Department of Justice

CLAIMS OF PREDATION IN A COMPETITIVE MARKETPLACE: WHEN IS AN ANTITRUST RESPONSE APPROPRIATE?

REMARKS BY

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Introduction

I am pleased to be here to address this distinguished group of antitrust and international lawyers. My assigned topic, "antitrust enforcement in an increasingly international environment," is particularly appropriate at a time when the U.S. and Canada appear to be at the dawn of a new era in trade relations. If and when it is finally ratified, the Canada-U.S. Free Trade Agreement ("FTA") will mark a dramatic step toward achieving the benefits of truly open trade for our two nations.

With open trade, of course, will come increased competitive pressures for firms both north and south of the border. Within ten years, bilateral tariffs that currently protect inefficient industries from full competition by rivals across the border will be eliminated. Many of the other import restrictions that disadvantage Canadians selling to the U.S. or Americans selling to Canada will be phased out or eliminated. The restrictions on the creation of new trade barriers will be even stiffer. And although the regimes of antidumping and countervailing duty law will continue to operate for now, the FTA requires the U.S. and Canada to try over the next five years to bring these regimes more fully into line with the new liberalized North American trading environment.

It would be naive to expect that all North American companies will uniformly welcome the new era of increased competition under the FTA with equanimity and optimism. Faced with the prospect of increased competition and denied the opportunity to ask for new trade and tariff barriers, some U.S. and Canadian firms are likely to cry "foul" to antitrust authorities or courts. These disappointed competitors are likely to claim that the increased competition they face is unfair "strategic behavior," "predation," or -- a shibboleth heard all too frequently these days -- "raising rivals' costs," designed to drive them out of business or deter their entry.

The question will inevitably arise, what should antitrust authorities make of these claims? This afternoon I will explain why I think the answer in the vast majority of cases will be "nothing." The best course antitrust enforcement can take to protect the benefits of new-found competition is to avoid embracing novel theories of predation that create new barriers to free trade. Rather, policymakers and enforcers should let the "invisible hand" of the free market act as the final, impartial arbiter of economic success. Predation and similar anticompetitive activity almost by definition cannot be common and are extremely difficult to distinguish from perfectly appropriate "hard" competition. Allegedly predatory activity thus can rarely be remedied without crippling legitimate competition.

"Inefficient Competition"

"Predation," "strategic behavior," and even "raising rivals' costs" generically might be described as "inefficient competition." Like forms of efficient competition, they seek to advance the economic interests of the actors at the expense of their marketplace rivals; unlike efficient competition, they do so at a net cost to society.

In the theoretical model of "perfect competition," of course, every firm ignores the existence of rivals in pricing, output, and other business decisions. Firms instead rationally focus on minimizing costs, taking the price set by the market as a given. The real world, however, rarely fits this model of "perfect competition." Firms in most industries recognize and react to their rivals during every waking moment. When Harry's gas station on one corner cuts prices in order to steal customers from Jack across the street, Jack is sure to respond. He may slash prices to even lower levels, sell cheap soda with a fill-up, or give away free cartoon tumblers. Jack may begin an advertising campaign to publicize his "higher quality" gasoline and service. He may even open another station on the corner opposite Harry's or seek to have Harry's land rezoned. Jack's ultimate choice will depend on which strategy he believes will be most effective at winning customers from Harry.

Obviously, most strategies for "getting a leg up" on the competition are not inefficient -- to the contrary, they are the essence of a vital, dynamic capitalist economy. Generally, vigorous rivalry -- price wars, research and development, new innovation in the form of fighting brands, investments in good will, and the like -- benefit consumers. On the other hand, antitrust lore suggests that some forms of strategic competition are unacceptable. Strategic behavior, we are told, may be anticompetitive when it is aimed at creating market power either by driving the targeted rival out of the market or by beating it into submission. But, of course, effective, efficient competition frequently achieves identical results.

Theoretical Plausibility of Predation

As a theoretical matter, there is nothing inherently impossible about inefficient competition. More than a few economists and antitrust scholars have made their reputation telling theoretically plausible stories of "rational predation." 1/ The problem is that the prerequisites for the actual existence of rational predation are far less common. Moreover, even if some inefficient competition does in fact

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1/ See generally R. Posner, Antitrust Law: An Economic Perspective 187 (1976).

exist, the policy implications are extremely limited. It is practically impossible in most cases to distinguish between efficient and inefficient competition, and it is very difficult, and often impossible, to craft a remedy even when the distinction can be made.

