2010

Unilateral, Anticompetitive Acquisitions of Dominance or Monopoly Power

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UNILATERAL, ANTICOMPETITIVE ACQUISITIONS OF DOMINANCE OR MONOPOLY POWER

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The prohibition of certain types of anticompetitive unilateral conduct by firms possessing a substantial degree of market power—variously called "monopolists" or "dominant firms"—is a cornerstone of competition law regimes worldwide. Yet, notwithstanding the social costs of monopoly—which may include output reduction and higher prices, limited choices for consumers, and diminished incentives for innovation[1]—modern legal regimes refrain from prohibiting it outright. They do not condemn mere monopoly,[2] both because the rewards associated with substantial market power stimulate competition and innovation and since monopolies may sometimes be more efficient than their smaller competitors.[3] Instead, competition laws prohibit monopolies or dominant firms from engaging in those types of anticompetitive conduct that amount to "monopolizing"[4] or to an "abuse of dominant position."[5]

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[1] *See, e.g.*, 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 631, at 71 (3d ed. 2008); *see also* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 63–78 (1988) (reviewing the costs of monopoly).

[2] Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911) (stating that the Sherman Act does not forbid mere "monopoly in the concrete").

[3] *E.g.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."). *See generally* 3 AREEDA & HOVENKAMP, *supra* note 1, ¶ 631 (3d ed. 2008).

[4] 15 U.S.C. § 2.

[5] Treaty on the Functioning of the European Union, art. 102, May 9, 2008, 2008 O.J. (C 115) 47 (effective Dec. 1, 2009) [hereinafter EU Functioning Treaty]. As of December 1, 2009, the Treaty of Lisbon became effective and introduced a renumbering of the

Importantly, anticompetitive conduct can take place both on the road to monopoly and, later on, once substantial market power has been achieved. Thus, the accepted standard in the United States for monopolizing conduct prohibits "the willful acquisition or maintenance" of monopoly power,[6] in reference to these two distinct categories of anticompetitive conduct.

Yet the seeming parallelism between the two conduct categories of "monopoly acquisition" on the one hand and "monopoly maintenance" on the other is not borne out by the reality of U.S. antitrust law. To the contrary, casual observation suggests that only a fraction of monopolization enforcement actions, case law, and scholarly discourse over more than a century of antitrust in the United States has concerned anticompetitive acquisitions of monopoly rather than its maintenance.[7]

Moreover, the emphasis on monopoly maintenance rather than acquisition in the United States is further exceeded by the European Union's competition law regime that does not at all prohibit anticompetitive unilateral acquisitions of dominance.[8] In other words, while in the United States some unilateral anticompetitive acquisitions of monopoly are illegal, even if not often prosecuted or even examined, a non-dominant firm may obtain dominance through unilateral anticompetitive conduct without risking violating European competition law.

This somewhat puzzling state of affairs may be partly attributed to those pervasive concerns of modern antitrust regimes about the potential chilling effects of "false positives"—namely, enforcement actions

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articles in the Treaty Establishing the European Community. Relevant to the discussion here, Article 82 is now Article 102. However, for ease of reference, I will continue to use the prior numbering in my discussion.

6 United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966). *See also* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (discussing "any purpose to create or maintain a monopoly").

7 Although quantitative evidence on this point is not readily available, the emphasis on monopoly maintenance over its acquisition has been noted by some scholars. *See* Timothy J. Brennan, *Saving Section 2: Reframing U.S. Monopolization Law, in* THE POLITICAL ECONOMY OF ANTITRUST 417, 424–25 (Vivek Ghosal & Johan Stennek eds., 2007) (noting and criticizing this emphasis).

8 *See, e.g.*, Case 247/86, Alsatel v. Novasum, 1988 E.C.R. 5987, ¶ 23 (Eur. Ct. Justice) (ECJ holding that potentially abusive practices are not prohibited where a non-dominant undertaking is concerned); Case T-17/93, Matra Hacette v. Comm'n, 1994 E.C.R. II-595, ¶¶ 123–124 (Ct. First Instance) (CFI noting, inter alia, that the achievement of dominance is not prohibited under Article 82); *see generally* RICHARD WHISH, COMPETITION LAW 173 (6th ed. 2009) ("Article 82 applies only where one undertaking has a 'dominant position' or where two or more undertakings are 'collectively dominant.'") (footnote omitted); Carles Esteva Mosso et al., *Article 82, in* THE EC LAW OF COMPETITION 313, 314–15 (Jonathan Faull & Ali Nikpay eds., 2d ed. 2007) (noting the same and explicitly stating that "[a]rticle 82 does not prevent the mere creation . . . of a dominant position.").

and judicial decisions that erroneously condemn procompetitive unilateral conduct as monopolization.[9] The limited legal attention to the unilateral acquisition of substantial market power may also stem from the perception that its anticompetitive effects are often insignificant—given the limited market power of its non-monopolist, even nondominant, perpetrators. In the same vein, because successful anticompetitive conduct in traditional markets often results in incremental accretions of market power, legal regimes may consider it sufficient to address it once its perpetrators have reached dominance or near-monopoly.

These explanations, however, which only account for certain categories of conduct, do not justify a complete neglect of monopoly acquisition by non-dominant firms through unilateral conduct. Thus, concerns regarding false positives are more significant for pricing behavior, for instance, than for abuses of governmental processes.[10] And even where the chilling effects of false positives are significant, they must be balanced against the harms of "false negatives"—that is, of anticompetitive conduct the law fails to prohibit.[11] Similarly, while the harmful effects of certain types of unilateral conduct—like tying—depend on the market power of the firms employing them,[12] other types of conduct—such as fraudulent patent infringement suits—may generate significant compet-

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[9] These concerns have been manifested clearly in recent U.S. jurisprudence. *See, e.g.*, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 325 (2007) (noting the serious risk of "chilling procompetitive behavior" when Section 2 conduct standards are set too low); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 414 (2004) (similar concerns cited to justify the Court's caution in applying Section 2 to unilateral refusals to deal).

[10] *Compare* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226–27 (1993) (emphasizing the importance of fashioning Section 2 standards that avoid chilling aggressive price cutting), *with* ROBERT H. BORK, THE ANTITRUST PARADOX 159 (1978) (stating that "[m]isuse of courts and governmental agencies is a particularly effective means of delaying or stifling competition").

[11] Notably, the legal discourse adopting a decision-theoretic framework in antitrust has been decidedly one-sided, rarely voicing concerns regarding the risks of false negatives. For two notable exceptions in the Section 2 context, see EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 230 (2007) ("The question then becomes what set of legal rules would achieve the optimal result by minimising the total harm from underdeterrence and overdeterrence.") (footnote omitted), and Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 5 (2004) (arguing that tolerant Section 2 standards may "lead to 'false negatives. . .'").

[12] While the effects of tying are complex, the leading theories of anticompetitive harm concern firms with a monopoly in the tying product market. *See, e.g.*, Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990); Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194 (2002); *see also* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397 (2009) (discussing at length the various effects of tying and their prerequisites).

itive harm when employed by non-monopolists, even those possessing little market power when the conduct takes place.[13] And in contrast to the commonly incremental increases in market power that occur in many industries, some forms of conduct—such as the abuse of standard-setting processes and other forms of regulatory gaming—may lead to swift transition from non-dominance to dominance and even to monopoly,[14] especially in network markets or "new economy" industries,[15] as explained in greater detail below.

Therefore, although an expansive prohibition of unilateral acquisition conduct may well be undesirable, legislators should give careful consideration to its potential harms before either permitting it altogether or merely posing few constraints on conduct even when it leads or is likely to lead to monopoly. Such consideration would be particularly timely, both because lawmakers around the world increasingly adopt the European Union's approach to abuse of dominance with its non-regulation of unilateral acquisition conduct,[16] and since new economy markets have become more important to world economies and thus to their competition policy regimes.

To this end, this article develops an analytical framework for evaluating the legal regulation of unilateral, anticompetitive acquisitions of dominance or monopoly power, thereby providing a more coherent account than is currently available for the extant EU and U.S. approaches

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[13] *See, e.g.*, 3 AREEDA & HOVENKAMP, *supra* note 1, ¶ 651f, at 123 (providing this example for "conduct challenged as exclusionary [that] could be profitable for either a monopolist or a nonmonopolist"); *see generally* Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005); *see also infra* notes 68–72 and accompanying text.

