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ABSTRACT

Prosecuting loyalty rebates—and other price-related antitrust behavior—entails significant pitfalls for antitrust policymakers. Low prices are one of the key benefits antitrust law seeks to promote. And yet, when it comes to low prices, anticompetitive strategy is almost indistinguishable from strong competition. There is thus a significant risk that poorly tailored antitrust rules would chill firms' incentives to compete. These difficulties should notably prompt antitrust policymakers and courts to reject largely unworkable concepts, such as the notion of non-contestable market segments (in bundled rebates cases) and firms' intent to foreclose competitors.

La poursuite de rabais de fidélité – et d'autres comportements antitrust liés aux prix – comporte des pièges importants pour les responsables de la politique antitrust. Les prix bas sont l'un des principaux avantages que la loi antitrust cherche à promouvoir. Et pourtant, lorsqu'il s'agit de prix bas, une stratégie anticoncurrentielle est presque impossible à distinguer d'une forte concurrence. Il existe donc un risque important que des règles antitrust mal adaptées refroidissent les incitations à la concurrence des entreprises. Ces difficultés devraient notamment inciter les responsables de la politique antitrust et les tribunaux à rejeter des concepts largement inapplicables, tels que la notion de segments de marché non contestables (dans les affaires de rabais groupés) et l'intention des entreprises d'évincer leurs concurrents.

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I. Introduction

1. Anticompetitive (that is, consumer-harming) strategies capable of foreclosing even efficient competitors are difficult—often impossible—to distinguish from vigorous competition (which benefits consumers). Courts are compelled to rely on a limited set of observable parameters to infer whether a firm's behavior falls under one or the other category. This process entails significant pitfalls.[1]

2. When it comes to allegedly anticompetitive lowering of prices—predation, discounts, and rebates—low prices themselves are the posited mechanism for anticompetitive foreclosure and thus a key component of the liability regimes pertaining to pricing practices. Yet low prices are also precisely the consumer benefit that antitrust law ordinarily seeks to preserve, especially when these low prices are sustained in the long run. Most of the time, rebates and discounts represent welfare-enhancing price competition; nevertheless, economic theory teaches that strategic pricing, by firms with market power, can be anticompetitive. As Judge Easterbrook described, "[l]*ow prices and large plants may be competitive and beneficial, or they may be exclusionary and harmful. We need a way to distinguish competition from exclusion without penalizing competition.*"[2] In short, false positives in these settings may be especially costly because they penalize consumer-benefiting low prices.

3. The challenge for courts is distinguishing between robust competition and anticompetitive conduct when a primary indicator of both—low prices—is the same. Although the dividing line will always be imperfect such that it is not always clear when anticompetitive conduct is occurring, the academic literature and the courts have established guiding rules and standards designed to minimize error, maximize ease of administration, and protect consumer welfare.

4. Against this backdrop, our paper focuses on recent litigation in the United States opposing Sanofi to Mylan. Sanofi is currently seeking to overturn a district court's summary judgment in favor of Mylan, which held that Mylan's EpiPen rebate agreements (loyalty discounts) did not foreclose Sanofi from competing in the market for epinephrine auto-injectors. The paper argues that finding in favor of Sanofi would mark a misguided departure from the error-cost framework that has been the linchpin of modern antitrust enforcement. Loyalty discounts—and the lower prices they bring—routinely benefit consumers. Sanofi's approach would increase the risks of wrongly imposing antitrust liability and, in turn, harming consumers, while being more difficult to administer. In other words, we

1 See G. A. Manne & J. D. Wright, If Search Neutrality Is the Answer, What's the Question?, 2012 Colum. Bus. L. Rev. 151, 184–85 (2012) ("The key challenge facing any proposed analytical framework for evaluating monopolization claims is distinguishing pro-competitive from anticompetitive conduct. Antitrust errors are inevitable because much of what is potentially actionable conduct under the antitrust laws frequently actually benefits consumers, and generalist judges are called upon to identify anticompetitive conduct with imperfect information.")

2 F. H. Easterbrook, The Limits of Antitrust, 63 *Tex. L. Rev.* 1, 26 (1984).

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argue the court should not endorse a theory of harm that does not adequately distinguish between pro-competitive and anticompetitive behavior, as doing so could chill firms' incentives to compete on price.

II. Sound antitrust rules for loyalty discounts

5. Antitrust law—as it is enforced in the United States, and to a lesser extent in the European Union—seeks to develop rules that promote consumer welfare. Antitrust judgments may err in two directions: They may permit anticompetitive (output-reducing) behaviors, or they may prevent pro-competitive (output-enhancing) conduct. In crafting antitrust doctrines, courts should aim to minimize the sum of welfare losses from these two sets of errors plus the costs of administration.[3] The US Supreme Court has repeatedly endorsed this "decision-theoretic" approach, which maximizes the social welfare antitrust generates.[4]

6. As we explain below, this error-cost framework has important ramifications for the antitrust rules pertaining to pricing-related behavior, in particular loyalty discounts. For a start, the error-cost framework warrants that certain practices be absolved of antitrust liability, even though it is uncontested that they can sometimes harm consumer welfare. This is notably the case for several forms of above-cost pricing. Likewise, error-cost considerations also explain why decision-makers should be wary of claims that certain market segments are "non-contestable," as advanced in Sanofi's case against Mylan, but also in several European competition cases, notably the ECJ's *Tomra*, *Post Danmark*, and *Intel* rulings.[5] Indeed, this concept is hard to demonstrate in actual cases, absent exceptional circumstances (for instance when firms enjoy a legal monopoly, as was the case in *Post Danmark* dispute). Reliance on the concept thus threatens to undermine firms' incentives to aggressively compete on price if markets are wrongly deemed to be non-contestable.

