DISCUSSANT COMMENTS ON EXPLOITATIVE ABUSES UNDER ARTICLE 82 EC

Remarks before the European University Institute
Twelfth Annual Competition Law and Policy Workshop:
"A Reformed Approach to Article 82 EC"

Florence, Italy
June 9, 2007

William Blumenthal[*]
General Counsel
Federal Trade Commission
Washington, D.C.

I am delighted to be able to join you for this morning's session on "Exploitative Conduct and the Remedies – The Interface between Regulation, Antitrust, and Consumer Protection – Is Price Regulation the Answer?" I have been asked to serve as discussant for papers by Amelia Fletcher[1] and Ian Forrester,[2] who address possible policy responses to excessive pricing by dominant firms. In the course of my comments, I'll also touch upon issues raised by the paper on related issues by Emil Paulis.[3]

In considering policy towards "excessive pricing" by dominant firms, I begin with this recognition: Not all market failures can be effectively redressed through competition work of Stephen Breyer, now a Justice on our Supreme Court, on the issue of regulatory matches and mismatches.[5] During the late 1970s and early 1980s, while a law professor at an earlier stage of his career, Justice Breyer developed a list of marketplace problems that might justify intervention and a separate list of possible regulatory tools, and he observed that certain tools were best suited to certain problems.[6] Where regulation was unsuccessful, as was often the case in the United States during that era, the reason could often be traced to selection of the wrong tool for the particular problem. In Justice Breyer's words, "regulatory failure sometimes means a failure to correctly match the tool to the problem at hand."[7] His list of marketplace problems includes natural monopoly, rent control, spillovers, information inadequacies, and moral hazard. The regulatory tools include cost-of-service ratemaking, nationalization, taxes, marketable rights, information disclosure, standard-setting, and antitrust.

As practiced today by reasonably sophisticated governments, virtually all of those regulatory tools include competitive effects as an element of analysis, but they are not "competition policy" in the sense of antitrust. At the Federal Trade Commission, for example, we have a Bureau of Competition and a separate Bureau of Consumer Protection. Many of the interventions by the Bureau of Consumer Protection involve market failures arising from information inadequacies. In conducting our work relating to those interventions, we routinely involve economists in our Bureau of Economics, and we routinely assess the competitive effects of possible agency actions; but most of the remedies involve some form of information disclosure, as distinct from the forms of antitrust remedy ordinarily sought in matters brought by our Bureau of Competition.

There is a tendency on the part of competition lawyers to view competition enforcement (in the sense of antitrust) as pure, and sectoral economic intervention as tainted. I accept that, at least directionally, but the distinction is not so clearly drawn as we competition lawyers commonly think. From the perspective of the economy as a whole, competition enforcement will generally be superior; it qualifies as the default regulatory tool. From the perspective of particular circumstances with a market failure, however, the answer will be less clear. Competition enforcement may sometimes be

---

directed at issues facing China as it seeks to adopt a competition law regime – things such as the allocation of responsibilities between competition authorities and sectoral regulators, the problems of state aid and regional preferences, and the tendency "to limit the agency's jurisdiction by excluding certain industries or certain segments of the economy, often on grounds that those industries or segments are ill-suited for competition . . . because they are 'natural monopolies'." Id. at 16. That is, the issue in Hangzhou was that governments often adopt a public-utility-style regulatory tool when a markets-based competition tool would be adequate and preferable. Today's panel is addressing the reciprocal problem. That is, the issue in Florence is the interest of competition lawyers in adopting an antitrust-based tool when it may not be adequate and when some alternative regulatory mechanism might be preferable.

5 *See, e.g.*, STEPHEN BREYER, REGULATION AND ITS REFORM (1982) (hereinafter BREYER). The book elaborates on and develops views initially presented in a law review article that is often easier to locate

inadequate. Some industries are inherently monopolies – they have room for only one player, due to either their cost structure or perhaps network effects. In those industries some form of utility-style regulation may be a better tool.

The Fletcher and Forrester papers do an excellent job of collecting and summarizing the fundamental difficulties in using competition law to intervene against high prices and other forms of exploitation of monopoly power. The Paulis paper, on which I am not a designated commentator, does as well. Taken together, the three papers provide as complete a list as I have seen in any single source. I do not try to reconstruct the list comprehensively here, but the key points seem to be these:

> Considered in terms of the economic system as a whole, the opportunity to charge high prices and earn monopoly profits, at least for a short period, is desirable in that it attracts investment and business talent and yields innovation and growth.
>
> Considered in terms of the particular market, high prices are a signal indicating that the market may currently be characterized by undersupply, and suppressing that signal will deprive the economy of warranted entry and capacity expansion.
>
> Assessing whether a price is truly elevated is difficult for several reasons, which defy the articulation of clear legal rules and deprive the business community of needed guidance:
>
> – Identifying the benchmark against which price should be measured presents complex policy questions,
>
> – Insofar as the benchmark involves cost, measuring cost poses operational difficulties, and
>
> – For multi-product firms and for firms in multi-product markets, even measuring the appropriate "price" can pose operational difficulties.
>
> The legal regime required to address exploitative prices is equivalent to price regulation and is highly distortive.
>
> Intervention against exploitative prices challenges the institutional capabilities of a competition enforcement agency, a point to which I will return below.

Because of these many difficulties, this morning's papers uniformly realize that intervention against exploitation should be an exceptional use of Article 82, and probably an extraordinarily exceptional use. From an outsider's perspective, it appears that the discussion within Europe is asking what are the narrow, focused circumstances – what are the extensive preconditions that must be satisfied – before intervention would be warranted.

at least judgment in the wider set of other interventions. And that is a cost I am not willing to pay.

Let me conclude, then, with these observations:

The availability of an effective remedy has been a recurring issue in the dominance field for many decades.[13] In some instances, an effective focused remedy will be feasible. It typically will address a particular restraint that can be excised through a prohibitory injunction. As the range of business conduct that must be addressed broadens, however, or if the injunction moves beyond prohibitions into affirmative obligations, the likelihood that a remedy will be successful becomes more remote. A remedy that entails ongoing regulation of prices and profits by courts or competition authorities is almost certain to fail, for the reasons of competence and resources noted above.

Governments have a number of regulatory tools at their disposal for responding to perceived market defects. If a particular monopoly presents a problem that is so severe and intractable that enforcement officials believe the only effective remedy would entail ongoing monitoring and supervision of price, we should be asking whether a sectoral regulator with the appropriate competencies is available. And if none is, we should be asking whether the market failure is really of such a character that one should be constituted.

---

[13] *See, e.g.*, United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); United States v. Aluminum Co. of Am., 91 F. Supp. 333 (S.D.N.Y. 1950). *Cf.* 4 PHILLIP E. AREEDA, A