The “No Economic Sense” Test for Exclusionary Conduct

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I. INTRODUCTION

Section 2 of the Sherman Act prohibits the acquisition or maintenance of monopoly power through the use of “predatory” or “exclusionary” conduct.1 In Trinko,2 the Solicitor General argued that when “the plaintiff asserts that the defendant was under a duty to assist a rival . . . conduct is not exclusionary or predatory unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.”3 Although the Solicitor General only advocated this “no economic sense” test for a narrow class of conduct, the Department of Justice (DOJ) has consistently advocated this test in all of its section 2 cases.4 This Article briefly discusses Trinko and

4. In Microsoft, the DOJ argued that a course of conduct that served to protect the defendant’s operating system monopoly was exclusionary because it “would not make economic sense unless it eliminated or softened competition.” Brief of the Appellees United States and the State Plaintiffs at 48, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (Nos. 00-5212, 00-5213). In American Airlines, the DOJ charged the defendant with “adding money-losing capacity” to drive out rivals by luring away their passengers and contended that “distinguishing legitimate competition from unlawful predation requires a common-sense business inquiry: whether the conduct would be profitable, apart from any exclusionary effects.” Brief for Appellant United States at 2, 30, United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003) (No. 01-3202) (public redacted version). In Dentsply, the DOJ argued that the defendant’s policies of terminating dealers that carried rivals’ products and accepting dealers only if they dropped rivals’ products “made no economic sense but for their tendency to harm rivals,” because the policies cost the defendant something yet produced no possible benefit other than reducing competition. Brief for Appellant United States at 28, United States v.
explains how the “no economic sense” test is motivated by policies the Supreme Court articulated in *Trinko* and prior cases. This Article also explains the role the test can usefully play in section 2 cases and why it does not have the flaws of the “profit-sacrifice” test with which the “no economic sense” test has been confused.

II. THE *TRINKO* CASE

Mr. Trinko’s law firm selected AT&T to provide its local telephone service.\(^5\) The incumbent local exchange carrier (ILEC) in New York City, a successor of the Bell companies, owned facilities necessary to provide the service, and it was required by the Telecommunications Act of 1996\(^6\) to “share its network with competitors.”\(^7\) The ILEC, which later became part of Verizon, entered into interconnection agreements with AT&T and others, and the ILEC made available its “operations support system,” through which customer orders were placed.\(^8\) Complaints that the ILEC nevertheless failed to fill orders were addressed by a consent decree the ILEC entered into with the FCC.\(^9\) One day after entry of the decree, Trinko filed suit under section 2 of the Sherman Act, alleging that the ILEC failed to provide AT&T with access to its facilities equivalent in quality to the ILEC’s own access to them.\(^10\) The district court twice dismissed the complaint for failure to state a claim, and the Second Circuit reversed, holding that the complaint “may state a claim under the ‘essential facilities’ doctrine” and that Trinko also “may have a monopoly leveraging claim.”\(^11\)

In its consideration of the case, the Supreme Court initially observed that “a detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether.”\(^12\) But the Court found that such shielding had been precluded by language in the 1996 Act providing that “nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of . . . the antitrust laws.”\(^13\)

The Court then explained why the Sherman Act should not be understood to impose a general “duty to aid competitors”:

Compelling . . . firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited. Moreover, compelling negotiation

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8. Id. at 402-03.
9. Id. at 403-04.
10. Id. at 404-05.
13. Id. (quoting 47 U.S.C. § 152 (2005)).
between competitors may facilitate the supreme evil of antitrust: collusion. The Court held that “as a general matter, the Sherman Act ‘does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal.’”

Acknowledging there were “exceptions” to this general rule, the Court reviewed a particularly notable example—its Aspen decision—making clear that the facts of Aspen were “at or near the outer boundary” of circumstances in which “a refusal to cooperate with rivals can constitute” a violation of section 2. In explaining why it made sense to impose antitrust liability in Aspen, even if not in most other cases, the Court stressed that the defendant had refused to sell lift tickets to the plaintiff even at the retail price charged to individual skiers. Hence, the Court concluded that the facts of Aspen “suggested a willingness to forsake short-term profits to achieve an anticompetitive end.” The Court thereby hinted at something akin to the “no economic sense” test.