1. The error costs of loyalty discounts

7. When it comes to pricing behavior, the courts have recognized that rules that discourage discounting can be antithetical to the purpose of antitrust law, as lower prices help consumers in the short term, even if anticompetitive behavior has the potential to harm consumers in the longer term.[6]

8. There are, naturally, myriad nuances and complexities within the broad category of discount pricing. The simplest expression of discount pricing can be found in Supreme Court case law concerning predatory pricing. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the Supreme Court found that below-cost pricing should not be subject to potential liability under the antitrust laws unless a plaintiff shows (i) "*that the prices complained of are below an appropriate measure of its rival's costs*" and (ii) "*that the competitor had a reasonable prospect* (…) *of recouping its investment in below-cost prices*."[7] This rule was designed to decrease the risk of false positives.

9. Notably, the Supreme Court in *Brooke Group* identified below-cost pricing as an element of liability without reasoning that below-cost pricing is a necessary prerequisite to the exclusion of rivals that are, at least potentially, equally efficient, leading to consumer harm. Indeed,

3 See, e.g., Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.) ("Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve."); P. L. Joskow, Transaction Cost Economics, Antitrust Rules, and Remedies, 18 J. L. Econ. & Org. 95, 99–100 (2002) ("[T]he test of a good legal rule is not primarily whether it leads to the correct decision in a particular case, but rather whether it does a good job deterring anticompetitive behavior throughout the economy given all of the relevant costs, benefits, and uncertainties associated with diagnosis and remedies."); see generally F. H. Easterbrook, supra note 2; G. A. Manne, Error Costs in Digital Markets, in Global Antitrust Institute Report on the Digital Economy, J. D. Wright & D. H. Ginsburg, eds. (2020), 33.

4 See, e.g., Ohio v. Am. Express Co., 138 S. Ct. 2274, 2287 (2018) ("Any other analysis would lead to 'mistaken inferences' of the kind that could 'chill the very conduct the antitrust laws are designed to protect.' ") (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993)); see also T. A. Lambert & A. F. Abbott, Recognizing the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies, 11 J. Competition L. & Econ. 791 (2015); T. A. Lambert, The Roberts Court and the Limits of Antitrust, 52 B.C. L. Rev. 871 (2011).

5 See CJEU, 19 April 2012, Tomra and Others v. Commission, case C-549/10 P, ECLI:EU:C:2012:221, ¶ 79 ("The General Court was therefore justified in ruling, in essence, in paragraphs 269 to 271 of the judgment under appeal, that the loyalty mechanism was inherent in the supplier's ability to drive out its competitors by means of the suction to itself of the contestable part of demand. When such a trading instrument exists, it is therefore unnecessary to undertake an analyse of the actual effects of the rebates on competition given that, for the purposes of establishing an infringement of Article 102 TFEU, it is sufficient to demonstrate that the conduct at issue is capable of having an effect on competition, as recalled in paragraph 68 of this judgment."); CJEU, 6 October 2015, Post Danmark A/S v. Konkurrencerådet, case C-23/14, ECLI:EU:C:2015:651, ¶ 35 ("[S]uch a rebate scheme is capable of making it easier for the dominant undertaking to tie its own customers to itself and attract the customers of its competitors, and thus to secure the suction to itself of the part of demand subject to competition on the relevant market. That suction effect is further enhanced by the fact that, in the case in the main proceedings, the rebates applied without distinction both to the contestable part of demand and to the non-contestable part of demand, that is to say, in the latter case, to addressed advertising mail weighing less than 50 grams covered by Post Danmark's statutory monopoly."); CJEU, 6 September 2017, Intel v. Commission, case C-413/14 P, ECLI:EU:C:2017:632, ¶ 122 ("[T]he Commission submits that the exclusivity rebates have anticompetitive features such that it is generally unnecessary to demonstrate that they are capable of restricting competition. Thus, those rebates have a dissuasive effect on customers caused by the prospect of losing the rebates over the non-contestable share of the market. It follows that they generally restrict the customer's freedom to choose the supplier with the most attractive offer.").

6 See Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.").

7 509 U.S. at 222–24; see also Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 318–19 (2007).

