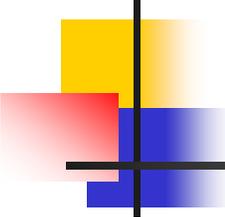


Anticompetitive Overbuying

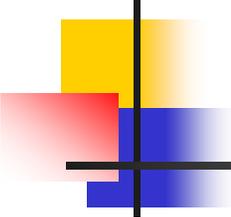
Steven C. Salop
Georgetown University Law Center
CRA International

*FTC Hearings
June 21, 2006*



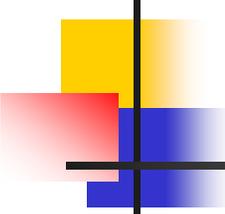
Anticompetitive Exclusion

- Two distinct exclusion paradigms
 - Predatory pricing (on seller side)
 - Raising rivals' costs ("RRC") (*non-price predation*)
- RRC raises greater antitrust concerns
 - More likely to succeed and harm consumers*
 - No need to induce competitors to exit
 - No need for short-run profit sacrifice
 - No inherent short-run consumer benefit
 - *RRC can cause immediate consumer harm*



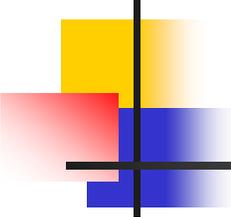
Anticompetitive Overbuying

- Two distinct overbuying allegations
 - Predatory overbuying (*predatory bidding*)
 - Raising rivals' costs ("*RRC*") overbuying
- Allegations correspond analytically to the two anticompetitive paradigms



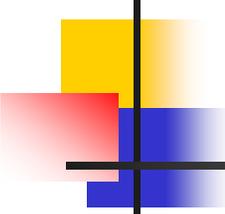
Antitrust Evaluation: Predatory Overbuying

- Goal: Buyer-side mkt power in input (upstream) market
- 4-step legal standard
 - Buyer power and artificially inflated input purchasing
 - Is increased purchasing “artificial”
 - “Warehousing” inputs raises greatest concerns
 - Require proof of purchasing to point where output price below-cost (*i.e., MRP < input price*) (*Brooke Group*)
 - Exit or permanent capacity reduction by input market competitors
 - Recoupment thru buyer-side monopsony power in input market
 - Net consumer harm on balance over entire time frame (*predatory + recoupment periods*)



Antitrust Evaluation: RRC Overbuying

- Goal: Seller-side mkt power in output (downstream) market
- 4-step legal standard
 - Buyer power and artificially inflated input purchasing
 - Is increased purchasing “artificial”
 - “Naked” purchasing and “Warehousing” inputs raise greatest concerns
 - ***Do not require*** proof of purchasing to point where output price below-cost (*i.e., $MRP < input\ price$*)
 - Raising rivals costs (*harm to competitors*)
 - Downstream mkt power over price (*harm to competition*)
 - Net consumer harm: Benefits to consumers from procompetitive benefits do not outweigh consumer harms from market power
- Step-1 standard for RRC overbuying is more interventionist because of greater competitive concerns than for predatory overbuying
- “Consumer harm” means *true* consumer welfare standard

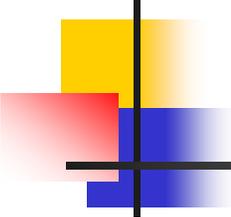


Economic Welfare Standards

- True consumer welfare standard
 - *Consumer surplus*

- Total welfare standard
 - *Total surplus*
 - Bork's deception? or just confusion?

- Why use true consumer welfare standard?
 - Does not permit *competitor injury* to trump *consumer benefits*
 - ***But, total welfare standard does -- Did Bork know?***
 - Consistent with precedent
 - Simpler to evaluate (*price and output*)
 - Induces efficient conduct
 - Firm can marginally restructure transaction in efficient way to eliminate consumer harm
 - Offsets inability of courts/agencies to rigorously apply less restrictive alternative std or gain full information about potential alternatives, thereby preventing inefficiencies
 - Supports innovation



Innovation Incentives

*Consider impact on innovation incentives
when standards focus on short-run effects*

- Consumer welfare standard supports greater overall innovation incentives
 - TW std allows dominant firm to destroy higher cost rivals that would innovate, thereby reducing innovation
 - TW std allows mergers that eliminate competition, leading merged firm to have less incentive to innovate
 - These harms likely are larger than any efficiency benefits from allowing mergers or exclusionary conduct that modestly reduce costs, while leading to higher prices to consumers
- Thus, using the consumer welfare std leads to higher *long-run* total welfare, plus higher *long-run* consumer welfare.