having written policies serves to guarantee that everyone in the agency gets exactly the same message. This is especially important when there is significant turnover within the organization.

Second, we have learned from experience that our guidelines provide advice that is at its most concrete and useful when they set forth clear statements of conduct that will not be challenged except in extraordinary circumstances – what are often referred to as antitrust “safety zones” or “safe harbors”. Our horizontal merger guidelines spell out clear concentration measures and indicate that transactions in unconcentrated markets, or that have only modest effects on concentration, are highly unlikely to raise serious competitive concerns. Likewise, our 1993 statements of Antitrust Enforcement Policy in the Health Care Area spell out six explicit safety zones for various categories of conduct – such as group purchasing arrangements where the participants account for less than 35% of purchases and 20% of sales in the downstream market – that will not be challenged because they are likely to generate pro-competitive benefits and highly unlikely to cause anticompetitive harm. We are cognizant, however, that the articulation of such safety zones must be accompanied by a very clear message that conduct outside those zones *will not* automatically be condemned – lest our guidance induce parties to act too conservatively by limiting their conduct to that covered by the safe harbors.

Third, we have found that parties act not only on guidance we convey explicitly in the text of our guidelines – i.e., the analytical framework, statements of presumptions and safe harbors – but also on the enforcement attitudes revealed in the tone and tenor of those guidelines. The audience of our guidelines includes both experienced competition law practitioners, who will carefully parse the precise language used to articulate our enforcement policy, as well as many who know little of competition law and on whom subtle nuances may be wasted. Those with less intimate knowledge of the inner workings of competition law often will form impressions based on what they perceive to be the enforcement attitudes reflected in the guidelines. Guidelines and other policy statements always send a message – whether overtly or subliminally – of reassurance, hostility, or something in between. When we craft our guidelines we must work hard to ensure that the intended message gets through. For example, in our Antitrust Guidelines for Collaborations Among Competitors, we were careful to send the right messages about different categories of conduct: emphasizing a hostile view of naked agreements and a neutral analytical stance towards other competitor collaborations that have pro-competitive potential. Clearly, it does not serve the ends of competition policy to send a message of hostility with respect to conduct that is most often

pro-competitive, or to send a message of reassurance with respect to conduct that is most often anticompetitive.

Fourth, we have learned that guidelines can be a two-edged sword. To be useful to the business community, guidelines must limit an agency's discretion by setting out general limiting principles and by establishing specific limits on the potential application of the relevant provisions of law. But these same limits can end up binding the agency in those cases when it concludes an exception is warranted. We have found that the courts are responsive to arguments by targets of an agency's enforcement actions that enforcement of the antitrust laws against their conduct would be inconsistent with the agency's officially stated policy. This presents a substantial challenge in drafting guidelines, especially because it is impossible to anticipate and analyze all possible circumstances. Striking the right balance is always difficult, and in some complex areas it may prove infeasible to assist the business community substantially without unduly limiting an agency's discretion. In addition, zealous advocates for the parties sometimes assert inconsistencies between the agency's enforcement action and its stated policies even when such inconsistencies do not actually exist. Experience has taught that exquisite care must be taken in the drafting of guidelines to limit opportunities for creative advocates to assert false inconsistencies. Language that appears to its drafters to be unambiguous may be understood in a different way by others, so guidelines require extensive vetting that affords ample occasions to discover and correct failures to communicate.

Finally, as suggested by some of the preceding observations, issuing formal guidelines or policy statements is not always the right thing to do. To be sure, a basic principle of good government is that agencies should communicate their practices and policies to the public. Businesses directly affected by agency actions should be informed about what the agencies do and why. But if the legal framework is too complex to express in simple terms, or if clear safe harbors are too difficult to articulate, providing formal guidance that reserves sufficient enforcement flexibility for the agency might entail creating even more uncertainty than existed without the guidelines – or an atmosphere in which perceived risks are elevated rather than reduced. In such settings the agency's desire to be transparent might better be served by communicating in less formal ways. Sometimes, actions can speak louder than words; agency enforcement decisions, especially if accompanied by detailed explanations of the underlying facts and reasoning, can inform the public more effectively than general policy statements. The US agencies have also communicated their views on enforcement policy in other ways, for example by posting court filings on the agency's web site¹³ and by promoting public speeches by agency officials.¹⁴

¹³ Especially useful are the briefs in these cases that were filed in the courts of appeals. These briefs are available at: <http://www.usdoj.gov/atr/public/appellate/appellate.htm>.

¹⁴ Recent speeches by DOJ officials are available at <http://www.usdoj.gov/atr/public/speeches/speeches.htm>.