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scholars have repeatedly shown that prices that are low but above cost can maintain or enhance the discounter's market power by precluding rivals that are currently less efficient from attaining the scale that would enable them to match or exceed the discounter's efficiency.[8]

10. Despite this possibility, the *Brooke Group* Court required below-cost pricing as an element of liability because "*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.* (…) *'To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result.'*"[9]

11. Thus, the overriding concern for the Supreme Court in the context of price cuts is adopting an administrable rule that avoids false positives—which would saddle consumers with higher prices and depress competition—even if this sometimes comes at the expense of permitting false negatives.[10] Furthermore, as the US Court of Appeals for the 10th Circuit has noted (citing *Brooke Group* as an example), "*most every rule proves over- or under-inclusive in some way. We often accept a degree of over- and under-inclusion as the price that must be paid for the benefits associated with a clear rule of law*."[11]

12. The *Brooke Group* rule for finding antitrust liability—animated by screening out false positives—has been extended to loyalty discounts.[12] In that context, there can be no liability unless the unit price of the product at issue, after the entire loyalty discount or rebate is applied to all the buyer's purchases, is below the seller's incremental cost.[13] Suppose, for example, that a seller's cost is $70/unit, its normal retail price is $100/unit, and it offers a 25% discount on all purchases if the buyer purchases at least 80% of its requirements from the seller. That discount is legal because the discounted unit price of $75 is above the seller's cost. Any equally efficient rival could meet that discount without pricing below cost.

13. It is, however, worth noting that this concern regarding false positives is far less prevalent in the European Union, where the Court of Justice has repeatedly ruled that above-cost pricing may infringe competition law when it is part of a plan to exclude competitors.[14] The desirability of such a rule, compared to the US presumption, largely hinges on whether one believes authorities are well situated to differentiate healthy competition from anticompetitive strategies, as well as the prevalence of anticompetitive strategies involving above-cost prices.

14. Bundled discounts, by contrast, present a more difficult context for courts to create accurate and administrable rules that enhance consumer welfare because courts must determine whether and how to guard against the exclusion of an equally efficient competitor in one product of the bundle.[15] This difficulty is exemplified by the diversity of approaches that courts have taken regarding how to address bundled discounts resulting in above-cost bundled discounts.

15. The Third Circuit, in *LePage's Inc. v. 3M*, required the defendant to adduce a pro-competitive justification for its conduct.[16] This approach threatens to chill pro-competitive bundled discounts, as offering a business justification and showing that it could not be achieved in a less exclusionary fashion can be difficult; the court's approach accordingly increases the risk of wrongly imposing antitrust liability.[17] The Ninth Circuit, by contrast, created a safe harbor for certain bundled discounts in *Cascade Health Solutions v. PeaceHealth.*[18] Under the so-called discount attribution test, there is no liability for offering a bundled discount if, after attributing the entire dollar amount of the discount to the competitive product in the bundle (i.e., the one the complaining rival produces), that product is priced above the discounter's incremental cost.

16. Of course, this overt preference for type II errors (i.e., false negatives) ultimately rests on the assumption they are overall less costly to society, in part because markets may self-correct. And this premise has faced significant criticism. For instance, Herbert Hovenkamp and Fiona Scott Morton argue that this Chicago School

8 *See generally* B. Klein, Exclusive Dealing as Competition for Distribution "On the Merits," 12 *Geo. Mason L. Rev.* 119, 122–28 (2003).

9 509 U.S. at 223.

10 See Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 451 (2009) ("To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low.").

11 *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1073 (10th Cir. 2013) (Gorsuch, J.).

12 *See*, e.g., *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000) (finding that the *Brooke Group* standard applied to challenged discounts and rejecting reliance on cases involving "*bundling or tying*" because "*only one product* (…) *is at issue here*").

13 Average variable cost, rather than marginal cost, is often used as the touchstone because it is easier to assess in the context of litigation and may be a workable proxy for marginal cost.

14 See, e.g., CJEC, 2 April 2009, France Télécom v. Commission, case C-202/07 P, ECLI:EU:C:2009:214, ¶ 109 ("Thus, the Court of Justice has held, first, that prices below average variable costs must be considered prima facie abusive inasmuch as, in applying such prices, an undertaking in a dominant position is presumed to pursue no other economic objective save that of eliminating its competitors. Secondly, prices below average total costs but above average variable costs are to be considered abusive only where they are fixed in the context of a plan having the purpose of eliminating a competitor (see AKZO v Commission, paragraphs 70 and 71, and Tetra Pak v Commission, paragraph 41).").

15 *See* A. M. Panner, Viewpoint: Bundled Discounts and the Antitrust Modernization Commission, eSapience Ctr. for Competition Pol'y, at 5–6 (2007) (highlighting the difficulty of identifying the undiscounted price of a particular product and the incremental cost of the competitive product in a multi-product bundle).

16 *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc).

17 *See* T. A. Lambert, Evaluating Bundled Discounts, 89 *Minn. L. Rev.* 1688, 1718–26 (2005).

18 *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895 (9th Cir. 2007), amended by 515 F.3d 883 (9th Cir. 2008).

