Volume 4 | Number 2 | Autumn 2008

# Competition Policy International

## "Dynamic Competition" Does Not Excuse Monopolization

Jonathan Baker

Copyright © 2008
Competition Policy International, Inc.

Published in Competition Policy International (print ISSN 1554-0189, online ISSN 1554-6853), Autumn 2008, Vol. 4, No. 2. For articles and more information, visit www.globalcompetitionpolicy.org.

# "Dynamic Competition" Does Not Excuse Monopolization

*Jonathan B. Baker**

## I. Introduction

In the 2004 *Trinko* decision,[1] Justice Antonin Scalia, writing for the Supreme Court, depicted "monopoly power, and the concomitant charging of monopoly prices" as "an important element of the free-market system."[2] Scalia argued that "[t]he opportunity to charge monopoly prices—at least for a short period . . . induces risk taking that produces innovation and economic growth."[3] According to Scalia, this benefit of monopoly explains a long-standing element of the antitrust prohibition against monopolization: "To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*."[4]

1. Verizon Commc'ns Inc. v. Law Office of Curtis V. Trinko, 540 U.S. 398 (2004). *Trinko* held that a regulated telephone company's alleged refusal to share its network with rivals, as required by the regulatory scheme for the telecommunications industry, did not state an antitrust claim for monopolization where the regulatory framework provided for a non-antitrust means of deterring and remedying harm to competition. In a more recent decision, the Court expanded the antitrust immunity implied by the presence of a parallel regulatory scheme. Credit Suisse Sec. (USA) LLC v. Billing, 127 S.Ct. 2383 (2007).

2. *Trinko*, 540 U.S. at 407.

3. *Id.*

4. *Id.* This observation was unnecessary to reach the decision in the case.

*Professor of Law, American University Washington College of Law. The author is indebted to Andy Gavil, Jim May, Dave Reitman, Dick Schmalensee, and Steve Salop for valuable comments and discussions, and to Michael Turner for research assistance.

In that brief passage, Justice Scalia made two controversial claims, one about economics and the other about antitrust law. He argued first that the prospect of achieving monopoly fosters innovation, and, second, that this economic proposition explains one important aspect of antitrust doctrine. The provocative new article by David S. Evans and Keith N. Hylton offers a detailed justification for Scalia's claims (though, surprisingly, without reference to Scalia's views).[5]

Neither Justice Scalia nor Professors Evans and Hylton draw out the implication of these claims for antitrust policy.[6] Indeed, it is difficult for Evans and Hylton to say more about how they would change antitrust law while simultaneously relying on the "revealed preferences" of policy-makers to infer the goals of antitrust, as that method subtly equates "is" with "ought."[7]

But it is evident that the argument will in practice be deployed to justify, on innovation-promoting grounds, the exercise of market power, and, consequently, to call for a relaxation in antitrust enforcement, particularly against monopolization.[8]

This implication was drawn by Assistant Attorney General Thomas Barnett, the current head of the Justice Department's Antitrust Division ("DOJ"). In a recent article on antitrust and innovation, Barnett endorsed Scalia's economic argument from *Trinko*, stating that "the ability to charge monopoly prices, at least for a short while, can be what induces firms to take the risks that produce inno-

---

5. David S. Evans & Keith N. Hylton, *The Lawful Acquisition and Exercise of Monopoly Power and Its Implications for the Objectives of Antitrust*, 4(2) COMPETITION POL'Y INT'L (2008) [hereinafter Evans & Hylton]. Professors Evans and Hylton do not limit their antitrust law discussion to the Sherman Act §2 rules prohibiting anticompetitive single firm conduct. But the rules regarding monopolization are the focus of much of their article and are emphasized here.

6. *See* Evans & Hylton, at 236 ("We are not advocating lower scrutiny for any particular practice.")