The Court stressed that the “cost of false positives counsels against an undue expansion of § 2 liability,” and it found that the institutional setting of the case weighed against “adding . . . to the few existing exceptions from the proposition that there is no duty to aid competitors.” But the Court neither enumerated circumstances in which there is a “duty to aid competitors” nor articulated a standard for identifying such cases. The Court found no need to “recognize” or “repudiate” the essential facilities doctrine invoked by the Second Circuit, because the Court concluded that imposing a duty to deal “serves no purpose” when “access exists” under a regulatory scheme such as that of the 1996 Act. The Court also rejected the Second Circuit’s reliance on “monopoly leveraging” because “leveraging presupposes anticompetitive conduct, which . . . could only be the refusal-to-deal claim” the Court was rejecting.

14. Id. at 407-08.
15. Id. at 408 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).
16. Id.
18. Trinko, 540 U.S. at 408-09.
19. Id. at 409.
20. Id.
21. In the wake of Trinko, two courts of appeals have suggested that a short-run profit sacrifice is required to make out a section 2 violation, although neither asserted that Trinko so held. Covad Commc’ns Co. v. Bell Atl. Corp., 398 F.3d 666, 675-76 (D.C. Cir. 2005) (stating “in the vernacular of antitrust law, a ‘predatory’ practice is one in which a firm sacrifices short-term profits in order to drive out of the market or otherwise discipline a competitor”); MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1134 (9th Cir. 2004) (holding alleged conduct did “not fall within the Aspen Skiing exception to the general ‘no duty to deal’ rule” because it did “not entail a sacrifice of short-term profits for long-term gain from the exclusion of competition”).
22. Trinko, 540 U.S. at 414.
23. Id. at 411.
24. Id.
25. Id. at 410.
26. Id. at 415 n.4.
III. POLICIES UNDERLYING THE “NO ECONOMIC SENSE” TEST

Although Trinko does not adopt the “no economic sense” test, both it and other Supreme Court decisions from the past twenty years articulate policies motivating that test. First and foremost, the Court has made clear that section 2 of the Sherman Act, which applies to single firm conduct, sweeps far less broadly than section 1, which prohibits all concerted conduct that “imposes an unreasonable restraint on competition.” The Court has described the Sherman Act as a “consumer welfare prescription,” but only section 1 makes consumer welfare the touchstone for legality.

It is not enough that a single firm appears to “restrain trade” unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient competitor may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster.

“Judging unilateral conduct” less strictly than concerted conduct, the Court reasoned, “reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.” Put another way: “Subjecting a single firm’s every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.”

A significant part of the Court’s rationale for treating single firm conduct less strictly than concerted conduct is that single firm conduct presents a greater danger that procompetitive conduct will be erroneously condemned. That danger is especially severe with exclusionary practices that attract customers away from rivals by offering a better bargain. Offering customers a better bargain is characteristic of the conduct deemed “competition on the merits,” yet it is also precisely how certain conduct, like predatory

27. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984) ("The Sherman Act contains a 'basic distinction between concerted and independent action.'" (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984))); id. at 768 ("Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2."); id. at 775 ("[T]he Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct."); see also Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993) ("[S]ingle-firm activity is unlike concerted activity covered by § 1, which 'inherently is fraught with anticompetitive risk.'" (quoting Copperweld, 467 U.S. at 767-69)).


30. Some case law suggests a limited role for a consumer welfare standard under section 2. Microsoft raises the possibility that exclusionary conduct may be found to be lawful because the defendant shows it has a legitimate business justification and the plaintiff is unable to demonstrate that the “anticompetitive harm of the conduct outweighs the pro-competitive benefit.” United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001). The court, however, did not engage in such a weighing, and the relevant conduct already had been found by the district court to be exclusionary under what is essentially the “no economic sense” test. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 38 (D.D.C. 2000).