[14] *See, e.g.*, Creighton et al., *supra* note 13; Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685 (2009) (discussing the related notion of "regulatory gaming" and arguing that the risk of such private behavior that exploits regulatory processes and institutions for exclusionary purposes justifies an oversight of regulated industries by the antitrust laws); *see also infra* notes 69–71 and accompanying text.

[15] Some of the main characteristics of these industries include high rates of innovation, network effects, the importance of compatibility and standardization, the centrality of IP rights, and more. *See, e.g.*, Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property*, 68 ANTITRUST L.J. 913 (2001) (examining the high-tech sector); Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925 (2001) (considering the software, Internet, and communications industries); Christian Ahlborn et al., *DG Competition Discussion Paper on Article 82: Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries* (Mar. 2006) (referring to the high-tech and innovation industries), *available at* http://ssrn.com/abstract=894466.

[16] *See, e.g.*, Michael W. Nicholson, *An Antitrust Law Index for Empirical Analysis of International Competition Policy*, 4 J. COMPETITION L. & ECON. 1009, 1021 (2008) (noting that "many transition economies have simply adopted language from the Treaty of Rome for their domestic laws . . . ."); *see generally* Michal S. Gal & A. Jorge Padilla, *The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy*, *infra* this issue, 76 ANTITRUST L.J. 899, 903 n.19 (2010).

in this area. This framework also permits a critical evaluation of these two regimes, showing how the lack of any liability for unilateral, anticompetitive, acquisitions of dominance in Europe not only leaves this regime unable to address some harmful unilateral practices but also leads to various distortions in its other unilateral conduct policies. Turning to the United States, this article shows its monopolization regime suffers some significant limitations, although it is potentially capable of addressing extreme instances of harmful unilateral conduct by non-monopolists. Finally, the analysis concludes by drawing together the lessons from the critical evaluation of the EU and the U.S. approaches for the appropriate design of unilateral conduct regimes worldwide.

I. THREE DIMENSIONS OF UNILATERAL CONDUCT REGIMES

If anticompetitive unilateral conduct is to be efficiently regulated, the social harm it generates must be weighed against the costs involved in its regulation. Competition laws may refrain from universally regulating or prohibiting monopolies if the significant social costs of mere monopoly are outweighed by the efficiency benefits of some monopolies, the incentives provided by the prospect of monopoly profits to market participants, and the dramatically large costs of such regulation.[17] At the same time, most legal regimes reflect the view that some anticompetitive unilateral conduct is sufficiently harmful to warrant its legal prohibition and regulation, despite the significant costs involved.[18] Yet such regulation inevitably faces the difficulty of distinguishing between anti- and procompetitive unilateral behavior, a difficulty that in turn increases the rate of enforcement and judicial errors, with their attendant chilling effects on beneficial competition.[19] These consequences are especially problematic, moreover, in the case of unilateral conduct, the most common and fundamental building block of market activity.

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[17] *See, e.g.*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 95–105 (4th ed. 2005) (describing the costs and benefits of monopoly); Mark Armstrong & David E.M. Sappington, *Recent Developments in the Theory of Regulation, in* 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 1557, 1605–06, 1639–40 (Mark Armstrong & Robert H. Porter eds., 2007) (summarizing some costs and limitations of optimal monopoly regulation and simple, practical regulatory strategies, respectively).

[18] *See, e.g.*, ELHAUGE & GERADIN, *supra* note 11, at 235 ("Virtually all the antitrust laws issued by the different nations cover unilateral conduct by firms holding some degree of market power.").

[19] *E.g.*, Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 357 (2003) (arguing that "for now the costs of false positives when dealing with exclusionary-practices claims seem very high—for a false positive means we will confuse real competition with exclusion, and thus harm consumers").

To better address these challenges, legal regimes can vary the specific contours of their unilateral conduct approaches within three dimensions—namely, (1) the type of conduct regulated; (2) the market power threshold for liability; and (3) the relationship between conduct and market power. First, they can limit the situations in which liability may be imposed on firms to specific types or categories of unilateral conduct or, conversely, they can impose general conduct liability but exempt limited types or categories of conduct. Such conduct-based liability can be flexible, targeting only practices whose potential anticompetitive effects justify intervention, and may take a variety of forms, from narrowly tailored rules to open-ended standards.[20]

As scholars have observed, unilateral conduct rules that prohibit specific, enumerated practices increase certainty and reduce the rate of false positives.[21] At the same time, narrow, bright-line rules that cannot capture the complexity of dynamic markets and the ever-changing variety of anticompetitive behavior within them may fail to prevent higher rates of false negatives.[22] General conduct standards, on the other hand, can make illegal any anticompetitive unilateral conduct, or certain categories thereof, without further specification. Such standards, however, generate a mirror-view set of benefits and costs when compared to specific rules, providing flexibility and reducing false negatives, while dramatically increasing uncertainty and false positive effects.[23]

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[20] *See, e.g.*, GIORGIO MONTI, EC COMPETITION LAW 16–18 (2007) (providing a basic account of the effects of rules versus standards in competition law); Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 81–101 (2007) (examining in depth the relative benefits and costs of rules and standards in antitrust); *see generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (providing an economic analysis of the respective costs and effects of rules versus standards).

[21] Assuming these rules are tailored to capture only anticompetitive conduct. *See, e.g.*, ELHAUGE & GERADIN, *supra* note 11, at 230 (suggesting that such an approach may be reflected in the U.S. approach to price discrimination). In reality, however, since conduct may have ambiguous competitive effects, rules that provide clear guidance regarding the legality of behavior may still condemn benign or procompetitive conduct. *Cf.* Crane, *supra* note 20, at 84–91 (examining under- and over-inclusion in antitrust rules and arguing the latter is a more severe problem).

[22] *Cf.* Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C. Cir. 1998) ("'Anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all . . . [its] varieties."). *But see* Crane, *supra* note 20, at 70 (criticizing the increasing adoption by the courts of this and similarly spirited statements to justify the excessive use of flexible, "post hoc decision making"), 82 (arguing that this "maxim does not make sense as applied to archetypal industrial behavior that is frequently the subject of antitrust litigation").

[23] *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12–13 (1984) (lamenting the high litigation costs generated by the rule of reason standard); *see also* KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION

Of course, specific rules and general standards may be combined, whether for unilateral conduct generally or for particular conduct types, in an attempt to maximize the efficiency of conduct-based regulation. When using both rules and standards, for instance, legal regimes can vary the level of required proof, demanding more proof for standards-based as compared to rule-based liability.[24] In such combined regimes, moreover, the reliance on rules may be limited, say, to a small number of better understood classes of anticompetitive conduct.

Whether rules or standards are concerned, however, the greater flexibility of regulation within this first, conduct-based, dimension must be traded against its implementation and error costs. Were conduct-based regulation used alone and thus applied uniformly to all market participants, regardless of market power, these costs would have been large indeed. It is therefore unsurprising that legal regimes commonly turn to a second dimension of unilateral conduct regulation, limiting such liability to firms that exceed a certain market power threshold.[25]

Within this second dimension, legal regimes can use different market power thresholds, thereby shielding the great majority of firms from unilateral conduct liability and its attendant chilling effects. At the most basic level, distinguishing between above- and below-threshold firms may be justified by the social costs associated with the very possession of substantial market power.[26] Some unilateral practices, moreover, can generate significant anticompetitive harm only when employed by firms

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129–31 (2003) (examining the respective false negatives and false positive effects of per se rules versus rule of reason standards). Note, however, that this effect of standards may also reverse itself, if courts and enforcers consistently construe standards narrowly. *Cf.* Jordi Gual et al., *An Economic Approach to Article 82 Report by the European Advisory Group on Competition Policy* 5 (GESY—Governance and the Efficiency of Economic Systems, Discussion Paper No. 82, July 2005) (arguing, when developing the case for an effects-based approach to Article 82, that the abandonment of a form-based approach—i.e., one that is typically based on rules—need not entail a loss of predictability and should increase consistency and reduce false positives), *available at* http://www.sfbtr15.de/dipa/82.pdf.