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preference is based mostly on ideology.[19] But they offer no evidence that their alternative to this Chicago assumption—ideological though it may be—would be preferable.[20] There is also empirical evidence that certain practices—including rebates—can harm social welfare.[21] Others have dissected the premises underlying Frank Easterbrook's error-cost framework and suggested, among other things, that market self-corrections are often not more common than judicial ones.[22] On the other side of the debate, proponents have offered lengthy defenses of Frank Easterbrook's interpretation of the error-cost framework, notably pointing to a long history of proposed antitrust rules that failed to understand underlying market realities.[23] At the end of the day, however, courts in the United States, when confronted with these issues in actual cases, appear to have been swayed by the Chicago approach. This almost certainly reflects a perception on their part that prohibiting certain forms of above-cost pricing would prove unworkable, that doing so would deter welfare-enhancing price competition and—in the case of rebates and exclusive dealing, more generally—that the weight of evidence still cuts in favor of a relatively laissez-faire approach towards exclusive dealing.[24]

17. The preference for type II errors exhibited by US courts is certainly not universal. For instance, European counterparts have taken a significantly tougher stance regarding bundled rebates. This includes early cases, such as *Hoffmann-La Roche*,[25] as well as more recent rulings, like *Tomra*[26] and *British Airways*[27] (and, to a lesser extent, *Post Danmark*[28] and *Intel*[29]). In all of these cases, the European Court of Justice created legal presumptions and other evidentiary shortcuts that effectively dispense authorities from showing that bundled rebates ultimately harm consumers. This reflects a far more pessimistic assessment regarding the pro-competitive benefits of bundled rebates, at least when implemented by dominant companies (and thus a more positive outlook on the error costs of antitrust enforcement in this space).

18. Whether the Chicago School position—largely endorsed by courts in the US—is preferable to the European approach ultimately depends on the likelihood of anticompetitive harm resulting from aggressive pricing by dominant firms. As we explain above, our assessment is that the weight of evidence still cuts firmly in favor of the more restrained approach of US courts.[30]

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19 H. Hovenkamp & F. Scott Morton, Framing the Chicago School of Antitrust Analysis, 168 *U. Pa. L. Rev*. 1870 (2019).

20 Instead, the authors outline several instances where firms may indeed durably harm competition, but that says nothing about the underlying error costs. *See* ibid. at 1870–71 ("*Given the strong incentive that firms have to cease competing, and the strong ability they have to reduce competition in the absence of antitrust laws, it is economically naive to assume that markets will naturally tend toward competition*.").

21 C. T. Conlon and J. Holland Mortimer, Efficiency and Foreclosure Effects of Vertical Rebates: Empirical Evidence, 129 *J. of Pol. Econ*. 3357 (2021).

22 N. Petit, A Theory of Antitrust Limits, 28 George Mason Law Review 1400, 1459 (2021) ("The legal and market processes that characterize the modern era do not suggest that markets outcompete courts at the game of monopoly power dissolution.").

23 *See*, e.g., D. H. Ginsburg & J. D. Wright, Dynamic Analysis and the Limits of Antitrust Institutions, 78 *Antitrust LJ* 1 (2012). *See also*, G. A. Manne & J. D. Wright, Innovation and the Limits of Antitrust, 6 *Journal of Competition Law and Economics* 153 (2010). *See also*, G. A. Manne & J. D. Wright, Google and the Limits of Antitrust: The Case Against the Case Against Google, 34 *Harv. JL & Pub. Pol'y* 171 (2011). *See also*, G. A. Manne, The Rule of Reason as a Discovery Procedure: A Response to Ramsi Woodcock's Hidden Rules of a Modest Antitrust, 105 *Minn. L. Rev. Headnotes* 422 (2020). *See also*, G. A. Manne, S. Bowman & D. Auer, Technology Mergers and the Market for Corporate Control, *Missouri Law Review*, Forthcoming, 86 Mo. L. Rev. (2022). *See also*, G. A. Manne & D. Auer, Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins, 28 *George Mason Law Review* 1279 (2021).

24 *See*, e.g., F. Lafontaine & M. Slade, Vertical Integration and Firm Boundaries: The Evidence, 45 *J. Econ. Lit*. 629 (2007); F. Lafontaine & M. Slade, Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy, in *Handbook of Antitrust Economics*, P. Buccirossi, ed. (The MIT Press, 2008) *See also*, J. C. Cooper, L. M. Froeb, D. O'Brien & M. G. Vita, Vertical Antitrust Policy as a Problem of Inference, 23 *Int'L. J. Indus. Org*. 639, 648 (2005) ("*In reviewing this literature, two features immediately stand out: First, there is a paucity of support for the proposition that vertical restraints/vertical integration are likely to harm consumers*. (…) *Second, a far greater number of studies found that the use of vertical restraints in the particular context studied improved welfare unambiguously* (…)"); D. P. O'Brien, The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems, in *The Pros and Cons of Vertical Restraints*, Konkurrensverket Swedish Competition Authority, ed. (2008), 40, 76–81; M. E. Slade, The Effects of Vertical Restraints: An Evidence Based Approach, ibid. 12, 22 ("[Table 1 in this paper] *indicates that voluntarily adopted restraints are associated with lower costs, greater consumption, higher stock returns, and better chances of survival*."). *See also*, G. Zanarone, Vertical Restraints and the Law: Evidence From Automobile Franchising, 52 *J. L. Econ*. 691, 699 (2009) ("*Taken together, these results are consistent with the view, shared by a broad range of economic theories, that vertical restraints are used to control horizontal and vertical externalities and to coordinate the price and service decisions of independent dealers*.").