31. Copperweld, 467 U.S. at 767.

32. Id.

33. Id. at 775.

34. The Supreme Court has often referred to, but never defined, the concept of “competition on the
pricing, may exclude competition. Consequently, “[i]t is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects.”

The potential to erroneously condemn procompetitive conduct is obvious with allegedly predatory pricing, and the Court’s *Matsushita* and *Brooke Group* decisions emphasized that “mistaken inferences” of predatory pricing “are especially costly, because they chill the very conduct the antitrust laws are designed to protect.” But *Trinko* made abundantly clear that this critical tenet of section 2 law has broader application. *Trinko* explained that “applying the requirements of § 2 ‘can be difficult’ because ‘the means of illicit exclusion, like the means of legitimate competition, are myriad,’” and, quoting *Matsushita*, declared quite generally: “Mistaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect.’”

Animating the *Trinko* decision was the notion that striving for monopoly “is an important element of the free-market system” because “it induces risk taking that produces innovation and economic growth.” This idea can be traced to Learned Hand’s admonition: “The successful competitor, having been urged to compete, must not be turned upon when he wins.”

Finally, a consistent theme of the Supreme Court’s jurisprudence has been that the purpose of section 2 is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. Hence, the mere fact that one competitor’s conduct injures another is far from a sufficient basis for presuming that the conduct is improper.
Because distinguishing exclusionary from procompetitive conduct is difficult and error prone, it would chill conduct from which consumers benefit greatly to impose on defendants a burden to defend most aggressive marketplace conduct and refusals to assist rivals. Rather, a significant burden must be placed on plaintiffs to establish that single firm conduct is, in fact, exclusionary. The “no economic sense” test properly imposes such a burden by requiring the demonstration that the challenged conduct would not be rational for the defendant absent a tendency to eliminate competition.

Professor Gavil objects “on procedural grounds” to placing this burden on plaintiffs, arguing that consistent with Rule 11 obligations plaintiffs would find it difficult to make the allegations required “[w]ithout any opportunity for discovery.” However, a complaint requires only a “short and plain statement of the claim” without significant elaboration of either legal theories or their basis in fact. Despite the suggestion in *Trinko* that conduct is exclusionary only if it involves a sacrifice of short-term profits, courts have refused to dismiss complaints lacking specific factual allegations of sacrifice.

IV. THE “NO ECONOMIC SENSE” TEST IS NOT A TEST FOR SHORT-RUN PROFIT SACRIFICE

There is a widespread misconception that the test advocated by the Solicitor General in *Trinko* makes a “short-term profit sacrifice” the touchstone for illegality. This misconception results from the failure to distinguish the “no economic sense” test from similar tests formulated in terms of profit sacrifice or departure from profit maximization.

competition, and the antitrust laws are not balm for rivals’ wounds. The antitrust laws are for the benefit of competition, not competitors.” *Ball Mem’l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986).

44. *See Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986) (“[T]he lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors. A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits.” (internal quotation omitted)).


46. *See, e.g., S. Austin Coal. Cmty. Council v. SBC Commc’ns Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001) (“It is not necessary that facts or the theory of relief be elaborated.”); *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999) (“The courts keep reminding plaintiffs that they don’t [i] have to file long complaints, don’t have to plead facts, don’t have to plead legal theories.”).

47. *See Covad Commc’ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 675-76 (D.C. Cir. 2005) (alleging that the defendant’s “refusal to deal was ‘predatory,’ which suffices to withstand a motion to dismiss because, in the vernacular of antitrust law, a ‘predatory’ practice is one in which a firm sacrifices short-term profits in order to drive out of the market or otherwise discipline a competitor”); *A.I.B. Express, Inc. v. FedEx Corp.*, 358 F. Supp. 2d 239, 250-51 (S.D.N.Y. 2004) (stating that allegations of significant forgone revenues are sufficient without any indication of avoided costs); *Creative Copier Servs. v. Xerox Corp.*, 344 F. Supp. 2d 858, 865-66 (D. Conn. 2004) (holding that *Trinko* did not alter pleading requirements).