[24] For instance, standards may call for proof of competitive effects at the same time that narrower rules may demand only evidence of particular conduct, as has been the case under the traditional per se versus rule of reason distinction in U.S. antitrust law. *See, e.g.*, LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 217–27 (2d ed. 2006) (briefly reviewing the development of these doctrinal categories).

[25] *Cf.* ELHAUGE & GERADIN, *supra* note 11, at 230 (noting how limiting unilateral conduct liability "to firms with some high degree of market power" shields from such liability the bulk of firms that might otherwise be overdeterred "and focuses on the set of firms for which the concern about underdeterring undesirable conduct is greatest"). Some regimes go further and employ market shares as proxies for market power thresholds. *See generally* MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES 66 (2003) (providing examples of market power and market share thresholds around the world).

[26] *See* 3 AREEDA & HOVENKAMP, *supra* note 1, ¶ 631, at 71; *see also* TIROLE, *supra* note 1.

possessing substantial power. Importantly, however, the use of thresholds will be justified despite the appreciable anticompetitive effect of some below-threshold activities when the costs of universally regulating unilateral conduct outweigh its benefits.

Hence, when adopting market power thresholds, legal regimes must trade off the relevant benefits and costs of thresholds against one another. On the one hand, higher thresholds reduce the incidence of antitrust enforcement generally and false positives specifically, along with their attendant costs, while lower thresholds tend to generate the opposite effects. On the other hand, higher thresholds—such as those employed by U.S. antitrust law—also shield the unilateral conduct of a larger proportion of firms, sometimes even ones with significant degrees of market power. Because they are based on the characteristics of firms rather than their conduct, however, thresholds apply uniformly to all types of conduct. Consequently, higher thresholds generate more instances of false negatives, especially for conduct that can be harmful irrespective of market power.[27]

Taking these tradeoffs into account, legal regimes typically combine the important but somewhat crude use of thresholds with more flexible conduct-based regulation. Such combinations can further reduce enforcement and error costs, moreover, by providing above-threshold firms additional protection from antitrust liability. Yet, while the joint use of thresholds and conduct-based regulation can assist in designing more efficient competition law regimes, it necessarily retains the inherent uniformity of thresholds. This uniformity, in turn, generates significant social costs, since some types of behavior—for instance regulatory gaming—can cause much harm regardless of their perpetrators' market power.[28] The anticompetitive effects of other conduct-types, such as exclusive dealing, may depend on market power yet exert significant harm even when carried out by below-threshold market participants in some circumstances.[29]

[27] The effects of thresholds also vary with their certainty. For instance, more uncertain thresholds impose a risk on near-threshold firms and generate additional chilling effects.

[28] *See* Creighton et al., *supra* note 13.

[29] In the case of exclusive dealing this such harm may result from the cumulative foreclosure of a significant portion of the downstream market by more than one below-threshold upstream firm. *E.g.*, 11 HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1821c, at 177 (2d ed. 2005). It may also occur when a below-threshold, upstream firm finds foreclosure of the downstream market economically attractive. *See* Brennan, *supra* note 7, at 431–33 (arguing that the monopolization of a market for a complement can also be achieved by a nondominant firm acquiring the ability to target rivals or even by someone not in the primary market at all, with harmful competitive effects).

At times, however, a third dimension that builds on the temporal relationship between the first two dimensions can be used to structure more efficient competition law regimes. Specifically, prohibitions of anticompetitive unilateral conduct can apply not only after a firm exceeds a market power threshold—as is commonly done when the conduct-based and threshold-based regulation are combined—but also beforehand. Pre-threshold regulation may be directed at the anticompetitive conduct through which a below-threshold firm obtains, or seeks to obtain, above-threshold market power, such as a dominant position or a monopoly. In fact, the U.S. Sherman Act's prohibition of monopolizing conduct has been interpreted to include the regulation of some pre-threshold conduct.[30]

By using this third dimension, legal regimes can reach important classes of anticompetitive unilateral conduct without resorting to pure conduct-based regulation and relinquishing the benefits of thresholds altogether. Specifically, pre-threshold regulation can address unilateral conduct that is capable of harming competition even when employed by firms with near-threshold or even lower levels of market power. Such rules can also prevent those market distortions and efficiency losses that result from the mere possession of above-threshold market power by firms that obtained their power by illicit means.

Nevertheless, as with the other dimensions, pre-threshold regulation is not without its enforcement and error costs. In fact, these costs are likely to be much more significant for pre-threshold than for post-threshold regulation, since they impose potential liability on a larger set of market participants. At the same time, however, these costs will be more limited than the unbearable costs an extreme, threshold-free regime would have generated, yet provide competition law with an increased reach in the face of particularly harmful conduct.

Importantly, pre-threshold liability is also inherently constrained by its causal connection to the ultimate acquisition of above-threshold market power. It captures only unilateral conduct that led—or would have been likely to lead if unstopped—to the acquisition of dominance or monopoly power.[31] Of course, where market power is only likely to be acquired yet not acquired in fact, one must also determine the degree of likelihood necessary for pre-threshold liability to attach. In general, where

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[30] *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

[31] *Cf.* 3B AREEDA & HOVENKAMP, *supra* note 1, ¶ 803a, at 398 (noting that "[w]hen dealing with defendants who lack monopoly power at the time of their anticompetitive conduct, evidence of causation is particularly critical. The question is whether the challenged conduct . . . has led or would lead to monopoly power").

substantial market power was not acquired, the high costs associated with such liability militate against demanding merely a low likelihood of success, which would threaten altogether to eliminate the crucial screening role of thresholds. Hence, allegedly anticompetitive pre-threshold conduct should at least be likely to lead to the acquisition of above-threshold market power. Furthermore, competition law regimes can adjust their pre-threshold liability—and limit its costs—where above-threshold power was not acquired in fact by demanding different levels of likelihood.[32]

The substantial costs of pre-threshold regulation can be further reduced, moreover, by making concomitant cost-reducing adjustments in the threshold dimension. Thus, having incorporated a pre-threshold element, legal regimes can significantly reduce costs by raising thresholds, all the while retaining a selective pre-threshold reach that can capture unilateral anticompetitive acquisitions of above-threshold market power. This may be illustrated by the U.S. monopoly threshold, which is higher than its European dominance counterpart but accompanied, at least in principle, by the compensatory use of pre-threshold monopolization liability.

In addition to remedying some shortcomings of threshold-based regulation, a pre-threshold approach can partially solve certain problems with above-threshold, conduct-based regulation. For example, legal regimes may find exploitative conduct by above-threshold firms socially harmful, yet refrain from regulating it due to heightened error-related concerns or because such conduct is expected from profit-maximizing firms. Pre-threshold regulation, however, can partly ameliorate these harms by limiting the legal exploitation of above-threshold market power to those firms that did not reach their position through anticompetitive means.

All in all, therefore, by enriching the basic combination of conduct- and threshold-based regulation with select pre-threshold elements, competition law regimes can develop more flexible and efficient approaches to unilateral conduct. The specific combination chosen by a given legal system, however, should reflect both its antitrust policy preferences and its beliefs regarding the relative benefits and costs of unilateral conduct

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[32] As illustrated by the requirement of U.S. antitrust law that allegations of the attempted monopolization offense show, inter alia, "a dangerous probability of achieving monopoly power." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993). However, U.S. case law has incorporated a market-power threshold into the "dangerous probability" element of the attempted monopolization offense. 3B AREEDA & HOVENKAMP, *supra* note 1, ¶ 807c, at 436–41.

rules. Part II therefore illustrates the insights provided by the three-dimensional framework through an analysis of current EU and U.S. unilateral conduct regimes.

II. A THREE-DIMENSIONAL PERSPECTIVE ON THE U.S. AND EU REGIMES

The three-dimensional framework not only clarifies the relationship among different elements of unilateral conduct regimes, but also highlights the special role of pre-threshold liability within this model. Specifically, a superficial, two-dimensional comparison of the U.S. and EU regimes may suggest they use dramatically different approaches to unilateral conduct regulation generally and anticompetitive market power acquisitions specifically. A three-dimensional perspective, however, reveals the differences between the two regimes to be less pronounced, if still significant.