At a minimum, two basic and difficult-to-satisfy conditions are necessary, but not by themselves sufficient, for inefficient competition to be a rational practice: (1) the ability to inflict harm on a rival sufficient to enhance the predator's market power and (2) a resulting ability to exercise the market power in such a way as to turn a net profit on the investment in predation. Given the nearly infinite economic literature in this field, I cannot today discuss all the theories of predation. Instead, I will limit myself to a few general words to underscore the general implausibility of anticompetitive predation.

First, the ability to harm a rival is vital to any predatory strategy. This ability to harm is vital not because the harm itself benefits the predator, but rather because that harm, or the threat of that harm, will prevent the rival from interfering with the predator's plan to earn supracompetitive profits. The predator's objective may be accomplished by deterring the rival's entry, by forcing the rival to drop out of the market, or by coercing it to abide by an anticompetitive

agreement. The rival must view as credible the threat posed by the predatory activity, and thus must be convinced that dropping out of the market, refraining from entry, or complying with a price-fixing agreement is its most profitable course of action. For the rival to believe that, the rival must believe that the predator has both the resources and the incentive to follow through with the strategy, whatever the costs.

Imposing costs on a rival, however, is very expensive. Forcing a rival to sell at low prices requires the predator also to sell at low prices. Typically, the losses that the predator must absorb in selling at the predatory prices will equal or exceed the costs imposed on the rival. Similarly, denying a rival access to low cost inputs requires that the predator pay others not to produce or pay for inputs that the predator does not need. And while the costs of such predation may be certain, the long-term gains remain speculative.

For example, traditional predatory pricing -- involving a homogeneous product and a dominant firm -- is an inherently implausible concept. The predator who prices below its costs must be able to expand its output to meet the market demand generated by the lower prices. The predator thus must bear the majority of the losses inflicted by the low prices. Recognizing this fact, the rival need only bide its time during the price war -- perhaps even temporarily withdrawing from the

market -- to share in the subsequent bonanza when the predator subsequently raises price, as it must in order to recoup its price-cutting losses. The heavy, and certain, costs that the predator must bear therefore limit predatory strategy in two ways: by making the strategy expensive and by making the target less likely to capitulate.

There, nevertheless, are a handful of circumstances under which a predator <u>can</u> manifest a credible threat to its rival with the hope of getting the rival to stay out of the market or to go along with some anticompetitive arrangement.

First, the predator may be able to target a narrow market or, if price discrimination is possible, a group of customers, while conducting business as usual in other markets or as to other customers. Such precise targeting conceivably may enable the predator to inflict greater losses on the rival than the predator itself suffers. Predation may pose a credible threat to the rival if the rival cannot retaliate in other markets where the predator has not employed this strategy. For example, a large, incumbent garbage hauler may cut prices to select customers that are being solicited by a new entrant and that are crucial to its successful entry. Such a strategy might plausibly deter entry or increase the entrant's willingness to agree to an anticompetitive arrangement. The biggest inhibition to such a strategy, however, is the

difficulty of preventing the price cuts from spreading to other markets or customers. In addition, it may not be easy to convince the rival that the predation will continue unless and until the rival capitulates and that the predator will resume the predation if the rival does not behave.

Second, a predator may engage in conduct that may appear to be economically irrational in order to establish a credible reputation as a "wild man." If firms repeatedly interact, a predator may make it clear that whenever its rivals engage in certain conduct -- for example, soliciting the predator's customers -- the predator will drastically reduce its price, regardless of the cost to itself. If the cost imposed on rivals is sufficiently great, carrying through on the threat on a few occasions may be sufficient to make it credible. In some cases, it is conceivable that the reputation of the "wild man" could be so credible and well known that others who have never dealt with the predator will refuse to cross him or her the first time they come in contact. 2/

The strategy may appear irrational if one looks only at the effects in isolation when the predator actually carries out its threat. If, however, the expected returns in other markets

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2/ See R. Posner, supra note 1, at 186.

and in other instances where rivals are deterred by the reputation exceed the cost to the predator of the "demonstrations," then, in theory, the strategy may be rational. It is less clear, however, whether and how often such a reputation can be effectively established. If the "wild man" is forced to respond too often, the strategy will cease being profitable, it will be abandoned, and any hope of establishing a predatory reputation will be dashed.