7. The revealed preference approach is predicated either on the dubious assumption that the existing body of law—the product of the past choices of Congress, the enforcement agencies and the courts—successfully implements throughout the economic principles currently accepted by those policy-makers, or on the related and suspect claim that legal and political institutions evolve to capture efficiencies. For criticism of the efficiency view of political institutions, *see, e.g.,* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 7 (1990) (explaining that North abandoned the efficiency view of institutions when he recognized that rulers devised property rights in their own interests and that transactions costs typically resulted in typically inefficient property rights prevailing); Daron Acemoglu, *Why Not a Political Coase Theorem? Social Conflict, Commitment and Politics*, 31 J. COMP. ECON. 620 (2003); *cf.* Richard E. Wagner, *Common Law, Statute Law and Economic Efficiency*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 313 (Peter Newman ed. 1998) (reviewing arguments for and against the efficiency of the common law and statutes); Jürgen G. Backhaus, *Efficient Statute Law*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 24 (Peter Newman ed. 1998) (same).

8. *See* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 44 (2004) (arguing that Justice Scalia's "deliberate goal" in *Trinko* was "to build the case for a more tolerant monopolization standard"). It is hard to reconcile the recent concern about the impact of monopolization standards on innovation with the lack of evidence of successful Sherman Act §2 challenges directed at innovative dominant firm conduct.

vation and other efficiencies, which ultimately benefits consumers."[9] Barnett saw that argument as a reason to call for "appropriate caution in enforcement of the antitrust laws against single firm conduct."[10] Consistent with his views, the DOJ has brought no monopolization cases during the George W. Bush administration.[11]

To the contrary: nothing is more important to economic welfare than innovation and growth, and competition and antitrust enforcement are essential for fostering them.

This comment critically evaluates Evans and Hylton's defense of Justice Scalia's legal and economic claims, and the policy implication drawn by Assistant Attorney General Barnett. It shows, first, that the legal claim is at best only partially correct, as the conduct requirement for the monopolization offense was importantly prompted by concerns other than for innovation. Second, it shows that the economic claim misleads unless qualified by the observation that the push of competition generally spurs innovation more than the pull of monopoly. Third, it explains why greater attention to fostering innovation does not call for relaxing antitrust enforcement, contrary to the policy implication.

As Evans and Hylton emphasize, innovation is important, and an appropriate concern of antitrust policy. But considerations of "dynamic competition" do not argue against antitrust enforcement. To the contrary: nothing is more important to economic welfare than innovation and growth, and competition and antitrust enforcement are essential for fostering them.

---

9. Thomas O. Barnett, *Maximizing Welfare Through Technological Innovation*, 15 Geo. Mason L. Rev. 1191, 1201 (2008). Barnett prefaced this aspect of his article with an explanation of how competition encourages innovation.

10. *Id*. Others favoring relaxation of antitrust's concern with market power and monopoly argue for less intervention on the ground that markets are self-correcting. *See* Frank Easterbrook, *The Limits of Antitrust*, 63 Texas L. Rev. 1, 15 (1984) (making self-correction argument). For criticism of this argument, see Ariel Ezrachi & David Gilo, *Are Excessive Prices Really Self-Correcting*?, J. Comp. L. & Econ (forthcoming 2008) *available at* http://ssrn.com/abstract=1237802) (working paper).

11. Although the Justice Department's workload statistics list one monopolization case brought in 2002, that figure appears to be an error. *See* Antitrust Division Workload Statistics, FY 1998-2007 *available at* http://www.usdoj.gov/atr/public/workstats.htm) (last consulted Oct. 13, 2008). In 2007, one West Virginia newspaper's acquisition of its rival and joint venture partner was challenged under the statutes prohibiting anticompetitive mergers and agreements (Clayton Act §7 and Sherman Act §1), along with a Sherman Act §2 count. *U.S. v. Daily Gazette Co.*, No. 2:070329 (S.D. W.Va. filed May 22, 2007). But this is only a technical monopolization case: the monopolization claim is not the gravamen of the violation; the Justice Department's press release emphasizes the acquisition frame for the case, and the Antitrust Division's workload statistics for 2007 do not record it (or any other case) as a monopolization filing. By contrast, the Justice Department brought at least seven monopolization cases during the Clinton administration. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 Antitrust L.J. 377, 449 (2003), reports seven cases and the Antitrust Division's workload statistics as of mid-2001 record eleven Sherman §2 cases filed in district court between 1994 and 2000. *See* Antitrust Division Workload Statistics, FY 1991-2000 *available at* http://web.archive.org/web/20010101000000-20011231235959/http://www.usdoj.gov/atr/public/7344.htm.