When considering only the first two dimensions—of conduct- and threshold-based regulation—the U.S. unilateral conduct regime appears far more permissive than its EU counterpart.[33] Commentators have offered various explanations for this systematic difference based on the two regimes' diverging values and beliefs. That is, modern U.S. antitrust law sees its mission as the protection of efficient markets and the competitive process. While sharing these concerns, the EU's regime, on the other hand, is also driven by fairness considerations and sometimes seeks to protect individual competitors as well as competition writ large.[34]

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[33] *See, e.g.*, William J. Kolasky, *What Is Competition? A Comparison of U.S. and European Perspectives*, 49 ANTITRUST BULL. 29, 40–53 (2004) (also noting that the divergence between the two regimes is most apparent in the area of dominant firm regulation); Keith N. Hylton, *Section 2 and Article 82: A Comparison of American and European Approaches to Monopolization Law* 7 (Law & Economics Working Paper No. 06-11, May 2006) ("Viewed in light of the American experience, Article 82 reflects a less conservative, more interventionist approach toward antitrust law."), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902655; *see also* Michal S. Gal, *Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief About Monopoly?*, 49 ANTITRUST BULL. 343, 345–46 (2004) (making this observation in the context of monopoly pricing). *But see* ELHAUGE & GERADIN, *supra* note 11, at 234 (arguing that despite appearances "[t]he European conduct standard may . . . be more lenient than some of these [U.S.] standards and tougher than others").

[34] *See, e.g.*, Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 981, 983–85 (1986) (also discussing the different historical background and paths of the two regimes); Gal, *supra* note 33; Per Jebsen & Robert Stevens, *Assumptions, Goals, and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union*, 64 ANTITRUST L.J. 443, 454–61 (1996) (comparing the goals and policies of the U.S. and EU dominant firm regimes); *see also* Mosso et al., *supra* note 8, at 315–16; MONTI, *supra* note 20, at 20–52

These value differences are reinforced, moreover, by the two regimes' differing beliefs, for where the current U.S. approach emphasizes the costs of false positive and their effects on markets,[35] the EU is also concerned about the risks of false negatives and underdeterrence.[36] Furthermore, the U.S. regime reflects a greater degree of faith in the ultimate efficacy of markets on the one hand and the severe limitations to beneficial governmental intervention on the other. The balance of judgment embodied in its EU counterpart, however, is very different, revealing stronger faith in the potential of government action and a weaker belief in the power of market forces alone to generate efficient results.[37]

Together, the regimes' differences of value and belief shape their respective policies. With regard to conduct-based regulation, U.S. antitrust law only prohibits firms with substantial market power from engaging in behavior that is exclusionary.[38] At the same time, the European Union holds firms liable for abuse of dominance for conduct—such as excessive pricing—that merely exploits their dominance without maintaining or extending it.[39]

Moreover, beyond imposing liability on dominant firms for an additional category of conduct, EU competition law gives a significantly broader meaning to its prohibition of exclusionary abuse.[40] Thus, EU competition law holds that a dominant firm "has a special responsibility not to allow its conduct to impair undistorted competition on the com-

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(respectively providing summary and detailed reviews of the core values of Article 82 and European competition law).

[35] *See, e.g.*, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 325 (2007); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 414 (2004).

[36] *E.g.*, Hylton, *supra* note 33, at 9 (stating, when discussing predatory pricing that "[t]he American approach puts a great deal of weight on the costs of false convictions. . . . The European approach puts more emphasis on the costs of false acquittals."). This is reflected, for instance, in the often-repeated statement of the European Court of Justice that a dominant firm "has a special responsibility *not to allow its conduct to impair genuine undistorted competition* in the common market." Case 322/81, Michelin v. Comm'n, 1983 E.C.R 3461, ¶ 57 (Eur. Ct. Justice) (emphasis added).

[37] *E.g.*, Gal, *supra* note 33; Kolasky, *supra* note 33.

[38] *See, e.g.*, 3 AREEDA & HOVENKAMP, *supra* note 1, ¶ 650a, at 90 (stating that in "the monopolization offense, the relevant conduct is often described as 'exclusionary'. . .").

[39] *E.g.*, Mosso et al., *supra* note 8, at 348 (stating that "[i]t is now established that . . . [Article 82] covers both exclusionary and exploitative practices by dominant undertakings"); Rhodri Thompson & John O'Flaherty, *Article 82, in* BELLAMY & CHILD EUROPEAN COMMUNITY LAW OF COMPETITION 909, 952 (Peter Roth & Vivien Rose eds., 6th ed. 2008) (explaining that Article 82 encompasses both exclusionary and exploitative abuses).

[40] *See, e.g.*, Jebsen & Stevens, *supra* note 34, at 487–512 (reviewing the broader scope of liability for abuse generally and specific practices in the areas of pricing and refusals to deal in the European Union as compared to the United States).

mon market."[41] Consequently, EU liability for exclusionary conduct may attach even to acts that only harm specific competitors of the dominant firm rather than distort the market as a whole.[42] Furthermore, this generally expansive approach to exclusionary conduct has also led the European Union to construe specific types of exclusionary conduct—such as predatory pricing or bundled rebates—more broadly than the comparable offenses in U.S. antitrust law.[43]

Finally, the basic structure of Article 82 combines an open-ended prohibition on abuse of dominant position with a rule-like list of specifically enumerated examples of abuses.[44] These examples, while not exhaustive, impose liability for certain forms of dominant firm behavior, such as unfair pricing and trading conditions, price discrimination, tying, and more.[45] In the United States, in contrast, the common-law, open-ended monopolization standard of Section 2 incorporates no explicit rule-like elements.[46] And although over time the U.S. courts have developed

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[41] *Michelin*, 1983 E.C.R 3461, ¶ 57.

[42] *See* Mosso et al., *supra* note 8, at 348 (stating that the European Union's "early approach has often been to protect the economic freedom of other players in the market; particularly competitors," while noting the ongoing debate about the justification of this approach); *id.* at 351–52 (noting that the elimination, sometimes even only the weakening, of a single competitor sufficed for a finding of abuse by the European Court of Justice, occasionally even where the concerned conduct was "not at all likely to affect market structure and, therefore, the degree of competition in the market"); MONTI, *supra* note 20, at 173 (observing that "[t]he most common concern in EC competition law has been practices that force rivals out of markets and/or prevent the entry of new rivals"); WHISH, *supra* note 8, at 191 (noting that "[c]ritics of the way that Article 82 is applied in practice often argue that it has been, and is, used to protect competitors, including inefficient competitors, rather than to protect competition."). *But see* the more recent approach reflected in the European Comm'n, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, ¶ 54 (2005) [hereinafter *DG Competition Discussion Paper*] (stating that "it is competition, and not competitors as such, that is to be protected"), *available at* http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf.

[43] *See, e.g.*, Jebsen & Stevens, *supra* note 34, at 487–512 (comparing pricing practices and refusals to deal in the European Union and the United States); Hylton, *supra* note 33, at 7–9 (same).

[44] The abuses enumerated in Article 82 cannot be considered rules in a strict sense, both because they contain open-ended, standard-like elements, such as "unfair" prices, and since they all require varying degrees of judgment and classification of different conduct elements. *Cf.* Crane, *supra* note 20, at 71–80 (discussing the inherent indeterminacy and malleability of antitrust rules, focusing on the example of the per se prohibition of price fixing in the United States and concluding that liability still differs significantly depending on whether "rules" or standards are employed).

[45] *See, e.g.*, VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 135 (9th ed. 2007) (describing the list of examples in Article 82).