Third, perhaps the most effective predatory strategy is to induce the government to impose costs on one's rivals. For example, government licensing and other regulatory regimes offer a relatively cheap means to make life difficult or impossible for rivals. At little expense to the predator, the slow and costly wheels of government may be set in motion, imposing, at the very least, heavy litigation and/or lobbying costs on its rival. 3/ And if the government can be persuaded to act against the rival, the penalty that the government may impose -- in some cases, for example, permanently excluding the rival from the marketplace -- will often be severe and will be backed by the coercive power of the state.

3/ The opportunities for successful predation through abuse of government processes has been characterized as "almost limitless." See R. Bork, The Antitrust Paradox 347-48 (1976).

Finally, violence or threats of violence -- like the dynamiting of a rival's plant -- can quickly put a rival out of business, or at least increase its costs substantially, at little out-of-pocket cost to the predator. Of course, this kind of activity constitutes a criminal violation of a whole range of state and federal statutes, including Section 2 of the Sherman Act. 4/ The imposition of criminal sanctions for such conduct should deter this activity.

But even if a firm can predate or credibly threaten to predate against its rivals, it will not do so unless the strategy is expected to be profitable. Essentially, the relevant question is whether the returns from the investment in predation exceed the cost of capital -- that is, exceed alternative investments for the capital expended on the predation. 5/ In order to generate a positive net return, the predation generally must create or facilitate the exercise of market power over a sustained period of time.

4/ 15 U.S.C. § 2; see also "Criminal Enforcement of the Antitrust Laws: Targeting Naked Cartel Restraints," Remarks of Charles F. Rule, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, before the 36th Annual ABA Antitrust Section Spring Meeting, March 24, 1988.

5/ See, e.g., R. Bork, supra note 3 at 145 (1978).

Again, this is a very restrictive requirement. The predator will not be able to raise its prices in the future unless: (1) entry by new firms, or reentry by the firms driven out by predation, or expansion by the fringe is difficult, and (2) the predator obtains a very large share of the market, or at least the market is highly concentrated. If there are many firms or if entry is easy, then the presence of these actual or potential competitors will limit the predator's ability to raise price unilaterally. This will be true even if the predator succeeds in driving out the targeted rival or in deterring some isolated instance of entry. 6/ Similarly, if the predation effectively disciplines a particular rival, the prospect of entry or expansion of output will make any subsequent collusive effort to raise prices difficult, if not impossible.

Role of Enforcement

Despite the stiff requirements for successful predation -- at least when it does not involve the help of government -- inefficient competition no doubt does occur and at times may be successful. But the fact that inefficient conduct occurs does

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6/ See, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1357 (1986).

not inexorably lead to the conclusion that antitrust ought to do something about it. As with so many other market failures, the question whether enforcement tools should be used to deter predation depends on whether the costs of such a policy would outweigh its benefits. After all, the essential insight of the "Chicago School" is not that the market works perfectly, but rather that the market generally works better than government intervention. Even the most successful government intervention inevitably includes the prospect of mistakenly condemning economically beneficial conduct, the chilling effect of rules that can never be perfectly clear and absolutely precise, and the costs of actually administering the intervention.

In the case of inefficient competition, the conduct itself will frequently, though perhaps not always, be less costly to society than an antitrust policy designed to prevent it. It is almost always very difficult, if not impossible, to tell the difference between beneficial, efficient competition and objectionable, inefficient predation. Moreover, even when the distinctions can be made, the legal cure is almost always worse than the disease itself. Therefore, although we may assume that some anticompetitive strategic behavior does occur, the appropriate role of antitrust law in regulating that conduct is nevertheless very limited. In the vast majority of instances, antitrust enforcement cannot intervene to deter inefficient competition without imposing more costs on the economy than would be saved.

Good Competition Indistinguishable from Bad

Distinguishing between efficient and inefficient competition is very difficult, if not impossible, because anticompetitive strategic behavior on its face is often so similar to vigorous competition and the exercise of good business judgment. Practices that raise suspicions of predation, such as cutting price to rock bottom, building a higher fixed cost/lower variable cost plant than is the industry norm, or locking up long-term supplies or outlets, also can represent efficient business decisions in response to changing market conditions. Even under the best circumstances, the ability of enforcers and courts to obtain and evaluate information is simply not adequate to distinguish reliably between efficient and inefficient competition.