49. Some prior tests articulated by courts of appeals were quite close to the “no economic sense” test and did not refer to sacrifice or departure from profit maximization. See *Steams Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 523 (5th Cir. 1999) (noting that “a finding of exclusionary conduct requires some sign that the monopolist engaged in behavior that—examined without reference to its effects on competitors—
Exclusionary conduct was associated with profit sacrifice in several antitrust treatises published in the late 1970s. Most often cited is Professor Bork’s formulation:

Predation may be defined, provisionally, as a firm’s deliberate aggression against one or more rivals through the employment of business practices that would not be considered profit maximizing except for the expectation either that (1) rivals will be driven from the market, leaving the predator with a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds inconvenient or threatening.

Similarly, Professor Posner maintained: “An exclusionary practice is generally a method by which a firm (or firms) having or wanting a monopoly position trades a part of its monopoly profits, at least temporarily, for a larger market share, by making it unprofitable for the other sellers to compete with it.” And Professor Sullivan suggested: “Perhaps the characteristic feature of such a predatory thrust is that the predator is acting in a way which will not maximize present or foreseeable future profits unless it drives or keeps others out or forces them to tread softly.” A highly influential formulation also was offered by economics professors Ordover and Willig: “[P]redatory behavior is a response to a rival that sacrifices part of the profit that could be earned under competitive circumstances, were the rival to remain viable, in order to induce exit and gain consequent additional monopoly profit.” Although the Supreme Court’s Aspen decision did not adopt such a definition of exclusionary conduct, it summarized what made the conduct at issue exclusionary by noting that the defendant “was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.”


53. LAWRENCE ANTHONY SULLIVAN, ANTITRUST 113 (1977).

54. Janusz A. Ordover & Robert D. Willig, An Economic Definition of Predation: Pricing and Product Innovation, 91 YALE L.J. 8, 9-10 (1981) (citations omitted). This test was reformulated and dubbed the “‘but-for’ test.” Steven C. Salop & R. Craig Romaine, Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft, 7 GEOR. MASON L. REV. 617, 650 (1999) (stating that “[a] defendant’s exclusionary conduct can only be said to have the purpose of monopolizing if the conduct would have been unprofitable (and thus likely not undertaken) in the absence of the barriers to competition”).

Recent commentators have correctly noted that a short-term profit sacrifice is neither necessary nor sufficient for conduct to be exclusionary. But they have failed to recognize that the “no economic sense” does not imply that a short-term profit sacrifice is either necessary or sufficient for conduct to be exclusionary.

It is obvious that a short-term profit sacrifice is insufficient to make conduct exclusionary, because much pro-competitive conduct entails the sacrifice of current profit in the pursuit of greater profit over the longer term. Investing in research and development or capital equipment sacrifices current profit in order to obtain what is expected to be a significantly greater future profit. It is just as obvious that a short-term profit sacrifice is insufficient to make conduct exclusionary under the “no economic sense” test. Ordinary investments in opportunities for future profit normally are not exclusionary conduct under that test, both because they make economic sense apart from any tendency to eliminate competition and because they have no such tendency. If the defendant’s conduct entails a short-run profit sacrifice, the “no economic sense” test further asks why it is rational to make that sacrifice.

A short-run profit sacrifice also is not necessary for conduct to be deemed exclusionary by the “no economic sense” test because the anticompetitive gains from exclusionary conduct sometimes can be reaped immediately. Exclusionary conduct can extend the period during which monopoly profits can be reaped. In some cases, the exclusionary impact of such conduct also is immediate, and thus the conduct increases the monopolist’s profit (by preventing a decrease) at the same time the conduct is undertaken. Hence, it is possible, at every point in time, that the exclusionary conduct generates rewards in excess of its costs, so there is no sense in which a short-run sacrifice is made to generate future monopoly profits.