## II. Why Monopolization Is Not a Status Offense

Professors Evans and Hylton correctly observe that antitrust law does not make mere monopoly pricing illegal. Monopolization is a conduct offense, not a status offense: the monopolization prohibition applies only if the monopolist has also inappropriately obtained or maintained its monopoly power. This doctrinal point was made clear during antitrust's structural era.[12] It was suggested in the seminal monopolization decision, *Alcoa*,[13] and confirmed by the Supreme Court in the still-cited elaboration of monopolization doctrine in *Grinnell*.[14]

Evans and Hylton follow Justice Scalia's *Trinko* dictum in explaining why mere monopoly power is insufficient to prove a Sherman Act §2 violation: they interpret this aspect of the longstanding doctrinal rule as proof that antitrust accepts monopoly when doing so provides incentives for innovation.[15] This interpretation of the mid-twentieth century case law is incomplete. While *Alcoa* recognized the potential for adverse incentive effects of a rule condemning monopoly pricing, it did not articulate clearly what those incentive concerns would be. It is hard to say whether the *Alcoa* court was more concerned that a sleepy monopolist would fail to minimize costs or that the monopolist would fail to pursue the development of new products and processes.[16] Moreover, the no-fault deconcentration proposals of antitrust's structural era—a mainstream idea during the 1970s (though ultimately not adopted by Congress or the courts)—suggest more of a concern with production efficiency than innovation incentives, as those proposals generally

---

12. Antitrust's "structural era" lasted from the 1940s through the late 1970s. *See generally* Jonathan B. Baker, *A Preface to Post-Chicago Antitrust, in* Post Chicago Developments in Antitrust Analysis 60, 63-64 (Roger van den Bergh, Roberto Pardolesi & Antonio Cucinotta, eds., 2002). Monopolization had previously been recognized as a conduct offense rather than a standard offense in *United States v. Standard Oil Co.*, 221 U.S. 1, 62 (1911) (noting "the omission of any direct prohibition against monopoly in the concrete" from the Sherman Act).

13. United States v. Aluminum Co. Of America, 148 F.2d 416, 430 (2d Cir. 1945) (*Alcoa*) (monopoly power not objectionable when acquired through "superior skill, foresight, and industry"). Ironically, *Alcoa* may have been the structural era monopolization decision that came the closest toward making monopolization a status offense, through an expansive definition of exclusionary conduct. *Cf. In re* E.I. DuPont de Nemours & Co. (*$TiO_2$*), 96 F.T.C. 653 (1980) (declining to find monopolization with conduct similar to the basis for a violation in *Alcoa*).

14. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) (distinguishing unlawful conduct from "growth or development as a consequence of a superior product, business acumen, or historic accident").

15. *See* Evans & Hylton, at 220.

16. *Alcoa*, 148 F.2d at 427 ("Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic . . . that the spur of constant stress is necessary to counteract an inevitable disposition to leave well enough alone."); *see* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979) (recognizing that if monopolies were deemed unlawful *per se*, the antitrust laws would "compel the very sloth they were intended to prevent").

exempted large firms benefiting from substantial economies of scale without explicitly exempting firms in industries experiencing rapid innovation.[17]

Evans and Hylton neglect another reason for the acceptance of a conduct predicate for the monopolization offense during the structural era that has nothing to do with incentives to innovate: if mere monopoly pricing were deemed a violation of the antitrust laws, the possible judicial remedies—divestiture and price regulation—would be unattractive, particularly in a private case.[18] Price regulation is particularly troublesome, as courts are ill-suited for determining a reasonable price in the first instance, and, of equal importance, poorly-equipped to adjust the price over time as costs and other market conditions change.[19]