[46] Thus, Section 2 makes it illegal to "monopolize" without providing further detail (15 U.S.C. § 2), having left the courts to give concrete content and structure to the offense over time. *See* William F. Adkinson, Jr. et al., *Enforcement of Section 2 of the Sherman Act: Theory and Practice* 16 (FTC & Dep't of Justice, Working Paper on Section 2 Hearings, Nov.

many detailed and complex doctrines, their fundamental values and beliefs have led them, at least in recent decades, to restrict the exclusionary conduct liability of monopolists rather than to expand it.[47]

The systematic differences between the two regimes are also apparent in the second, threshold-based dimension, where the U.S. approach again appears more permissive than its European counterpart. The standard EU definition of dominance is "the power to behave to an appreciable extent independently."[48] On the other hand, to be of concern for monopolization law in the United States market power must be "both substantial in magnitude and durable."[49]

These somewhat different definitions translate in practice to significantly diverging market share thresholds, with U.S. precedent suggesting a lower bound of at least 50 percent, and typically more—in the range of 70 percent and above—before a firm will be deemed to possess

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3, 2008) ("Section 2's brief language offers little guidance in identifying prohibited conduct. Rather than defining its central concept—'monopolize'—the statute leaves that task to the courts. Their analysis has evolved over time, reflecting changes in business practices and market characteristics and the evolution of economic thinking."), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/section2overview.pdf; *see also* Crane, *supra* note 20, at 66 ("Monopolization law has always been more flexible and fact-sensitive. . . . Section 2 . . . contains no clear target [for adjudication] because all of a firm's amorphous conduct may be relevant to answering the question whether it unlawfully monopolized.")

47 Thus, one review summarizes this dynamic as follows:

> Generally, the trend has been towards shrinking the scope of section 2 liability, and giving dominant firms more leeway in pricing, product development, and other business strategies. This shrinkage has occurred virtually across the spectrum of section 2 offenses, as economic thinking and legal learning has cast doubt on the more interventionist approach of earlier years.

Adkinson et al., *supra* note 46, at 16 (citation omitted). *See also* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 3 (noting this development since the 1970s); *id.* at 14–15 (stating that "[t]he double helix of [Chicago/Harvard] ideas does not preclude enforcement, but it has supported the creation of presumptions that elevate the hurdles that antitrust plaintiffs must clear to prevail in the courts").

48 Case 27/76, United Brands v. Comm'n, 1978 E.C.R. 207, ¶ 65 (Eur. Ct. Justice) (defining dominance as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"). More recently, however, this definition increasingly has been linked to a requirement of substantial market power. *See, e.g.*, *DG Competition Discussion Paper*, *supra* note 42, ¶ 28 (explaining that the standard definition translates, in the case of single dominance, as "whether [the allegedly dominant undertaking] holds substantial market power").

49 2B AREEDA & HOVENKAMP, *supra* note 1, ¶ 501, at 111 (3d ed. 2007) (further explaining that "[f]or antitrust purposes, therefore, market power is the abilities (1) to price substantially above the competitive level *and* (2) to persist in doing so for a significant period without erosion by new entry or expansion"). One may, however, also find older precedents referring to "the power to control prices or exclude competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

the substantial degree of market power required by the law.[50] The EU definition, on the contrary, has been interpreted to include even firms with market shares slightly below 40 percent,[51] with an actual presumption of dominance for firms with shares of 50 percent and higher.[52] Hence, a significant portion of those firms that exceed the EU dominance threshold do not meet the U.S. threshold for substantial market power.

Altogether, therefore, a basic comparison of the two regimes within the first two dimensions reveals that the United States takes a consistently more restrained approach to unilateral conduct regulation than the European Union does. In other words, the theoretical potential of the two dimensions to compensate for one another, such that a competition law regime might balance higher thresholds with more expansive conduct-based liability and vice versa, does not appear to have materialized in fact.[53]

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[50] For instance, Areeda & Hovenkamp suggest:

> Although one cannot be too categorical, we believe it reasonable to presume the existence of substantial single firm market power from a showing that the defendant's share of a well-defined market protected by sufficient entry barriers has *exceeded 70 or 75 percent* for the five years preceding the complaint. *Most recent cases dismiss claims as a matter of law where the defendant's market share is less than 50 percent.*

3B AREEDA & HOVENKAMP, *supra* note 1, ¶ 801a, at 383 (emphasis added).

[51] *See generally* WHISH, *supra* note 8, at 46, 177–79; Thompson & O'Flaherty, *supra* note 39, at 925–29 (reviewing references to market share levels in various cases). In one case, in fact, the CFI found dominance with a share of 39.7 percent. *See* Case IV/D-2/34.780—Virgin/British Airways, Comm'n Decision, 2000 O.J. (L 30) 1. While in another case, the Court of Justice noted that an undertaking with market shares between 32–36 percent "may, depending on the strength and number of its competitors, be considered to be in a dominant position, [although] those market shares cannot on their own constitute conclusive evidence of a dominant position." Case C-250/92, Gottrup Klim v. Dansk Landbrugs, 1994 E.C.R. I-5641, ¶ 48 (Eur. Ct. Justice).

[52] *See* Case 62/86, AKZO Chemie v. Comm'n, 1991 E.C.R. I-3359, ¶ 60 (Eur. Ct. Justice). Notably, moreover, "very high market shares provide in themselves virtually conclusive proof that a firm is dominant." Mosso et al., *supra* note 8, at 324–25 (briefly reviewing relevant cases). In the United States, on the other hand, courts may find no monopoly power for high market shares in the presence of easy entry. 2B AREEDA & HOVENKAMP, *supra* note 1, ¶ 532, at 242–51 (3d ed. 2007) (discussing the relationship between market share and power). *Cf.* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 3 (1992, rev. 1997) (explaining that high market shares may be of little concern when the federal agencies evaluate horizontal mergers in the face of easy entry, stating that "[i]n markets where entry is that easy (i.e., where entry passes these tests of timeliness, likelihood, and sufficiency), the merger raises no antitrust concern and ordinarily requires no further analysis."), *available at* http://www.ftc.gov/bc/docs/horizmer.htm.

[53] Of course, the employment of both higher thresholds and narrower conduct definitions, or vice versa, may be explained by a regime's extreme concern about the costs of false positive or negatives, respectively.

Yet a separate study of the U.S. and EU law on unilateral, anticompetitive acquisitions of market power would have suggested that the two regimes had reversed their respective approaches, with the United States employing a more interventionist policy and the European Union altogether refraining from regulating such conduct. Section 2 prohibits not only the maintenance of monopoly power but also its acquisition and even its attempted acquisition.[54] Article 82, on the other hand, only prohibits the abuse of an extant dominant position, remaining silent regarding the means by which firms have reached their dominance.[55]

However, the three-dimensional framework suggests that the isolated study of either the unilateral conduct policies of the two regimes regarding the first two dimensions—of conduct- and threshold-based liability—or their seemingly reversed attitudes to anticompetitive market power acquisitions is incomplete. Instead, an examination of the three dimensions together reveals, first, that the differences between the U.S. and the EU approaches to pre-threshold liability are less dramatic than they initially appear; and, second, that the regimes' respective policies regarding this third dimension also compensate for some limitations of their conduct- and threshold-based liability policies.

In the first place, the EU regime's more expansive approach to conduct- and threshold-based liability partly compensates for its lack of any pre-threshold liability.[56] Moreover, those already dominant EU firms face more extensive regulation under the abuse of dominance framework than under the U.S. monopolization prohibition. The EU approach also applies to all dominant firms, while the United States addresses only the unilateral conduct of the limited subset of these firms that reach its higher threshold for substantial market power. Hence, when considering the pre-threshold approaches of the two regimes to-

[54] *See* 15 U.S.C. § 2. U.S. firms acquiring or attempting to acquire substantial market power through anticompetitive means therefore face potential antitrust liability for their conduct, irrespective of their behavior later on. U.S. antitrust law, moreover, imposes potential liability on some non-monopolists that have attempted, yet failed, to obtain monopoly power through anticompetitive means. Liability for attempted monopolization requires: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993). *See generally* 3B AREEDA & HOVENKAMP, *supra* note 1, ch. 8B, at 403–63 (reviewing the law of attempt to monopolize).

[55] *E.g.*, WHISH, *supra* note 8; Mosso et al., *supra* note 8.

[56] Thus, many firms that clearly cross the EU dominance threshold—such as most of those with market shares greater than 50 percent, and even some of those with lower shares—do not reach the U.S. monopoly threshold. The unilateral conduct of these firms, therefore, is subject to the full panoply of abuse regulation under Article 82 that already deems them "dominant," making questions of acquisition conduct superfluous.

wards dominant firms in light of their thresholds and conduct-based liability policies, one finds not a reversal but rather a reflection of their typical attitudes, at least where the unilateral conduct of mid-range, dominant firms is concerned.