25 CJEC, 13 February 1979, Hoffmann-La Roche v. Commission, case C-85/76, ECLI:EU:C:1979:36, ¶ 7 ("An undertaking which is in a dominant position on a market and ties purchasers—even if it does so at their request—by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article 86 of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements [whether the quantity of its purchases be large or small] from the undertaking in a dominant position.").

26 Tomra, supra note 5, at ¶ 42 ("[T]he foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors. First, the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it. Second, it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand.").

27 CJEC, 15 March 2007 British Airways v. Commission, case C-95/04 P, ECLI:EU:C:2007:166, ¶ 68 ("It follows that in determining whether, on the part of an undertaking in a dominant position, a system of discounts or bonuses which constitute neither quantity discounts or bonuses nor fidelity discounts or bonuses within the meaning of the judgment in Hoffmann-La Roche constitutes an abuse, it first has to be determined whether those discounts or bonuses can produce an exclusionary effect, that is to say whether they are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners.").

28 Post Danmark, supra note 5, at ¶¶ 59-60 ("[I]n a situation such as that in the main proceedings, characterised by the holding by the dominant undertaking of a very large market share and by structural advantages conferred, inter alia, by that undertaking's statutory monopoly, which applied to 70% of mail on the relevant market, applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible. (…) Furthermore, in a market such as that at issue in the main proceedings, access to which is protected by high barriers, the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking.").

29 Intel supra note 5.

30 *Supra* notes 21 to 24.

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2. *Sanofi v. Mylan*, and the question of “non-contestable” market segments

19. Basing antitrust liability on the notion of “non-contestable” (or “entrenched”) market segments raises practical difficulties that are perhaps nowhere clearer than in the ongoing *Sanofi v. Mylan* litigation.

20. As described in the opinion of the district court, Mylan’s various discounts on its EpiPen product are properly characterized as loyalty discounts—that is, they apply to a single product (not a multi-product bundle). Accordingly, applying the *Brooke Group* safe harbor should be straightforward: unless a plaintiff can show that a particular loyalty discount constitutes actual predatory (i.e., below-cost) pricing, the court’s inquiry is at an end.[31]

21. Under *Brooke Group* and the error-avoidance principles that animate that decision, that factual finding alone is sufficient to sustain the no-liability finding with respect to Mylan’s challenged pricing behavior. The question is not whether there is any theory under which Mylan’s pricing could have had the effect of foreclosing competition by a potentially efficient competitor.[32] Instead, it is whether a rule that permits scrutiny of above-cost pricing of a single product, like the pricing challenged here, runs an unacceptable risk of false positives, such that the game is not worth the candle. The Supreme Court answered that question in *Brooke Group*—such scrutiny will deter consumer-benefiting conduct—and that answer has arguably withstood the test of time.

22. In its US district court appeal, Sanofi is arguing that Mylan’s loyalty discounts should be subjected to the sort of scrutiny that would ordinarily apply to discounts applied to multi-product bundles. The apparent theory is that a defendant may have an “entrenched” share of the market, such that rivals are capable of competing only with respect to some subset of that market. Under this theory, whatever overall discount that defendant grants to a particular purchaser should be allocated only to the supposedly “contestable” share of the market—that is, if 50% of the market is “entrenched” and 50% is “contestable,” an apparent discount of 10% on all units sold (assuming that the entire discount is lost if the purchaser makes even a single purchase from some other seller) should be treated as a discount of 20% on the “contestable” units.

23. At the outset, it is worth emphasizing that whatever one thinks of this approach, at the end of the day, any liability rule—to be consistent with *Brooke Group* and its progeny—must still require a showing that the discount (however allocated) results in below-incremental-cost sales. In other words, if the full unit price of the product is $100, the incremental cost $75, the discount in the above example would still be deemed per se lawful because, even allocating the full discount to the “contestable” units, the price remains above incremental cost.

24. In any event, there would be notable additional drawbacks to the adoption of any liability rule that depends on treating some portion of a defendant’s share of a market as “entrenched.”[33] Any such approach risks error is difficult to administer, and thus is likely to harm consumers. Chief among the administration issues created are the questions of (i) when a market segment should be deemed “non-contestable” or “entrenched” and (ii) whether an incumbent’s discounts, while nominally pertaining to non-contestable sales, should be attributed to the “contestable” part of the market. One might argue in favor of such an attribution rule that, if a market segment is truly non-contestable, it would be irrational for a putative monopolist to grant discounts on those sales (because doing so would represent a departure from profit maximization). The only explanation, purportedly, is that, in reality, those discounts are designed to protect sales made in a contestable market segment.[34]

25. One key difficulty with this approach is that (at least in the absence of a legal prohibition on competitive sales) treating any segment of the market as not contestable may distort competitors’ *ex ante* incentives. For example, to the extent that a defendant is said to have an “entrenched” share due to brand loyalty or other consumer preference, such advantages are legitimate fruits of investment in the development of such brand loyalty or reputation for quality. Treating such consumer preference as a legitimate basis for the imposition of liability will discourage such investment. Moreover, a rival who reckons that failure to penetrate some market segment

31 *See Concord Boat*, 207 F.3d at 1062–63. According to the district court, “*Mylan never priced EpiPen below its costs to produce it.*” Dist. Ct. Op. 76 (Aplt. App. Vol. 13, at 2666).