Evans and Hylton's explanation for why monopolization law historically insisted on anticompetitive conduct along with monopoly power—their claim that antitrust law values monopolies for their role in promoting innovation—is far from

17. *See* White House Task Force Report on Antitrust Policy, *reprinted in* 2 Antitrust L. & Econ. Rev. 11 (1968-69) (Neal Task Force Report) (proposed "Concentrated Industries Act"); Industrial Reorganization Act, S. 1167, 93rd Cong. (1973) (Hart bill), *reprinted in* Industrial Concentration: The New Learning 444 (Harvey J. Goldschmid et. al, eds., 1974); Oliver E. Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 Harv. L. Rev. 1512, 1525 (1972) (persistent dominance should be presumptively unlawful under Sherman Act §2, rebuttable only by a showing of scale economies, an unexpired patent, or absolute managerial superiority). *But see* Carl Kaysen & Donald T. Turner, Antitrust Policy: An Economic and Legal Analysis 111-13 (1959) (recommending deconcentration legislation, but allowing dominant firms to rebut a presumption of unreasonableness by showing that their market power flowed from scale economies or the introduction of new products or processes). *See generally* Harlan M. Blake, *Legislative Proposals for Industrial Concentration*, in Industrial Concentration: The New Learning 340 (Harvey J. Goldschmid et. al, eds., 1974); William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 Iowa L. Rev. 1105, 1137 (1989).

18. This concern was highlighted by Donald Turner, one of the most influential antitrust commentators during that period. *See* Donald F. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 Harv. L. Rev. 1207, 1223-24 (1969). Turner saw no bar to a government monopolization case "based solely on the fact that the monopoly has been retained for a substantial period of time," *id. at 1223*, but emphasized that "there is no public interest" in such a government case "unless an effective remedy is available," *id.* at 1223. He saw restructuring through divestiture or dissolution as the best remedy, *see id.* at 1213-17, and preferred public to private actions against monopolists in part because private plaintiffs, which can seek damages, *id.* at 1223, "may well be biased toward relief" that impaired the efficiency of the surviving firms," *id.* at 1224. Turner was skeptical about the utility of direct regulation of prices and entry, even when conducted by an expert administrative agency rather than a court. *Id.* at 1231. Moreover, Turner had previously rejected the idea that the Sherman Act could go farther, and simply make unlawful "the charging of a monopoly price by a monopolist" on the primary ground that Congress could not possibly have "intended the courts, under the Sherman Act, to act as price regulators," Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 669-70 (1962) (stating that "the practical problems imposed on a court would of course be immense").

19. These problems may well be particularly acute in rapidly changing markets where innovation is important, as the reasonable price will turn in part on an assessment that may frustrate judicial determination: identifying the economic cost of investments in research and development, including the competitive return on such investments in the industry at issue after accounting for their risk. But that is a different point from Evans and Hylton's incentive claim.

the only serious candidate. In consequence, Evans and Hylton must argue for their view of appropriate antitrust policy on economic rather than legal grounds.

## III. Monopolization Discourages Innovation

Evans and Hylton view antitrust prohibitions as chosen by courts to balance the harms from the exercise of market power against the benefits to innovation that they expect market power to confer.[20] In their view, the exercise of market power creates both a social benefit, in the form of enhanced incentives to innovate, and a social harm, in the form of the cost to consumers resulting from the reduction of output and increase in price within the market.[21] After making that tradeoff, they say, monopolization that may seem harmful when looking only to its effects on price and output within a relevant market might turn out on balance to be beneficial.[22]

The idea that monopoly could be beneficial on innovation-promoting grounds has limited policy relevance for two reasons. First, in practice, even the most aggressive antitrust enforcement regime would not remove entirely the ability of firms, whether dominant or not, to profit from their new ideas, and thus would not completely destroy incentives to innovate. There are in general many important sources of appropriability for innovating firms—including first-mover advantages, intellectual property rights, brand reputation, and the sale of complementary products and services—and it is unlikely that enforcement against monopolization would subvert them all. Even when appropriability is weak, innovation incentives may be strong.[23] With other important sources of appropriability, moreover, the monopolist's incremental incentive to innovate arising from the challenged conduct may be small or even non-existent; one cannot simply assume it is substantial relative to the other welfare losses the same conduct creates.