Critically, the “no economic sense” test asks not just whether challenged conduct is profitable, but also why it is profitable. Because the “no economic sense” test has been wrongly viewed as a sacrifice test, it has often been erroneously said to be inapplicable when excluding competition costs very little, and consequently there is no meaningful “sacrifice.” Illustrations from section 2 cases in which exclusionary conduct is argued to cost little are attempts to enforce a


58. The notion that certain kinds of exclusionary conduct require no short-run sacrifice may have first been noted by Thomas Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals Costs to Achieve Power Over Price, 96 YALE L.J. 209, 224 (1986). See also Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 748 F. Supp. 344, 354 (M.D.N.C. 1990) (stating the plaintiff’s contention that there was “simultaneous recoupment” of the costs of predation).

59. The three cases discussed supra note 4, in which the DOJ advocated the “no economic sense” test, all involved conduct alleged to extend the period during which monopoly profits could be reaped. Nevertheless, in both AMERICAN AIRLINES and MICROSOFT, there was a short-term profit sacrifice. United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003); United States v. MICROSOFT Corp., 253 F.3d 34 (D.C. Cir. 2001).

fraudulently obtained patent, sham litigation or bad faith administrative filings, and abuse of a private standard-setting process. In each of these illustrations, however, it is impossible to exclude competition without incurring some cost, and applying the “no economic sense” test means asking whether the cost—no matter how slight—would sensibly have been incurred absent the tendency of the conduct to eliminate competition. In each of these illustrations, the conduct offers no prospect of a positive payoff apart from the tendency of the conduct to eliminate competition, and therefore the conduct is exclusionary under the “no economic sense” test.

It also has been argued that the “no economic sense” test certainly cannot be applicable to “costless exclusion.” A realistic scenario of costless exclusion is quite difficult to imagine, but all costs associated with exclusion can be easily assumed away. Consider, for example, a competitor that sets a match to the factory of a rival, and assume that matches are free, arson is not a crime, and there is no opportunity cost associated with the time it takes to commit the arson. Even in this hypothetical world, the arson is exclusionary under the “no economic sense” test, because that conduct is entirely pointless as an economic matter apart from its tendency to eliminate competition. To be exclusionary under the “no economic sense” test, it is sufficient that the conduct confer an economic benefit only if it eliminates competition.

V. A ROLE FOR THE “NO ECONOMIC SENSE” TEST

The phrasing of the “no economic sense” test suggests that it may be a one-way test. To say that “conduct is not exclusionary or predatory, unless it would make no economic sense for the defendant but for the tendency to eliminate or lessen competition,” suggests this test can be used only to exculpate conduct for which this condition is not met. But the reason for the “unless” formulation is that the “no economic sense” test provides only a partial definition of exclusionary conduct; the test can be usefully applied only once it has been demonstrated that the challenged conduct actually has a tendency to eliminate or lessen competition. In many cases, injury to a rival may be both clear and all that is required, although a rival’s lack of marketplace success cannot automatically be attributed to a defendant’s conduct.

64. Commentators have cited Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002), cert. denied, 537 U.S. 1148 (2003), as another example of a scenario in which there is no sacrifice. See Gavil, supra note 45, at 55; Robert A. Skitol, Correct Answers to Large Questions about Verizon v. Trinko, ANTITRUST SOURCE, May 2004, available at http://www.abanet.org/antitrust/source/may04/skitol.pdf. In that case, the defendant’s salespeople removed from retailers the racks on which the plaintiff’s products were displayed. Conwood, 290 F.3d at 778-80, 783-85. That obviously cost the defendant something, and it most likely produced a benefit only by hampering rivals’ sales. Hence, the conduct likely was exclusionary under the “no economic sense” test.
65. See Salop, supra note 56.
66. Although a defendant may rationally expect its conduct to exclude, and may undertake the conduct for no reason but to exclude, the conduct may utterly fail to exclude. Although it was reversed on appeal, this is precisely what the district court found in United States v. Dentsply Int’l, Inc., 277 F. Supp. 2d 387, 419-21, 440-48, 449-53 (D. Del. 2003), rev’d, 399 F.3d 181, 191-94 (3d Cir. 2005).
67. To be considered exclusionary, conduct must “reasonably appear capable of making a significant
The “no economic sense” test is likely to be most useful when it can play what is essentially the role of a sufficient condition. If challenged conduct with a tendency to eliminate competition would make “no economic sense” but for that tendency, the conduct is exclusionary. Whenever a plaintiff is prepared to demonstrate that the foregoing two-part condition is satisfied, the “no economic sense” test provides a logical fulcrum that allows the conduct to be labeled exclusionary.