At the same time, the U.S. prohibitions of monopolization and attempted monopolization by non-monopolists also serve partly to compensate for the limited constraints posed by this regime on extant monopolies. Thus, by imposing potential liability on a narrow subset of those firms that acquired or almost acquired substantial market power through anticompetitive conduct, the U.S. approach can both deter some harmful conduct and provide a remedy for its most extreme consequences.

As shown in Part I, moreover, the partial compensation provided by this pre-threshold policy also has the distinct advantage of addressing the acquisition of substantial market power with its attendant social costs, precisely in those cases where its social benefits are least significant. This advantage is especially important for the U.S. approach, with its more permissive post-threshold policy.

Notwithstanding its benefits, pre-threshold liability in the United States is severely constrained in theory, and even more so in practice. On the theoretical level, the monopolization offense captures, at best, only extreme conduct, consciously leaving some instances of anticompetitive unilateral conduct by non-monopolists outside its reach.[57] And the attempted monopolization offense has been narrowly construed by the courts, mainly due to false positives concerns, and therefore expands pre-threshold liability only to a limited, if non-negligible, extent.[58]

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[57] Thus, the Court noted in *Spectrum Sports*: "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Spectrum Sports*, 506 U.S. at 456 (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984)). As one treatise comments, "[I]t is . . . clear that *no matter how blatantly anticompetitive the conduct*, there is no attempt offense if the defendant's position in a contestable market impeaches all possibility of monopolization." SULLIVAN & GRIMES, *supra* note 24, at 151 (footnote omitted) (emphasis added). Note that if the acquisition of substantial market power were a prerequisite for anticompetitive effects no anticompetitive unilateral conduct would be left out.

[58] *See, e.g.*, *Spectrum Sports*, 506 U.S. 447; *see also* 3B AREEDA & HOVENKAMP, *supra* note 1, ¶ 807d, at 441 (noting that "[t]he trend in more recent decisions is to impose significant minimum market share requirements on the attempt offense"). *See also* discussion in note 32 and accompanying text.

In practice, moreover, pre-threshold monopolization liability has not been commonly imposed in recent years.[59] First, due to the structure of Section 2 and its jurisprudence, the same doctrines are applied to post- and pre-threshold conduct.[60] Therefore, pre-threshold conduct is subject to the same narrow definitions employed by U.S. monopolization law more generally. Where attempted monopolization is concerned, moreover, conduct-based liability is defined even more narrowly than post-threshold.[61] Second, the requirements of specific U.S. exclusionary-conduct doctrines—which explicitly or implicitly demand substantial market power—are almost never fulfilled where non-monopolists are concerned. For instance, predatory pricing doctrine implicitly demands such power by making the estimated likelihood of predation's success depend, in part, on the perpetrator's market power.[62] Naturally, therefore, such requirements are unlikely to be fulfilled by any except monopolists. Finally, the effects of the narrow definitions of monopolizing

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[59] *See* SULLIVAN & GRIMES, *supra* note 24, at 152 ("claims of attempt to monopolize are frequently married to monopolization claims . . ."); Adkinson et al., *supra* note 46, at Appendix Table 2 (collecting private Section 2 actions between 2000–2007 and finding, inter alia, that of the 539 total cases identified for the period, 61.6 percent concerned attempted monopolization and 74.0 percent concerned claims of monopolization). However, a simple citation search shows no subsequent appellate history of attempted monopolization case citing the Court's *Spectrum Sports* decision in 1993.

[60] *See, e.g.*, Taylor Publ'g Co. v. Jostens Inc., 216 F.3d 465, 475, 481 (5th Cir. 2000) (explicitly adopting the accepted exclusionary conduct formula for monopolization in examining an attempted monopolization claim); 3B AREEDA & HOVENKAMP, *supra* note 1, ¶ 806a, at 412 (asserting that "the same basic definition of exclusionary conduct should apply to both monopolization and attempt claims") (footnote omitted).

[61] As a leading treatise notes, while conduct legal for a monopolist is necessarily legal for a non-monopolist (3B AREEDA & HOVENKAMP, *supra* note 1, ¶ 806d, at 416–23), conduct that is illegal for a monopolist may in fact be legal for its non-monopolist counterpart. *Id.* ¶ 806e, at 423–26.

[62] *See* 3A AREEDA & HOVENKAMP, *supra* note 1, ¶ 728, at 98–105 (explaining that the recoupment requirement in predatory pricing cases cannot be satisfied by firms that do not possess a monopoly or at least a near-monopoly); *id.* at 102 (even suggesting "a strong presumption that Sherman Act predation is unreasonable at market shares below 60 percent"). Similarly, the illegality of tying arrangements—typically examined under Section 1 of the Sherman Act—requires, inter alia, possession of market power. *See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 11–14 (1984) (suggesting that the power in the tying product market "to force a purchaser to do something that he would not do in a competitive market" is necessary for competitive harm); 10 PHILLIP E. AREEDA, EINER ELHAUGE & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1734, at 35–52 (2d ed. 2004) (explaining that market power is necessary but not sufficient to generate the potentially detrimental effects of tying); *see also* Elhauge, *supra* note 12 (providing a recent review of tying doctrine and theory). Importantly, those cases of "technological tying" that are missing some of Section 1's doctrinal elements (such as the agreement requirement) can be deemed exclusionary under Section 2, yet their harmful potential may still depend on the perpetrator's market power. *See, e.g.*, C.R. Bard v. M3 Sys., Inc., 157 F.3d 1340 (Fed. Cir. 1998) (Section 2 liability for the technological redesign of a biopsy gun to accept only defendant's needles); *see generally* 3B AREEDA & HOVENKAMP, *supra* note 1, ¶ 777, at 300–15.

conduct and the market power elements of specific exclusionary conduct doctrines are reinforced by those pervasive concerns about the undesirable effects of false positives that permeate unilateral conduct policy in the United States.[63]

Altogether, therefore, an analysis of the two main competition regimes shows their respective approaches to pre-threshold liability can be better understood in light of their main conduct- and threshold-based liability choices. Importantly, it also reveals how these regimes adjusted their third-dimension, pre-threshold liability—albeit with only partial success—to compensate for other limitations in their unilateral conduct policies.

III. THE EU AND U.S. APPROACHES: A CRITICAL EVALUATION

The analysis in Part II showed that, to be properly understood, pre-threshold liability regimes are best examined in the context of the broader unilateral conduct policy within which they are situated. This analysis also revealed how the extant EU and U.S. pre-threshold liability regimes and their main unilateral conduct policies partly compensate for each other's limitations. However, the specific regulatory choices of these regimes should be evaluated in light of their respective values and beliefs and the policy tradeoffs involved.

Of the two approaches studied here, the three-dimensional framework poses the most obvious challenge to the EU regime. The problem is that its broad above-threshold liability cannot reach even the most harmful anticompetitive unilateral conduct of below-threshold, nondominant, firms. At the same time, however, the European Union's avoidance of pre-threshold regulation is necessary, since the cost of imposing liability below its already-low threshold to reach some nondominant firm conduct would have created an unacceptable risk for such firms. Nonetheless, the inherent limitations of uniform threshold-based approaches leave the European Union without the means to address some classes of nondominant firms' anticompetitive conduct, as explained below.

These limitations are of little concern for those forms of unilateral conduct that require significant market power to cause appreciable harm—such as most exploitative abuses and some classes of exclusionary conduct. Yet other forms of anticompetitive unilateral conduct, like

[63] *E.g.*, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 325 (2007); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 414 (2004).

those involving deception or abuse of governmental processes, do not require market power to generate their effects.[64] And while capturing all such behavior is impractical, given the ubiquity of unilateral conduct, the EU approach provides only limited tools for addressing even its most egregious manifestations where nondominant actors gain substantial market power by anticompetitive means.[65]

The most common category of such anticompetitive conduct likely is "cheap exclusion."[66] Typical examples of cheap exclusion include opportunistic behavior in regulatory settings—such as where drug companies "game" the system for approval of generic drugs to extend the exclusivity of branded ones; tortious conduct, including fraud or misrepresentation, toward other market participants or consumers; and the abuse of governmental processes—from standard setting to various forms of legislation.[67]

Cheap exclusion can occur in traditional markets, for instance where an aspiring monopolist tortiously prevents competitors' products from reaching consumers.[68] It is often more attractive in dynamic technology markets, however, due to a number of related reasons: First, many markets in which research, development, and innovation are of paramount importance, such as pharmaceuticals and communications, are heavily regulated. Consequently, a successful manipulation of the regulatory framework can provide stable and durable market power.[69] Second, in many new-economy markets—such as the computer hardware or communications industries—opportunities for effectively abusing either gov-

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[64] *See, e.g.*, Creighton et al., *supra* note 13.