Evidence concerning the intent of a firm and its managers is, in truth, very little help in distinguishing inefficient competition. Virtually all competitors, or at least those who are not fixing prices or lethargically holding a price umbrella over their fellow market participants, view their market rivals as the enemy in the war to win the hearts and minds of the consumers. And consumers benfit from that war in the form of low prices, new technology, and enhanced choices. It is not the competitive spirit that distinguishes the good from the bad; rather, it is the effect of the conduct.

Unfortunately, the search for objective indicia that a practice is a form of inefficient competition seems similarly fruitless. Asking whether prices are below some measure of cost -- short-run marginal, long-run marginal, average variable or even, heaven help us, below the short-run profit maximizing price 7/ -- may sound like neat, easy-to-apply tests, but they generally are not reliable. Uncertainty regarding which costs are relevant, what time period is significant, and even what the actual prices were, is likely to doom this inquiry to failure. Yet, even if a court is lucky enough to get the data to conclude positively that prices have indeed fallen below the relevant threshold for a substantial period, there often are legitimate and rational business reasons for selling goods below cost -- indeed, even for giving them away. For example, so-called "learning-curve" pricing of new technology products, such as semiconductors, involves selling below current, actual costs of production but is nevertheless rational and efficient.

Similarly, attempting to gauge whether a business practice is a form of inefficient competition generally is not only very difficult, but also requires extraordinary intrusion into the day-to-day operations of business. Many of the

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7/ See International Air Industries v. American Excelsior Co., 517 F.2d 714, 724 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976).

business decisions made every day -- whether they are to invest in R & D or to choose a given plant location or supply arrangement -- may appear unprofitable in the short run. On closer analysis, however, they more often can be explained as efforts to compete more effectively in the long run, by, for example, building good will or brand loyalty. Even if the antitrust enforcer or court might "know predation when it sees it" -- and having met a lot of excellent enforcers, I doubt that ever is true -- businesspeople are left only with uncertainty, and no guidance.

Finally, any effort to identify instances in which market power has subsequently been exercised is equally futile. Not only is it essentially impossible to tell whether prices in a market reflect the existence of market power, but the fact of market power itself may be irrelevant. The law does not -- nor should it -- punish the exercise of market power even by a monopolist so long as the power was achieved by way of superior product, business acumen, or historic chance. 8/ Given that courts and enforcers generally cannot tell how market power has been achieved, its exercise alone adds nothing to the calculus.

8/ See United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

Thus, it is inevitable that any rule or enforcement stance that sought to root out and eliminate all forms of inefficient competition would inadvertently punish healthy competition. Moreover, it would generate so much uncertainty that the fear of treble-damage liability would deter a great deal of procompetitive conduct. Take a few examples of what might appear at first blush to be clear instances of predation:

1. A computer firm with a large share of the personal computer or "PC" market provides its PCs, free of charge, to primary schools across the country. Rival manufacturers, which previously sold PCs to this segment of the market at a profit, see their market shares vanish. Moreover, they lose market share in the rest of the market as users educated on the free PCs buy that brand of PC for personal use.

One could argue the firm has competed inefficiently. It may be clear that the dominant firm was not acting altruistically, but rather that it wished to increase its market share. Moreover, giving the PCs away -- that is, at zero price -- is below any cost standard.

On the other hand, one could argue -- more persuasively to my mind -- that the firm has simply invested in the development of good will. The firm's give-away both enhances its reputation in the community and familiarizes future

purchasers with its brand of PC. As a result, sales of its brand increase, and, because of trademark, copyright, and other intellectual property regimes, rival firms are largely (but probably not completely) excluded from sharing in the benefits. Consumers, though, are likely better off.

2. A significant competitor in a fabricating industry negotiates long-term exclusive arrangements, albeit at a substantial cost to itself, with a large majority of the most efficient suppliers of raw material inputs. The firm's rivals are left with few sources of supply. Consequently, in times of strong demand and poor supply, input costs to those rivals skyrocket, and they find themselves at a competitive disadvantage.

Apart from the concern that the firm in this case may have monopolized the supply of inputs, it is not clear whether the agreements are efficient or inefficient. Certainly, they make life more difficult for other fabricators. On the other hand, the agreements may substantially reduce the fabricator's cost by ensuring a stable source of consistently high-quality inputs. Such agreements may reduce cost. Moreover, because this fabricator was the first to recognize the cost-saving potential, it may have been able to contract with the most efficient suppliers. Penalizing such conduct may thus have more costs than benefits.