The utility of the “no economic sense” test is apt to vary, however, depending on how feasible it is to determine whether the challenged conduct would make “no economic sense” but for its tendency to eliminate competition. It is doubtful that the “no economic sense” test would have been well suited to the bundled rebates at issue in LePage’s. Such rebates implement a form of price discrimination, which can make them profitable even apart from any tendency to eliminate competition, and it may be infeasible to separate the profits from discrimination and the profits from eliminating competition.

Even if the “no economic sense” test determines that challenged conduct is exclusionary, it need not follow that the conduct violates section 2. A variety of immunities and exemptions limit the application of the Sherman Act. In addition, the case law may effectively place certain types of potentially exclusionary conduct, for example, pricing above cost, in a prudential safe harbor. Although the case law has not explicitly placed much conduct in such a safe harbor, it is impossible to believe that a court would entertain the notion, for example, that merely introducing a new product could be anything but lawful competition on the merits.

In addition, the “no economic sense” test can be applied only when there is a single, well-defined “but for” scenario. That often presents no problem because the proper “but for” scenario is precisely what actually occurred with the exception of the challenged contribution to creating or maintaining monopoly power.”

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68. In the Trinko case, an amicus brief filed on behalf of economists William J. Baumol, Janusz A. Ordover, Frederic R. Warren-Boulton, and Robert D. Willig argued that the “no economic sense” test generally is appropriate, with the primary exception being some regulated industries. See Brief of Amici Curiae Economics Professors in Support of Respondents at 13-21, Verizon Comm’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682).


70. See generally 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 200-33 (2d ed. 2000); 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 240-62 (2d ed. 2000).

71. To establish predatory pricing, a plaintiff must show “that the prices complained of are below an appropriate measure of its rival’s costs.” Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 222 (1993). The Court held that above cost prices could be exclusionary, but it was unwise to permit liability: “As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.” Id. at 223.

72. For example, the use of litigation cannot violate section 2 unless it is “objectively baseless.” See Prof’I Real Estate Investors, Inc. v. Columbia Pictures, Inc., 508 U.S. 49, 60 (1993).

73. Introducing a new product in place of an existing product raises more difficult issues, and a court might entertain the notion that such conduct could be exclusionary. While considerable skepticism is appropriate in a challenge to a product design decision, design changes may constitute unlawful exclusionary conduct. See United States v. Microsoft Corp., 523 F.3d 34, 64-67 (D.C. Cir. 2001) (en banc) (per curiam).
incremental conduct. If so, the issue is whether it made “no economic sense” for the defendant to undertake the challenged conduct instead of continuing on its prior course. In some cases, however, changed market conditions may make clear that continuing the prior course of conduct would have made “no economic sense.” In such cases, the “no economic sense” test may not be useful unless the defendant’s choices can be narrowed down to a few, only one of which includes the challenged conduct. The test may be applied to the decision to slash prices 25% in response to entry, but not to the marginal decision to select a cut of 25% rather than 24%. The test does not identify as exclusionary every departure from short-run profit maximization.\textsuperscript{74}

Finally, the “no economic sense” test is not designed to identify all single firm conduct that harms consumers by excluding competition.\textsuperscript{75} A critical premise of the “no economic sense” test is that some potentially harmful conduct must be tolerated to avoid even greater harms from chilling risk taking and aggressively competitive conduct. A policy of prohibiting all single firm conduct injuring consumers also would be unworkable. In most cases, there is no satisfactory way to trade off short-run benefits from injecting competition into one market against long-run costs from the reduced innovation and economic growth that may flow from reduced risk taking throughout the economy.