[65] This is illustrated by the allegations that Rambus, a non-dominant firm, monopolized certain computer memory markets through deception in a standard-setting process. Rambus Inc., FTC Docket No. 9032, Opinion of the Commission, at 98–114 (Aug. 2, 2006) (*Rambus Comm'n Opinion*), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf, *rev'd & remanded*, Rambus Inc. v. FTC, 522 F.3d 456, (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (2009). Somewhat ironically, however, in the European enforcement actions against Rambus, which followed the U.S. one, the European Commission was able to obtain a significant remedy against the allegedly monopolizing firm by reaching beyond the limitation imposed by the legal framework of Article 82 and its jurisprudence described in this article. *See infra* note 75.

[66] Creighton et al., *supra* note 13; Dogan & Lemley, *supra* note 14.

[67] Creighton et al., *supra* note 13, at 977–78 (reviewing these forms of cheap exclusion); Dogan & Lemley, *supra* note 14, at 709–29 (discussing a number of forms of regulatory gaming).

[68] *E.g.*, Conwood Co. L.P. v. U.S. Tobacco Co., 290 F.3d 768, 783 (6th Cir. 2002) (discussing use of misrepresentations and abuse of trust by misusing a category manager position to "dupe" retailers and to "exclude rivals' products").

[69] *See, e.g.*, Creighton et al., *supra* note 13, at 983–85 (discussing the "Orange Book Cases," which concerned attempts to game the regulatory regime controlling the approval of generic drugs under the Hatch-Waxman Act); Dogan & Lemley, *supra* note 14, at 709–17 (analyzing pharmaceutical product hopping).

ernmental or private standardization processes abound because of the common need for compatibility and standardization and due to high switching costs.[70] Third, in these technology markets, intellectual property rights—most notably patents—often play a central role. A successful abuse that brings an industry standard under the control of a patented technology, for example, can therefore result in a durable market power acquisition.[71]

As its name signals, moreover, cheap exclusion typically requires the investment of only limited resources in the relevant deceptive, tortious, or otherwise opportunistic behavior. In fact, some forms of cheap exclusion may be more attractive to small, nondominant firms than to their dominant counterparts. For instance, large established firms might avoid abusing industry standard-setting processes for fear of similar conduct by their rivals. Small firms (or firms that do not manufacture in the relevant market), on the other hand, can gain much from a patent hold-up of the entire industry, while risking only a relatively small harm from similar conduct by rivals.[72] Hence, cheap exclusion is particularly attractive to nondominant firms compared to other forms of anticompetitive conduct, posing a real risk, especially in dynamic technology markets, that remains unaddressed under the Article 82 regime.

In recent years, with cheap exclusion gaining increased salience on both sides of the Atlantic, the European Commission has occasionally tried to address the pre-threshold gap within its extant framework. In one case, for example, it suggested that cheap exclusion by way of a "patent ambush" that captures an industry standard may be addressed by post-threshold rules.[73] According to this approach, conduct-based rules prohibiting exploitative abuses may be used to impose special restrictions on a dominant firm that reached its position by anticompeti-

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[70] *E.g.*, *Rambus Comm'n Opinion*, *supra* note 65, at 98–114.

[71] *Id.*

[72] This is illustrated by *Rambus*. *Id.* In that case, defendant Rambus's business model depended on patent royalties. *Id.* at 7 ("Rambus is not a manufacturing company; rather, Rambus earns its revenue through the licensing of its patents."). The other, larger industry participants, on the other hand, were likely to have held relevant patents but did not seek to enforce them due to their mutual desire to have an open industry standard, as reflected in their behavior and the organization's policies alike. *Id.* at 52–59.

[73] *See* Press Release, European Comm'n, Commission Confirms Sending a Statement of Objections to Rambus (Aug. 23, 2007) (Memo/07/330) (where the Commission confirmed it sent a Statement of Objections (SO) to Rambus that outlined the Commission's preliminary view that Rambus violated Article 82 "by claiming unreasonable royalties" for the use of its patented technology that had been adopted by the industry. The release further explains the Commission's position that "without its 'patent ambush,' Rambus would not have been able to charge the royalty rates it currently does.").

tive means.[74] Besides its limited efficacy,[75] however, and much like the other ad hoc responses to the European Union's lack of pre-threshold liability, such an approach contradicts both the language and spirit of Article 82 and its jurisprudence, which do not discriminate among dominant firms based on the causes of their market power.[76]

Monopolizing conduct by nondominant firms may take a number of other forms, as well, some of which require significant financial resources, but not market power in the monopolized market.[77] A large multi-product firm, for example, may seek to monopolize a market where it is not currently dominant, as part of an overall strategy vis-à-vis other multi- or single-product firms in either the monopolized market or related ones. Examples of such strategies include predatory pricing, which requires deep pockets but not extant market power in the monopolized market; the foreclosure of access to vertically related markets by extensive exclusive dealing arrangements, which may make a profitable, if costly, investment; and more.[78]

In these cases, Article 82's lack of a prohibition against anticompetitive acquisitions of market power is problematic, since the perpetrating firm may not possess above-threshold market power in the market where

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[74] *Id. See also* Philip Lowe, Director General, DG Competition, Remarks at Conference on Pricing and the Dominant Company: The Commission's Current Thinking on Article 82, at 6–8 (Jan. 31, 2008); Lars-Hendrik Röller, *Exploitative Abuses, in* EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC 525, 528–29 (Claus-Dieter Ehlermann & Mel Marquis eds., 2007) (identifying potential gaps in the enforcement of Article 82 and recommending the use of the prohibition against exploitative abuses specifically to close the gap resulting from the exploitation of dominance that was reached by exclusionary means).

[75] These legal limitations notwithstanding, the Commission has recently succeeded in leading Rambus to propose it will place a five-year price cap on relevant royalty rates by threatening an enforcement action that goes beyond the boundaries imposed by Article 82. *See* Press Release, European Comm'n, Commission Market Tests Commitments Proposed by Rambus Concerning Memory Chips (June 12, 2009) (Memo/09/273) (release inviting interested parties to present their comments regarding the proposed commitment by Rambus).

[76] *Cf.* Damien Geradin, Pricing Abuses by Essential Patent Holders in a Standard-Setting Context: A View from Europe 13–18 (July 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1174922 (arguing that Article 82's prohibition against exploitative abuses is generally a poor means for determining ex post whether a given patent royalty rate is excessive or unfair); *But see* Inge Govaere, *In Pursuit of an Innovation Policy Rationale: Stakes and Limits under Article 82 TEC*, 31 WORLD COMPETITION 541, 549–51 (2008) (noting the inability of Article 82 to undo pre-threshold conduct while supporting the legitimacy and desirability of regulating the ex-post exploitation of dominance).

[77] *See also* IOANNIS KOKKORIS, A GAP IN THE ENFORCEMENT OF ARTICLE 82 (2009) (arguing there is a gap in the enforcement of Article 82, where nondominant firms may cause consumer harm by exploiting their superior economic power or market position in their contractual relations).