Second, the economic analysis proffered by Evans and Hylton ignores the possibility—indeed, the likelihood—that the exercise of market power harms aggregate innovation incentives rather than enhancing them. In the particular case of monopolization, if a dominant firm finds a way to raise its expected reward from successful innovation, that conduct may increase the dominant firm's incentive to

20. Evans & Hylton, at 220. They contend that the antitrust laws, like the intellectual property laws, are based on a "fundamental recognition that profits from securing significant market power serve as a reward for expending effort on things that will ultimately benefit society and that securing this effort is worth the price of deviations from the static competitive outcome." Evans & Hylton, at 226.

21. Evans & Hylton, at 220.

22. *See* Evans & Hylton, at 236 (arguing that the optimal penalty for monopolization could turn out to require no penalty at all, or even a subsidy, if the monopolist creates a new product or invests to expand a market).

23. Jonathan B. Baker, *Beyond Schumpeter Vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 580-81 & 581 n.14 (2007).

invest in research and development ("R&D"). But as a guide to antitrust policy, this proposition is incomplete. Whether total industry R&D and the aggregate likelihood of innovation success rise depends on the magnitude of the effect and on the extent to which the dominant firm's conduct simultaneously reduces the incentive of rival firms to invest in R&D. The available empirical evidence resolves the question in favor of competition by showing that as a general rule, greater product market competition strongly encourages innovation and productivity, its close cousin.[24] Hence, even if antitrust is concerned solely with innovation—even if antitrust enforcement is undertaken without regard for the static welfare losses that Evans and Hylton point to as antitrust's justification—antitrust law should still be concerned with monopolization and other exercises of market power.

Antitrust enforcement against monopolization most obviously benefits innovation when it targets "cheap exclusion"—exclusionary practices by a dominant firm that are inexpensive for the dominant firm to implement and have no efficiency justification.[25] When such conduct impedes rival innovation, as by limiting the rival's access to key inputs or the post-innovation market, it reduces the aggregate industry probability of innovation success. The government cases against Microsoft[26] and Rambus,[27] for example, can be understood as challenging cheap exclusion.[28]

Accordingly, antitrust enforcement attacking cheap exclusion increases the aggregate probability of industry innovation.

Cheap exclusion benefits an innovative dominant firm by increasing the reward to that firm from its own success in developing new products or processes. But that greater reward makes no difference to the probability of successful dominant firm innovation; it is simply the by-product of conduct that impedes rival innovation with no countervailing efficiency benefit. Accordingly, antitrust enforcement attacking cheap exclusion increases the aggregate probability of industry innovation.[29]

---

24. *See generally id.* at 583-86 (2007) (surveying literature). Additional empirical work on this topic would be useful. *Cf.* Evans & Hylton, at 240 (encouraging academic economists working on antitrust-related issues to pay more attention to dynamic competition).

25. Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 Antitrust L.J. 975 (2005).

26. *See* United States v. Microsoft Corp., 253 F. 3d 34 (D.C. Cir. 2004).

27. Rambus Inc., 2007-1 Trade Cas. (CCH) ¶75,585 (2006), *rev'd Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

28. *See* Baker, *supra* note 23, at 592-93.

29. For a technical statement of this argument, see Jonathan B. Baker, , *"Dynamic Competition" Does Not Excuse Monopolization* 13-15 (Oct. 15, 2008), *available at* http://ssrn.com/abstract=1285223.