\section*{VI. APPLYING THE “NO ECONOMIC SENSE” TEST}

The application of the “no economic sense” test is at least conceptually straightforward. If challenged conduct allegedly threatened to create a monopoly because of a tendency to exclude existing competitors, the test is whether the conduct likely would have been profitable under the assumption that a monopoly was not created because the existing competitors were not excluded. If the challenged conduct allegedly maintained a monopoly because of its tendency to exclude nascent competition, the test is whether the conduct likely would have been profitable under the assumption that the monopoly was not maintained because the nascent competition flourished.

Applying the “no economic sense” test in these ways may avoid the need to determine directly whether profit gains from challenged conduct should be attributed to legitimate competition on the merits or illegitimate elimination of competition. This is a cardinal virtue of the test, because antitrust law has never defined “competition on the merits.”\textsuperscript{76} This does not mean, however, that applying the “no economic sense” test is without difficulties. Particularly problematic would be a case in which the inevitable outcome of the competitive process would be a single surviving competitor.\textsuperscript{77}

\textsuperscript{74} In the \textit{American Airlines} case, the court of appeals rejected one of several price-cost comparisons proposed by the government on the grounds that it asked only whether the defendant “failed to maximize short-run profits.” United States v. AMR Corp., 335 F.3d 1109, 1119 (10th Cir. 2003). The court, however, mischaracterized the proposed comparison. \textit{See} Gregory J. Werden, \textit{The American Airlines Decision: Not with a Bang but a Whimper}, ANTITRUST, Fall 2003, at 34 n.35.

\textsuperscript{75} \textit{See} Salop & Romaine, \textit{supra} note 54, at 658 (“Exclusionary conduct that escapes condemnation under this test can nevertheless lead to anticompetitive effects on consumer and aggregate economic welfare.”).

\textsuperscript{76} For an attempt to define competition on the merits, see Elhauge, \textit{supra} note 49, at 270-71.

\textsuperscript{77} This can be the case in the presence of powerful network effects, which make competition “for the market” rather than “in the market.” \textit{See generally} Gregory J. Werden, \textit{Network Effects and Conditions of Entry: Lessons from the Microsoft Case}, \textit{69 ANTITRUST L.J.} 87, 89-91 (2001).
Under the “no economic sense” test, conduct can be exclusionary even if it produces some efficiency gain or consumer benefit. That conduct produces some gross benefit plainly is an insufficient basis for concluding that it makes economic sense, because there has been no consideration of cost. The “no economic sense” test may deem conduct to be exclusionary unless it has a positive expected payoff, net of costs and not including any payoff from eliminating competition.

The “no economic sense” test does not inquire into the actual impact of the challenged conduct, but rather into the reasonably anticipated impact of the conduct. The “no economic sense” test is applied as of the time the challenged conduct was undertaken on the basis of reasonable expectations at that time. Actual effects can provide powerful evidence of the reasonably anticipated effects, but actual effects also can be entirely irrelevant. Many business decisions ultimately prove unprofitable because of misfortune or ineptitude, and the antitrust laws do not add insult to injury by deeming as exclusionary all unprofitable conduct. Marketplace conduct also may prove highly profitable for reasons that could not have been anticipated when it was undertaken, and such unanticipated profits should not preclude a finding that the conduct was exclusionary. Finally, some conduct may have exclusionary effects that were unforeseeable when that conduct was undertaken, and such effects should not be a basis for condemning the conduct long after the fact.

The foregoing does not imply that the “no economic sense” test is based on intent. In applying the test, what matters are the objective economic considerations for a reasonable person, and not the state of mind of any particular decisionmaker. Conduct

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78. Professor Gavil wrongly criticizes the “no economic sense” test for not finding conduct to be exclusionary whenever it produces “any efficiency gain.” Gavil, supra note 45, at 53.

79. There may be no single time at which particular conduct was undertaken. A defendant pursuing a course of conduct for a considerable time may periodically reevaluate the wisdom of the conduct both in the light of new information on projected costs and benefits, and in response to changes in the economic environment. In such a case, the “no economic sense” test is applicable at several different times, with potentially different results.