32 As Thomas Lambert observes, antitrust exclusionary conduct has been defined in at least four different ways: “For more than a decade now, antitrust commentators have debated how to define unreasonably exclusionary conduct. Four possible universal definitions have emerged: (1) Judge Richard Posner’s ‘equally efficient rival’ approach, (2) post-Chicago theorists’ ‘raising rivals’ costs’ approach, (3) the consumer welfare effects test set forth in the leading antitrust treatise, and (4) the profit sacrifice or ‘no economic sense’ test the U.S. Department of Justice (‘DOJ’) once endorsed.” T. A. Lambert, Defining Unreasonably Exclusionary Conduct: The “Exclusion of a Competitive Rival” Approach, 92 N.C. L. Rev. 1175, 1179 (2014) (footnotes omitted). While there are significant divergences between these approaches, they all entail at least some limits to ensure that antitrust enforcement does not chill welfare-increasing conduct.

33 We distinguish here between a circumstance where a defendant is said to have an entrenched share by virtue of reputation or consumer preference and situations where competing sellers are legally barred from making sales in some portion of the market as a result of regulatory restrictions or protected monopoly. Cf. *Eisai, Inc. v. Sanofi Aventis U.S.*, LLC, 821 F.3d 394, 399, 406 (3d Cir. 2016) (rejecting the argument that portion of market for drug was incontestable because competitors did not have FDA approval for certain indications, since competitors had not shown they were unable to obtain such approval).

34 This argument fails on its own terms because there may be good reasons for discounting schemes even in monopoly markets without any threat of entry. For instance, a monopolist may grant rebates on non-contestable sales as a way of price-discriminating. Not only does this not entail any profit sacrifice—price discrimination generally entails higher profits—but it can also increase consumer social welfare by expanding output. Similarly, rebates may—as here—be customer-driven, when they constitute a form of payment to an intermediary such as a pharmacy benefit manager (“PBM”). Particularly in circumstances such as those in this case, such agreements enable group purchasing organizations like PBMs to trade off product variety for volume-driven price reductions. *See*, e.g., D. A. Crane & J. D. Wright, Can Bundled Discounting Increase Consumer Prices Without Excluding Rivals?, 5 *Competition Pol’y Int’l* 209, 217 (2009) (“*PBMs* (…) *and other buyer cooperatives that strategically employ bundled discounts are organized precisely in order to solve a collective action problem. By collectively committing to trade variety for lower prices, the purchasing organization prevents the seller from exploiting the individual members’ variety preferences to obtain higher prices*.”). Accordingly, even when markets are deemed non-contestable, it is misguided to presumptively allocate rebates entirely to the contestable segment.

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will potentially give rise to a claim of unlawful foreclosure has correspondingly less incentive to compete, knowing that it can attempt to sue for damages in the event the firm's entry is unsuccessful.

26. If a defendant can avoid antitrust scrutiny only by keeping its prices higher (i.e., eschewing discounts that might be subject to scrutiny if attributed to a subset of overall sales), consumers will end up paying higher prices. In many cases, such higher prices will do nothing to promote competition in the long run, but will simply create a price umbrella for rivals to enjoy and also diminish firms' incentive to secure (supposedly) non-contestable demand by creating innovative products, educating consumers about them, and building brand loyalty. In short, a rule that attributes discounts in this fashion would dilute *ex ante* incentives to build brand loyalty and to compete vigorously for every sale, all the while preventing discounting that would provide immediate benefits to buyers. Contrary to the purpose of antitrust, consumers would be harmed in the short run and the long run.

27. This brings us to the facts found by the district court in the *Sanofi v. Mylan* litigation. It makes no difference that Mylan allegedly used its price discounts to obtain exclusive contracts with certain pharmacy benefit managers ("PBMs"). As courts have recognized for decades, every sale and every sales contract "forecloses" some portion of the market and is "exclusive" as to those sales.[35] The district court found that the exclusive contracts at issue in the case did not foreclose any portion of the market for any significant length of time, as they were short-term and easily terminable. Payors apparently invoked the termination provisions and renegotiated rebate agreements annually, and sometimes even more frequently.[36] Sales facilitated by such contracts should not be treated as somehow more pernicious than any other sales.[37] Accordingly, the mechanism a defendant may employ to obtain such contracts—if not otherwise illegitimate—should be subject to no greater scrutiny for this reason.

35 See Barry Wright Corp., 724 F.2d at 236 ("[V]irtually every contract to buy 'forecloses' or 'excludes' alternative sellers from some portion of the market[.]").

36 Dist. Ct. Op. 89 (Aplt. App. Vol. 13, at 2679).

37 *See*, e.g., *Methodist Health Servs. Corp. v. OSF Healthcare Sys.*, 859 F.3d 408, 410 (7th Cir. 2017) (finding no exclusionary effects from contracts that expired "*every year or two,*" thus "*giving other* [competitors], *such as* [plaintiff], *a shot at obtaining the next contract by outbidding* [defendant]"); 11P. E. Areeda & H. Hovenkamp, *Antitrust Law* (4th ed., Wolters Kluwer 2018) § 1807b1 ("*Discounts conditioned on exclusivity in relatively short-term contracts are rarely problematic.*").