Suppose instead that the greater reward to the dominant firm from its successful innovation raises the incentive of the dominant firm to invest in research and development, consistent with the dynamic Justice Scalia and Professors Evans and Hylton emphasize. Antitrust enforcement can still lead to greater industry innovation, notwithstanding some reduction in the dominant firm's incentive to invest in R&D, because enforcement may simultaneously increase the R&D investment incentives of the dominant firm's rivals.[30]

Even if enforcement reduces a dominant firm's reward from innovation substantially, moreover, the marginal benefit of that firm's R&D investments need not decline markedly, so enforcement may not greatly lessen the dominant firm's likelihood of innovation success.[31] This idea may explain why antitrust enforcers have paid attention to monopolization allegations in "winner take all" (or "winner take most") markets, such as operating system software or microprocessors.[32] In those markets, the "prize" for successful innovation by the dominant firm is likely to remain large even after a monopolization case, so antitrust enforcement is likely to make little difference to the dominant firm's incentive to innovate.[33]

At the same time, the increased product market competition that results from antitrust enforcement may provide strong encouragement to R&D by the dominant firm's rivals, and consequently generate a substantial increase in rival prospects for innovation success. If so, the greater competition resulting from antitrust enforcement against monopolization would increase the aggregate odds of innovation success in the market as a whole.[34] This outcome would be contrary to what Evans and Hylton suppose, but it is consistent with the empirical evidence that competition spurs innovation.

---

30. Increased product market competition, as may result from antitrust enforcement, affects every firm's incentives to innovate in two ways: greater pre-innovation competition encourages innovation by feeding each firm's desire to escape product market competition, but it also discourages innovation by increasing firm fears that post-innovation competition will limit the profits from investment in R&D. The latter force is emphasized by Justice Scalia and Professors Evans and Hylton, but the desire to escape competition is often more important. *See generally* Baker, *supra* note 23. Antitrust enforcement may also encourage innovation by protecting competition in innovation markets (that is, by fostering competition in innovation itself). *Id.*

31. *Cf.* Gavil, *supra* note 8, at 43 (most innovation is encouraged by the prospect of profits rather than the prospect of monopoly profits). Similarly, the granting of intellectual property rights does not equate to the award of monopoly profits. It is now well established in antitrust, for example, that patents do not necessarily confer monopoly power.

32. *See, e.g.* United States v. Microsoft Corp., 253 F. 3d 34 (D.C. Cir. 2004) (exclusionary conduct by dominant firm in operating system software); In the Matter of Intel Corp. 128 F.T.C. 213 (1999) (exclusionary conduct by dominant firm in microprocessors).

33. *See* Baker, *supra* note 23, at 593-94.

34. For a technical statement of this argument, see Jonathan B. Baker, *"Dynamic Competition" Does Not Excuse Monopolization* 15-21 (Oct. 15, 2008), *available at* http://ssrn.com/abstract=1285223.

## IV. Conclusion

Justice Scalia, supported by Professors Evans and Hylton, essentially argues that monopolization cases are brought in spite of their deleterious effects on incentives to innovate. That argument reflects an incomplete view of antitrust history, economic theory and the empirical literature. It takes one side of an old debate between Schumpeter and Arrow that today's antitrust policy can and should go beyond.[35]

Greater attention to "dynamic competition," as Professors Evans and Hylton recommend, provides no justification for relaxing antitrust's longstanding concern with monopolization.

As a general matter, current antitrust rules target conduct and industries where antitrust intervention will tend to encourage innovation—as by attacking cheap exclusion, for example, or monopolization in winner-take-all markets.[36] Greater attention to "dynamic competition," as Professors Evans and Hylton recommend, provides no justification for relaxing antitrust's longstanding concern with monopolization.

35. *See generally* Baker, *supra* note 23.

36. *See generally id.* at 588-600. *Cf.* Dennis W. Carlton & Ken Heyer, *Appropriate Antitrust Policy Towards Single-Firm Conduct* (U.S. Department of Justice, Economic Analysis Group Discussion Paper EAG 08-2 March 2008) (arguing that current U.S. antitrust policy toward monopolization properly allows dominant firms to extract monopoly rents so long as those firms do not impair the competitive constraints imposed by rivals) *available at* http://www.usdoj.gov/atr/public/eag/231610.pdf.