80. The best evidence may be detailed business plans made by the defendant, which estimate the costs and benefits of alternative courses of conduct.


82. It is at least misleading for Professor Gavil to argue that the “no economic sense” test “could be interpreted as little more than a test of ‘intent.’” Gavil, supra note 45, at 52.

83. Modern section 2 jurisprudence generally rejects an intent-based approach. See United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc) (per curiam) (“[I]n considering whether the monopolist’s conduct . . . is . . . exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it.”); Ball Mem’l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1339 (7th Cir. 1986) (Easterbrook, J.) (“Vigorous competitors intend to harm rivals, to do all the business if they can. To penalize this intent is to penalize competition.”); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1984) (Breyer, J.) (stating that “‘intent to harm’ without more offers too vague a standard”); AREEDA & HOVENKAMP, supra note 67, ¶ 651b (“Despite loose language . . . the courts . . . have focused on conduct while talking about intent.”).

In Trinko the Supreme Court employed language suggesting an intent-based test by indicating that forsaking short-term profits in Aspen “revealed a distinctively anticompetitive bent,” and in contrasting Aspen with Trinko as to whether the defendant’s prior conduct shed light “upon the motivation of the refusal to deal” and whether it was prompted “by anticompetitive malice.” Verizon Commc’ns, Inc. v. Law Offices of Curtis V.
should not be condemned because the decisionmaker did not clearly focus on, or even was unaware of, sound economic reasons for the conduct. And exclusionary conduct should be condemned even if the decisionmaker’s rationale for undertaking the conduct was not profit maximization. Burning down a rival’s factory is exclusionary conduct even if the defendant is a pyromaniac and never considered the economic benefits of the conduct.

VII. CONCLUSION

By placing a significant burden on plaintiffs to demonstrate that challenged conduct truly is exclusionary, the “no economic sense” test implements important policies the Supreme Court has articulated in recent decades. Principal among them is that the application of section 2 must guard against the risk of false positive determinations that challenged conduct is exclusionary. To maximize the consumer benefits from competition, it is essential to allow some conduct to go unremedied even though it harms consumers. Doing otherwise would chill risk taking and aggressively competitive conduct from which consumers benefit greatly.

The “no economic sense” test may not be useful in every section 2 case, but it is very useful in most such cases, including cases of “low-cost exclusion,” which critics consistently cite as examples of cases in which the test cannot be applied. The “no economic sense” test does not require a profit sacrifice, especially in monopoly maintenance cases. Nor does the “no economic sense” test make the mistake of deeming exclusionary any current sacrifice of profit in the hope of greater future profit. Plaintiffs and defendants alike should find the “no economic sense” test, when properly understood, to be of great value in assessing possibly exclusionary conduct, as should the courts.

Trinko, LLP, 540 U.S. 398, 409 (2004). It is unlikely, however, that the Court intended any significant role for subjective motivation. Had the Trinko Court wanted to craft an intent-based test, it would have included the initial clause of the famous Colgate dictum: “In the absence of any purpose to create or maintain a monopoly.” United States v. Colgate & Co., 250 U.S. 300, 307 (1919). By omitting this clause when it quoted the dictum, the Court sent the clear signal that subjective motivation is not what matters. Trinko, 540 U.S. at 408.

84. Many section 2 cases mention the possibility of rejecting a business justification as “pretextual,” see, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461, 484 (1992), but few have explicitly focused on the state of mind of decisionmakers. A notorious case that did is Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997). “Evidence regarding the state of mind of Kodak employees may show pretext, when such evidence suggests that the proffered business justification played no part in the decision to act.” Id. at 1219.

85. If section 2 made liability turn on a decisionmaker’s state of mind, it would have to admit an insanity defense of sorts, but no such defense appears ever to have been suggested for civil antitrust cases. Of course, there must be some room for an insanity defense in a criminal antitrust case, since, like other violations of criminal law, a criminal antitrust violation requires a guilty state of mind. United States v. U.S. Gypsum Co., 438 U.S. 422, 435-43 (1978).