IV. Some Thoughts on the Role of Guidelines Addressing Competition Law as Applied to Single-Firm Exclusionary Conduct

What do these lessons tell us about how an agency can productively advance the goal of certainty with respect to standards governing single-firm conduct by dominant firms? This is a subject that the US agencies are evaluating carefully based on what we learned from our year-long series of hearings on single-firm conduct standards, and we look forward to communicating those findings to the public in some fashion in the not-so-distant future.¹⁵

Given the present state of the law on single-firm exclusionary conduct in both the United States and Europe – and in particular given the lack of clear standards applicable to the broad array of conduct that might form the basis of a claim that a dominant position was achieved or maintained through improper means – our experience suggests that guidelines on single-firm conduct would be most useful if they substantially increased clarity in this important and difficult area of competition policy. Guidelines that merely articulate alternative theories or that simply list factors considered in the agency’s analysis might be of some use in steering parties and courts away from inappropriate modes of analysis, but they would not provide much useful concrete guidance to businesses. Similarly, although guidelines might usefully articulate modern thinking on the ways in which single-firm conduct can be exclusionary, and thought they may caution businesses and their counselor to pay attention to competition law risks when they structure their affairs, such guidelines would not significantly assist the business community in formulating their strategies. Nor would they significantly assist practitioners in counseling their clients or significantly assist the courts in wrestling with difficult cases.

Useful guidelines on single-firm exclusionary conduct should do more, by *helping* those firms understand when they need not be sensitive to competition law rules, and by assisting them in avoiding risks without unduly sacrificing desirable pro-competitive benefits. In an area of otherwise open-ended or hard-to-understand rules, guidelines can do this only by both setting out a general set of principles that will guide analysis and establishing specific limits on the application of those principles to the facts. Equally important, the general tenor of any guidelines should communicate a message that is not susceptible to misinterpretation as being unduly hostile to most single-firm conduct, but that instead adequately reflects the fact that in most circumstances the kinds of conduct addressed by the guidelines would be pro-competitive rather than harmful to consumers (even if such conduct might in extreme cases constitute an abuse of dominance). Guidelines should not leave firms that possess only modest market share with the impression that they might well be found dominant and that much of their day-to-day unilateral conduct could violate the law.

Guidelines on abuse of dominance could most effectively assist the business community, practitioners, courts, and even the administering agencies by setting out safe

¹⁵ Extensive materials relating to the hearings are available at:
http://www.usdoj.gov/atr/public/hearings/single_firm/sfchearing.htm.

harbors. Such safe harbors would generally be warranted when conduct is sufficiently unlikely to be harmful that reserving the ability to challenge it does not justify the administrative costs of further analysis under the applicable legal framework, or the potential consumer harm associated with erroneously condemning the conduct, or the chilling effect associated with uncertainty.

Two categories of safe harbors would appear most promising. The first and most important safe harbor would address the threshold question of “dominance”. Such a safety zone would provide tremendous “bang for the buck” (or is it euro?) because it would tell *all* businesses that are not realistically “dominant” that they needn’t worry about the law’s prohibitions at all. Of course, selecting an appropriate level for a market share safe harbor is a delicate matter. Adopting a safe-harbor market share threshold that is very high might create substantial legal certainty but at an unacceptably high cost in terms of consumer harm from exclusionary conduct by firms that would fall within the safe harbor yet have the unilateral ability to injure the competitive process. But it does not follow that a safe harbor should employ a very low market share threshold. A market share safe harbor enhances legal certainty only to the extent that it affords real and reliable safety to firms that might otherwise have perceived a non-trivial risk of being found dominant. Establishing a safe harbor that applies only to firms with very low market shares might well *increase* business uncertainty by suggesting a greater likelihood that competitors just outside the safe harbor will be found dominant.

Creating a rebuttable presumption that a firm with less than some given market share lacks dominance might provide some useful guidance, but our experience tells us that that benefit would be limited. A mere presumption does not provide sufficiently useful assurances to the business community and it does not reduce the burdens placed on the enforcement institutions (agencies and courts) that must evaluate claims of abuse by firms that have little likelihood of being dominant.

So where should the safe harbor threshold for dominance be? Speaking from US experience, where the legal standard is “monopolization”, our case law would strongly suggest that there is little possibility of a firm having monopoly power unless it holds more than 70 percent of the market. Even when a firm’s market share is well above this level, there is often healthy debate whether its power is sufficiently real and durable. To the extent that competition law is concerned with the ability of a single firm acting unilaterally to cause significant harm to the competitive process, it is hard to imagine a firm having that ability if its market share is under 50-60 percent.