III. Evidence of intent

28. All of the safe-harbor and attribution rules discussed above, whatever their specific content, share a significant advantageous feature: they depend on objective and at least theoretically knowable facts about prices, costs, and market characteristics. Understandably, lawyers are often inclined to consider—when evaluating the potential anticompetitive impact of challenged conduct—evidence of the defendant's subjective intent to harm rivals. It might seem natural enough that if a defendant has admitted—in documents brought to light only through the mechanism of discovery—that a particular strategy is intended to "exclude" rivals and secure the market for the defendant, such documents should be taken as strong support for imposition of liability.

29. What may seem "natural enough" is often economics in error. Evidence of a defendant's subjective intent to harm rivals cannot substitute for antitrust rules based on objective facts without sacrificing the benefits of the error-cost framework on which modern antitrust law is based. Internal business documents, particularly those reflecting on a defendant's intent, are not, of course, improper for all evidentiary purposes. But, because liability under the antitrust laws turns on the likely anticompetitive effect of conduct, and because all businesses effectively hope to engage in conduct that excludes, forecloses, or raises the costs of their competitors, internal documents reflecting such intent arguably have little bearing on establishing the requisite effects for antitrust liability.[38]

1. The role of intent

30. Intent to preserve a monopoly is no more consistent with anticompetitive exclusion than it is with run-of-the-mill price competition.[39] In other words, competing to preserve a (near) monopoly position is not the same as anticompetitively maintaining it. The district court said as much in its summary judgment decision regarding the *Sanofi v. Mylan* dispute: "*But, as our Circuit has explained, 'intent to harm a rival, protect and maximize profits, or do all the business if they can, is neither actionable nor sanctioned by the antitrust laws.'* SCFC ILC, Inc. v. Visa USA, Inc., *36 F.3d 958, 969 (10th Cir. 1994) (citation and internal quotation marks omitted);* see also A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., *881 F.2d 1396, 1401 (7th Cir. 1989) ('Firms "intend" to do all the business they can, to crush their rivals if they can.... Rivalry is harsh, and consumers gain the most when firms slash costs to the bone and pare price down to cost, all in pursuit of more business.* (...)*')*."[40]

38 *See* G. A. Manne & E. M. Williamson, Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication, 47 *Ariz. L. Rev.* 609, 650–51 (2005) ("*It would be quite impossible for us to assert that there can be no probative value, in the abstract, of adducing corporate documentary evidence to try to prove anticompetitiveness. Nevertheless, such evidence is potentially prejudicial and certainly insufficient to assess the competitive character of challenged behavior.*").

39 See, e.g., H. Hovenkamp, The Monopolization Offense, 61 Ohio St. L.J. 1035, 1039 (2000) ("[A]ny competitively energetic firm 'intends' to prevail over its actual or potential rivals. (...) Indeed, in most circumstances involving monopoly, the 'intent' to create a monopoly anticompetitively cannot be distinguished from the intent to do so competitively.").

40 Dist. Ct. Op. 102–03 (Aplt. App. Vol. 13, at 2692–93).

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31. Similarly, in *Novell*, the Court recognized this danger of false positives: "*Were intent to harm a competitor alone the marker of antitrust liability, the law would risk retarding consumer welfare by deterring vigorous competition—and wind up punishing only the guileless who haven't figured out not to write such things down*."[41]

32. In addition to this untenable risk of error, a rule predicating liability on an alleged monopolist's intent would also be unworkable. As Judge Posner once observed: "*Any doctrine that relies upon proof of intent is going to be applied erratically at best. Judges and juries don't always understand that the availability of evidence of improper intent is often a function of luck and of the defendant's legal sophistication, not of the underlying reality*."[42]

33. There are many reasons for disregarding evidence of a seller's intent. Internal communications between employees are not always a fair reflection of a company's competitive strategy—they might, for instance, mistake aggressive pricing for pricing that actually threatens anticompetitive effects. There is also a risk that documents cherry-picked from the multitude of documents that modern firms produce on a daily basis will give a false impression of a defendant's internal deliberations (and this cherry-picking is almost unavoidable, as there is otherwise an incentive for would-be defendants to produce exculpatory evidence before the fact). Finally, documents of this sort are often too imprecise to provide a useful distinction between anticompetitive conduct and legitimate price competition. This view is well encapsulated by the US Court of Appeals for the Eighth Circuit, in *Morgan v. Ponder*: "*The statements made by* [defendants] *– 'we will not be underbid'; 'we'll do whatever it takes'; 'name your price' – are prime examples of remarks which, if portrayed by plaintiffs' attorneys as damning evidence of predatory intent, may lead juries to erroneously condemn competitive behavior.* (…) *These are phrases often legitimately used by business people in the heat of competition. They provide no help in deciding whether a defendant has crossed the elusive line separating aggressive competition from unfair competition*."[43]

34. Finally, and above all, intent is a poor predictor of anticompetitive effect—harm to consumers—without which intent is largely irrelevant.[44] The intent to deploy an anticompetitive strategy says little about the actual restriction of competition.