3. A firm files numerous legal actions to enforce its patent. The firm knows that there is a risk that the patent is invalid and that there is an even greater risk that the courts will ultimately conclude that some, perhaps most, of the defendants in the suits have not actually infringed its patent. The firm indicates that it will drop the suit against any and all defendants who agree to enter into restrictive geographic licenses and to pay a percentage royalty on their sales.

Leaving aside Noerr-Pennington issues, it is ambiguous whether the conduct is efficient or inefficient, even in this example. The patent suits may be vexatious and merely designed to impose disproportionate legal costs on rivals with the hope of reducing competition. On the other hand, the suits may represent legitimate attempts to protect a lawful property right, which itself supplies the incentive for investments in beneficial research and development. Surely the conduct should not be condemned simply because there was some uncertainty whether the suits would succeed. Moreover, the terms of the offered settlement may represent the most efficient way to reap the legitimate returns generated by the technology covered by the patent.

The conduct in these examples and many others we can all think of could be challenged by some competitor as inefficient

competition. To determine whether such conduct is actually efficient or inefficient, however, a court would require much more information. Even with unlimited access to information, however, the correct answers likely would remain beyond the court's grasp.

But the flesh and blood human beings who have to struggle to abide by the law every day under pain of treble damages would find the uncertainty intolerable. The best option for dealing with such uncertainty might well be simply to avoid vigorous competition. The uncertainty, however, would only be the beginning of the Kafka-esque nightmare. If conduct is actually challenged, the competitor will find itself trapped in a never-ending, obscenely expensive morass of litigation. It is not a coincidence that the most massive, expensive, and long-running antitrust cases, such as the government's marathon suit against IBM and the private Matsushita case, involved allegations of predation that ultimately came to naught. Not only is there a good chance that ultimately courts will arrive at inaccurate conclusions, it is hard even to be confident that the courts will be in the ballpark. The result is that a vigorous effort to track down and condemn all inefficient competition would punish and deter a great deal of procompetitive activity, while diverting attention and resources from more damaging violations of the antitrust law, such as price fixing and anticompetitive mergers.

Lack of a Workable Remedy

Even if, after extensive and painstaking analysis, antitrust law could identify the real cases of "inefficient competition," what should enforcers do about it? Anyone who has ever read the decree in a predation case knows the danger: the decree must limit the predator's ability to compete inefficiently. And the same difficulties associated with distinguishing efficient from inefficient conduct in the first place make it even more vexing to craft a decree that makes precise and accurate distinctions. Even if one believes that the cost that the decree imposes on the defendant is justified, it is the harm to consumers from reduced competition that should cause serious concern. Moreover, when the proven predation is an abuse of government process, a decree that limits the defendants' access to that process raises serious First Amendment concerns. In most cases, frankly, the competitive cure that results from "successful" antitrust enforcement against inefficient competition is worse than the malady itself.

Novel Theories of Predation -- Raising Rivals' Costs

This discussion indicates, I hope, that antitrust enforcers, even in the face of pressure resulting from the FTA, should recognize the severe and inherent problems associated

with attempting to police most forms of inefficient competition. Although economics has gained ascendancy in antitrust analysis, the courts and enforcers should not rush to embrace novel theories suggesting a need for antitrust intervention simply because those theories are phrased in economic terms. For example, the theory of "raising rivals' costs" 9/ has attracted much attention, particularly that of plaintiffs' attorneys looking for a new theory to try out on a judiciary that is increasingly skeptical of competitors' antitrust suits. The phrase refers to an assortment of concerns with inefficient competition that manifests itself in the form of increasing a rival's costs rather than forcing the rival to reduce its price and/or reducing the demand for the rival's product. Proponents of the theory posit that a wide variety of exclusionary vertical practices may be used to raise a rival's costs, and so to benefit the predator.

In fact, this school of thought should be known as "raising clients' costs." It often describes nothing but discredited theories of vertical foreclosure that misdirect attention from the relevant horizontal effect of a practice. It turns out that the concerns associated with raising rivals'

9/ See, e.g., T. Krattenmaker & S. Salop, "Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price," 96 Yale L.J. 209 (1986).

costs either are equivalent to monopolization of an input market, or represent evasion of regulation, 10/ or simply are nonexistent chimera. 11/ Thus, raising rivals' costs has nothing to add to existing antitrust doctrine. Certainly, the questionable theories cannot support heightened intervention in private market transactions to combat perceived predatory conduct.