Another important challenge is to provide safe harbors for particular *forms* of conduct engaged in by firms that are potentially dominant. Four years ago, former Competition Commissioner Mario Monti declared: “To define the notion of ‘exclusionary abuse,’ one should therefore make a distinction between competition on the merits, or ‘normal’

competition, and other types of behaviour.”¹⁶ Useful guidelines would flesh out this important concept both as a matter of general principle and in terms of specific safe harbors for limited categories of conduct. We recognize that this is not such an easy task, and that difficulty is one of the many reasons it is hard to produce useful guidelines on abuse of dominance.

DG Competition’s Discussion Paper¹⁷ articulated circumstances in which particular practices should be *presumed to infringe* Article 82. There is no doubt that presumptions of this sort can play a useful role in abuse of dominance guidelines. Where particular conduct by dominant firms is very likely to harm the competitive process, and where it very clearly does not constitute potentially pro-competitive competition on the merits, it is valuable to send a clear signal that the conduct is likely to be problematic. An entirely open-ended inquiry into competitive effects would maximize uncertainty in the business community as well as the burden placed on the agencies and courts.

However, it is important to ensure that presumptions of infringement are not too easily invoked, even when they are rebuttable. Otherwise, firms may find it too risky to adopt strategies that include conduct that would presumptively (though rebuttably) infringe Article 82 (or Section 2), even when such strategies would benefit competition and consumers. Firms would correctly perceive that overcoming a presumption would necessarily be an uncertain prospect, and that it could entail significant expense.

For purposes of this paper it would not be productive to analyze whether a safe harbor would be appropriate for each of the particular categories of conduct that might implicate Article 82 (or Section 2), especially since the work of the US agencies on this subject is far from complete. But I will address one type of conduct – predatory pricing. With respect to this practice, the competition enforcement community has a large body of scholarship and substantial case experience to draw on, so it is relatively easy to say what abuse of dominance guidelines could usefully do. First, guidelines should unequivocally state that a dominant firm engages in lawful competition on the merits when its aggressive price cutting does not go below its cost. Second, guidelines should articulate as clearly as possible how the agency would go about comparing prices to costs. Finally, guidelines should address the issue of recoupment. As probably everyone here is aware, the predatory pricing case law in the United States, but not in Europe, imposes on plaintiffs the burden to demonstrate a reasonable prospect that the defendant could recoup the losses it suffered while charging prices below its costs. Our experience has been that the recoupment requirement usefully focuses a Section 2 predatory pricing case on the critical issues. For example, in some cases it may be clear that recoupment is infeasible because the dominant firm’s scheme of offering low prices has already lasted too long for it to make economic sense as an investment in obtaining future monopoly power. The impossibility of recoupment in such a case would be powerful evidence that the conduct merely reflects persistent and intense competition on the merits,

¹⁶ Comments of Mario Monti, “Introductory Remarks”, in Claus-Dieter Ehlermann and Isabela Atanasiu, eds, *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?*, Hart Publishing, 2006, pp. 5 *et seq.*

¹⁷ *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* (Dec. 2005), <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

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and it would eliminate the need to address more difficult issues such as a comparison of the firm's prices with its costs.¹⁸

V. Conclusion

Developing sound legal standards for single-firm exclusionary conduct is hard work. The variety of means by which a dominant firm might conceivably harm the competitive process is quite broad. But those same means very often – and likely most often – are used by firms without market power (as well as firms with such power) to carry on their business in the manner they deem most efficient, most productive, and most profitable. In the vast majority of cases, therefore, those means *reflect rather than override* the competitive process and *benefit rather than harm* consumers. As a result, uncertainty regarding the line of illegality is likely to sacrifice exactly what competition law is designed to protect.

Legal standards must be cognizant of this basic conundrum, and they must strive to provide greater certainty to businesses. In the United States the enforcement agencies are in the midst of studying how the US regime can be improved without giving up the ability to challenge single-firm conduct in those situations where it truly threatens to harm competition. Our broad experience with enforcement guidelines suggests one path that holds promise, both in the United States and here in Europe: guidance that assures most businesses that their day-to-day striving to succeed will not run afoul of competition law rules, while preserving the agencies' ability to act where necessary to challenge bona fide threats to the competitive process.

¹⁸ The dominance requirement of Article 82 does not necessarily subsume the recoupment requirement. Recoupment requires not merely that a competitor be dominant at the outset; its predatory pricing must sufficiently enhance or preserve its dominance to make the short-term losses pay off as an investment in future market power. Hence, recoupment poses a question distinctly different from the question of dominance, and guidelines on predatory pricing should reflect this insight.

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