35. This is not to say there is no defensible reason for decision-makers to rely on evidence of intent, but rather that the suitability of this approach hinges on the existence of a strong correlation between documents revealing an intent to oust rivals, on the one hand, and anticompetitive effects, on the other. We believe this correlation is, at best, very weak, but others disagree. For instance, European courts have largely embraced such evidence, especially in aggressive pricing cases. This is notably the case of the ECJ's case law on predatory pricing, which conditions anticompetitive behavior upon evidence of a "*plan to eliminate competitors*."[45] Likewise, the ECJ extended a similar reasoning to bundled rebates, with the added proviso that anticompetitive intent can be inculpatory but never exculpatory.[46] As posited above, such as approach is liable to produce false positives and chill price competition between firms.

2. *Sanofi v. Mylan*

36. Returning to the *Sanofi v. Mylan* litigation, Sanofi argues that Mylan "*resolved to crush the innovator at inception*" by raising prices to make subsequent discounts more attractive.[47] But there is no argument (and Sanofi makes none) that such conduct is prohibited under antitrust law. If Mylan reduced its prices when confronted with strong competition, such reductions benefited consumers. This is hardly less true on the assumption that prices had been elevated previously. If anything, a history of higher prices would make a rival's lower prices (even if matched by the defendant) more attractive, not less. Such competition benefits consumers. But it will benefit consumers less, not more, if a defendant is penalized for competing vigorously in response.

37. Similarly, Sanofi's argument that PBMs "couldn't refuse" Mylan's offer—even if Mylan indeed intended to make its offer irresistible—does not convert such an offer into an act of anticompetitive foreclosure. If that is the case, the primary effect of these offers was straightforwardly lower prices. The same could be said for alleged product giveaways coupled with training programs—on their face, such marketing methods benefit consumers; they do not harm them. And that is true even if one credits the claim that "*Mylan's internal documents make clear the program was 'designed primarily to further* [its] *domination of the relevant market' by strengthening network effects and solidifying its entrenched share*."[48] The proper question is not whether Mylan "designed" its program to further its market power, but whether the program did so in a way that harmed competition and consumers.

41 *Novell*, 731 F.3d at 1078.

42 R. A. Posner, *Antitrust Law: An Economic Perspective* (University of Chicago Press, 1976), 190.

43 892 F.2d 1355, 1359 (8th Cir. 1989); cf. *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 872–73 (7th Cir. 2015) (Posner, J.) (explaining why supposed "smoking gun" email was anything but).

44 We hasten to add that the goose/gander rule applies: as the Areeda & Hovenkamp treatise observes, "[w]henever a restraint appears unreasonable in the light of (…) [its] redeeming virtues and alternatives, the defendant's innocent mental state will not save it." 7 P. E. Areeda & H. Hovenkamp, Antitrust Law (2d ed., Wolters Kluwer 2003) ¶ 1506.

45 *See*, e.g., *France Télécom*, *supra* note 14, at ¶¶ 109–110.

46 Tomra, supra note 5, at ¶¶ 20–22 ("[T]he existence of any anti-competitive intent constitutes only one of a number of facts which may be taken into account in order to determine that a dominant position has been abused. (…) The existence of an intention to compete on the merits, even if it were established, could not prove the absence of abuse.").

47 Sanofi Br. 17.

48 Sanofi Br. 55–56.

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38. The upshot is that intent is usually not a substitute for economic evidence of actual anticompetitive foreclosure.

IV. Conclusion

39. As this paper has explained, prosecuting loyalty rebates—and other price-related antitrust behavior—entails significant pitfalls for antitrust policymakers. The reason is simple: low prices are one of the key benefits antitrust law seeks to promote. And yet, when it comes to low prices, anticompetitive strategy is almost indistinguishable from strong competition. There is thus a significant risk that poorly tailored antitrust rules would chill firms' incentives to compete.

40. These difficulties largely explain why, unlike its European counterpart, the US Supreme Court has deliberately—and rightly, in our opinion—erred on the side of caution. Any rule will, almost by definition, be either over or under-inclusive. In the context of price-related theories of harm, the US Supreme Court concluded that, of those two risks, false negatives are the preferable harm. This led it to design rules that mostly curtail liability to instances where firms charge prices below cost, even though it is clear that anticompetitive harm can occur outside of those narrow circumstances. As we have argued, this should also prompt antitrust policymakers and courts to reject largely unworkable concepts, like the notion of non-contestable market segments (and at least as Sanofi would have it applied in the context of its antitrust complaint). Likewise, these circumstances aver against antitrust law relying upon unreliable evidence, such as firms' intent to foreclose competitors (most of the time, such evidence is at least as consistent with legitimate price competition).

41. In short, we argue that Frank Easterbrook's "The Limits of Antitrust" remains as relevant today as when it was written, almost forty years ago. It still is the definitive guide to antitrust policymaking. And yet, it remains extremely poorly understood by its critics. ■

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