Real Predation

All this is not to say that our understanding of predation offers no policy implications. Indeed, there are some, although they do not necessarily involve devising new antitrust doctrines.

Predation to Discipline a Cartel

There is one area in particular where predation does occasionally manifest itself unambiguously and is attacked, albeit indirectly, by antitrust enforcement. That is the use

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10/ See T. Brennan, Understanding "Raising Rivals' Costs," (Economic Analysis Group Discussion Paper 86-16, Sept. 26, 1986).

11/ "Alcoa Revisited: Raising-Rivals'-Costs Does Not Improve the Case," by Paul Godek and John Lopatka of the Federal Trade Commission (forthcoming working paper).

of predation to discipline cheaters in a price-fixing or bid-rigging conspiracy. Small doses of harm may be sufficient to bring a member who cheats on the cartel back into line. If cartel members already are coordinating their pricing, it may be relatively easy to coordinate a policing strategy involving a form of inefficient competition.

In this context, however, the real concern is not the disciplining behavior, but the naked horizontal agreement itself. The costs of a general predation policy may be avoided by resort to a far more precise and effective antitrust response -- criminal prosecution of naked horizontal agreements. The Department's criminal enforcement program targets these unambiguously harmful conspiracies wherever they are found and whatever means are used, and deters them with stiff fines and jail terms. 12/ The likely role of predation in this context will be to draw our attention to the existence of the underlying cartel.

12/ See "Deterring Antitrust Crimes Through Stiffer Penalties," Remarks of Charles F. Rule, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, before the ALI-ABA Course of Study on "Antitrust Law," May 6, 1988.

Regulatory Leverage and Abuse of Governmental Processes

Predation is also relatively more plausible when the predator uses the resources of the government or resources guaranteed by government regulation to fund its activities. Thus, predation through the abuse of governmental processes may often be credible and profitable. However, condemnation of such predation under the antitrust laws can interfere not only with the First Amendment 13/ but also with legitimate government policies that are meant to contravene competitive processes.

Another credible form of predation involving the government involves the leveraging by a rate-regulated monopolist of its market power into unregulated markets. Frankly, however, I am not convinced that such regulatory predation is very prevalent, particularly given the strong incentives for regulators to prevent such conduct if it serves to inflate the rate base.

Moreover, antitrust intervention to combat regulatory predation is not a simple matter. One could simply prohibit

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13/ See, e.g., California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

the regulated firm from competing in unregulated markets; however, as our experience with the AT&T decree points out, such a prohibition can deprive society of potentially very efficient competitors and of the economies of scale and scope that can only be generated if the regulated firm or firms enter the adjacent unregulated market. In addition, what may appear to be an easily administered, flat prohibition may prove to involve very complex and even intractable definitional issues as changes in technology and market conditions blur the distinction between the regulated and unregulated markets.

The alternative to a flat prohibition is to allow the regulated firm to compete in the unregulated market, and so to allow society to realize the benefits of such competition. However, any attempt to regulate the firm's behavior in the otherwise nonregulated market would hardly be easy to administer, particularly since it will at best involve a court and an enforcement agency. Moreover, such cumbersome court regulation would likely interfere with the ability of the legitimate regulators (such as the FCC in the case of the AT&T decree) to fulfill their public interest obligations in the regulated market.

The preferred solution in the case of both abuse of governmental process and predation by a rate-regulated monopolist is to minimize the opportunity for predatory abuse

by deregulating the economy wherever possible. This is because it is primarily the government's involvement in the market, not the market itself, that makes the predation credible and profitable. Increased reliance by policymakers on the market could potentially produce procompetitive benefits that dwarf those achievable by antitrust enforcement alone.

Conclusion

Even as to these limited areas, and perhaps a very few others, of legitimate concern, we should be careful not to let pleas for increased intervention stifle the free markets and trading opportunities opened by the historic Canada-U.S. Free Trade Agreement. Free and open markets will sort out and protect economic winners and losers much better than government attempts to fine-tune markets by attempting to distinguish between efficient and inefficient competition. Ultimately, the winners will be consumers whose interests, after all, matter more than the economic well-being of aggrieved competitors.