[78] *Cf.* Brennan, *supra* note 7.

the conduct is taking place. At times, EU law has responded to this difficulty by imposing liability on the unilateral conduct of dominant firms even for conduct outside the market which they dominate.[79] At other times, the Commission and the courts strove to define relevant markets narrowly, to bring those firms suspected of unilateral anticompetitive conduct above the already-low EU threshold requirements.[80]

While providing an ad hoc solution in some cases, however, these remedial efforts are in tension with the language and logic of Article 82; they are also of limited efficacy. The first solution—namely, reaching conduct in related markets—only addresses those related markets and cannot capture the conduct of large multi-product firms that are significant players in many markets but dominate none. The second solution—that is, defining relevant markets narrowly—is not only analytically problematic but also likely to be increasingly ineffective in practice, given the Courts' move towards greater reliance on economic analysis of markets, an approach that does not condone unsustainably narrow market definitions.[81]

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[79] This approach was taken, for example, by the Court of First Instance in the *Tetra Pak* case and subsequently confirmed by the Court of Justice on appeal. Case T-83/91, Tetra Pak Int'l v. Comm'n, 1994 E.C.R. II-755, ¶¶ 118–122 (Ct. First Instance) (noting such imposition of liability "can only be justified in special circumstances"), *aff'd*, Case C-333/94P, Tetra Pak Int'l v. Comm'n, 1996 E.C.R. I-5951, ¶¶ 27–31 (Eur. Ct. Justice). *See also* Mosso et al., *supra* note 8, at 344–45 (briefly reviewing related cases); Thompson & O'Flaherty, *supra* note 39, at 937–39 (reviewing relevant cases and noting that "there is an established and developing jurisprudence applying the prohibition of abuse of dominance to a range of situations where an undertaking enjoys market power on one market but exercises that power in a way that influences conditions of competition on a related market."). Importantly, such imposition of liability for related-market conduct is in addition to its more common application in vertically related markets. *See, e.g.*, *id.* at 937 (providing some examples). One might reasonably argue, however, that the condemned conduct in the related market may have been employed, inter alia, to maintain the perpetrators' dominant position in their "main" market.

[80] *See, e.g.*, WHISH, *supra* note 8, at 188 (discussing examples of narrow market definitions). *But see* KORAH, *supra* note 45, at 114 (arguing that since the 1980s the European Court of Justice started suggesting wider market definitions). Notably, this strategy is of lesser concern where the anticompetitive conduct must continue after the firm crossed the dominance threshold in the narrowly defined market.

[81] *Cf.* Peder Christensen et al., *Mergers*, *in* THE EC LAW OF COMPETITION 421, 425, *supra* note 8 (explaining, in the context of merger regulation, that the increased number and complexity of cases, the greater specialization of the competition bar, and the increased scrutiny and annulment of Commission decisions by the Court necessitated an increased reliance, inter alia, on an economic analysis of the cases). The Commission has stated it is moving towards a more economic (or effects-based) approach in the Article 82 area as well, citing its actions in *Wanadoo* (Case C-202/07 P, France Télécom SA v. Comm'n, 2009 O.J. (C 141) 2 (Eur. Ct. Justice)), *Microsoft* (Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601 (Ct. First Instance)), and *Telefónica* (Case T-336/07, Telefónica & Telefónica de España v. Comm'n, 2007 O.J. (C 269) 55) as manifesting this approach. Thus, in its most recent policy statement in this area the Commission repeatedly refers to the centrality of consumer harm in its analyses:

Another challenge to the EU approach is posed by network effects, where the utility of the product to consumers increases with the number of consumers purchasing the good.[82] In markets with strong network effects, such as where the operation of technology requires compatibility, consumers may face significant switching costs when moving from one supplier to another. Consequently, network markets sometimes exhibit a lasting "tipping" towards one supplier or technology. Before tipping, we may observe attempts to win the competition for the market by multiple nondominant competitors. After tipping, however, only one of these competitors would possess substantial market power.[83] Of course, acquisitions of market power in a tipping market often result from the superiority of a given supplier or technology. But when obtained through the anticompetitive conduct of nondominant firms they are outside the reach of Article 82.

Turning to the U.S. regime, which appears less subject to criticism given its incorporation of pre-threshold liability, the present framework nevertheless highlights some areas of concern. Specifically, the current U.S. approach, which combines pre-threshold liability with both high market-power thresholds and more limited conduct-based liability, does not reach most unilateral conduct of below-threshold dominant firms. In practice, moreover, casual observation suggests that pre-threshold liability is rarely imposed on U.S. firms where monopoly power has been acquired, and even more so where only attempted monopolization is alleged.[84]

Some of the U.S. reluctance in this area may be justified by this regime's values and beliefs regarding the respective benefits and costs of

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> In applying Article 82 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. . . . The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.

European Comm'n, DG Competition, *Communication from the Commission—Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C 45) 7, ¶ 5 (Dec. 3, 2008). *See also* Josef Drexl, *Real Knowledge Is to Know the Extent of One's Own Ignorance: On the Consumer Harm Approach in Innovation-Related Competition Cases*, *supra* this issue, 76 ANTITRUST L.J. 677 (2010) (criticizing the Commission's new approach).

[82] *See generally* Joseph Farrell & Michael L. Katz, *The Effects of Antitrust and Intellectual Property Law on Compatibility and Innovation*, 43 ANTITRUST BULL. 609 (1998); Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998).

[83] *E.g.*, Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, J. ECON. PERSP., Spring 1994, at 93, 105–06 (1994) (describing "tipping" as "the tendency of one system to pull away from its rivals in popularity once it has gained an initial edge.").

[84] See discussion and sources *supra* notes 54, 57–58 and accompanying text.

market power on the one hand and antitrust enforcement on the other. Yet the three-dimensional framework reveals that even an assertive use of pre-threshold liability only partly substitutes for the limitations imposed by a regime's main unilateral conduct policy choices. And the rare application of pre-threshold liability in the United States suggests its compensatory benefits may fail to materialize altogether, potentially leaving this regime excessively exposed to harmful monopolizing practices by below-threshold firms.

IV. INCORPORATING PRE-THRESHOLD LIABILITY

The analysis in Part III revealed how a regime without pre-threshold liability may suffer distortions in its other unilateral conduct rules in its attempt nevertheless to reach correct decisions in specific cases. In the European Union, for instance, the pre-threshold gap has partly contributed to distortions in the interpretation and application of Article 82, ranging from market definitions that are unjustifiably narrow, through the imposition of liability on dominant firms in markets where they were not dominant, to the discriminatory application of the prohibition on exploitative abuses based on the means by which a firm obtained dominance. Such distortions, however, may lead to unsound competition policy and fail to provide a direct and effective substitute to a judicious pre-threshold regime.

At the same time, even regimes that include pre-threshold rules in their unilateral conduct arsenal may not exploit its full potential. This can happen either due to a failure fully to recognize the interplay among the three dimensions of unilateral conduct policies or due to the challenges involved in developing appropriate conduct-based rules for pre-threshold liability. The United States, for example, for these reasons has used its prohibition of anticompetitive monopoly-creating behavior in the monopolization and attempted monopolization offenses only to a limited degree. That is, not only have acquisitions of monopoly remained less studied, but insofar as such behavior has been scrutinized, it was subjected to the same conduct-based rules applied to other monopolizing behavior. These rules, however, often incorporate—explicitly or implicitly—market power requirements that render them largely irrelevant in the pre-threshold arena.

Therefore, competition law regimes outside the European Union and the United States that seek to develop an efficient approach to unilateral conduct regulation would do well to take into account both the theoretical insights of the three-dimensional model and the lessons provided by the extant approaches of these two leading regimes. The EU experience suggests it may be unadvisable to rule out pre-threshold liability completely, even for a regime that is willing to lower thresholds and expand conduct-based liability. To incorporate such liability to any degree without creating unacceptable chilling effects on unilateral conduct, however, a regime must also avoid employing excessively expansive conduct-based rules or low thresholds. These lessons are particularly timely, moreover, given the increasing adoption of EU-like abuse of dominance regimes worldwide.

In addition, the U.S. approach shows the potential of pre-threshold liability, especially when it remains an active enforcement element, partly to compensate for less-interventionist choices of unilateral conduct policy more generally. However, the design of pre-threshold liability should feature conduct-based rules that capture those monopolizing behaviors that remain problematic even when carried out by initially weaker, below-threshold firms. Finally, given the dangers of an excessively broad pre-threshold reach, an assertive use of pre-threshold liability for actual monopolization will greatly benefit from a concomitantly restrained imposition of liability for attempted acquisitions of dominance or monopoly power, given the risks such liability poses for a broad swath of firms that never reach market power thresholds.