Federal Trade Commission

Has The Pendulum Swung Too Far?
Some Reflections on U.S. and EC Jurisprudence

J. THOMAS ROSCH[1]
COMMISSIONER, FEDERAL TRADE COMMISSION

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Lars-Hendrick Röller has accurately captured a pervasive American view that there is a fundamental difference between the American and European antitrust regimes. Many in the United States believe that European antitrust jurisprudence places a premium on predictability. Per se rules of illegality are favored, and form is emphasized. It is said that once dominance is established, a practice is apt to be summarily condemned under Article 82 if it is falls into a particular category. In contrast, it is suggested that the American system – dominated by the rule of reason analysis with its focus on effects and efficiencies – is far more flexible, and it puts a premium on precision. Or, to put it somewhat less elegantly (and more arrogantly) the American system stresses "getting it right."[2]

In discussing Europe's supposed preoccupation with predictability, Professor Röller has

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[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor Kyle Andeer for his invaluable assistance in preparing this paper.

[2] Lars-Hendrick Röller, Remarks at the Bates White Fourth Annual Antitrust Conference: *Article 82 in Europe* (June 25, 2007).

asked provocatively what is meant by predictability – does it refer to predictability about the analytical framework or about the outcome.[3] As to either (or both), one can argue that it is the American antitrust jurisprudence that has become preoccupied with predictability. The Supreme Court's decisions of the last thirty years have moved towards a regime of *per se* legality for many practices.

In its landmark *Sylvania* decision in 1976, the Supreme Court abandoned the *per se* rule against non-price vertical restraints – such as the assignment of exclusive territories and exclusive customers – it had adopted less than a decade earlier.[4] In holding that such restraints should be subject to the rule of reason, the Court discussed at length the potential pro-competitive benefits of those restraints – relying in part on the conservative economic scholarship of the "Chicago School." The Court expressed doubt as to whether the restraints at issue in that case could harm competition; the Court suggested that increased interbrand competition generally would more than offset any loss of intrabrand competition resulting from such complaints.[5] As a result of *Sylvania,* challenges to non-price vertical restraints have all but dried up. Today successful challenges to these practices are as rare as the cuckoo bird.

The Court's distinction in S*ylvania* between non-price and price vertical restraints preserved the longstanding *per se* rule against vertical price restraints.[6] However, as the Court noted in subsequent decisions, that distinction between price and non-price restraints grew

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[3] Id.

[4] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[5] Id. at 52 n.19, 54.

[6] Id. at 51 n.18.

the same thing in minimum vertical price-fixing cases. The *Leegin* decision is largely based on the same economic analysis that underlays *Sylvania*.[14] The dissenting opinion by Justice Breyer criticizes adoption of the rule of reason on the ground, *inter alia*, that it will stifle challenges to resale price maintenance, regardless of the effects of the practice.[15] However, even if the Court had preserved the *per se* rule in *Leegin*, it is doubtful that would have made any real practical difference. The standards for establishing an agreement articulated by Court over twenty years ago in *Monsanto* and *Sharp* would have still stood as a significant barrier to challenges to minimum vertical price-fixing agreements. Indeed it is a wonder that the *Leegin* case was ever brought.

Consider also the Court's decisions in *Brooke Group*[16] in 1993 and *Weyerhaeuser*[17] earlier this year. In those cases, the Court held (again based largely on Chicago School economic theories) that predatory pricing could be established only if a plaintiff showed that pricing was below some measure of cost and that the market structure was sufficiently unconcentrated that any losses suffered from below cost pricing could be recouped.[18] (Earlier, Judge (now Justice) Breyer rejected the premise that a firm might use its supra-competitive profits in one market to subsidize a predatory strategy in another market; he opined that no

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[14] Leegin Creative Leather Prods. v. PSKS, Inc., 2007 WL 1835892; __ S.Ct. __, Slip Opinion at pp. 9-10, 17-18, 20-21 (2007) *available at* http://www.supremecourtus.gov/opinions/06pdf/06-480.pdf. Author's note: publication of these remarks was deferred pending the Court's issuance of its decision in *Leegin*.

[15] Id. at 19.

[16] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[17] Weyerhaeuser v. Ross Simmons, 127 S.Ct.1069 (2007).

[18] Brooke Group, 509 U.S. at 222-224; Weyerhaeuser, 127 S.Ct. at 1078.

rational firm would use its profits in that fashion.[19]) Since *Brooke Group*, few predatory pricing claims have been brought and even fewer of those claims have been successful.[20]

In 2004, the Court in *Trinko* sounded what some commentators consider to be the death knell for refusal to deal challenges and the related doctrine of essential facilities.[21] I do not agree with that reading of *Trinko* and I believe some may be reading too much into that opinion. First, although to be sure the Court's comments about the viability of the essential facilities doctrine were so tepid that some consider that doctrine to on life support, the Court refused to explicitly reject the essential facilities doctrine.[22] Second, despite some commentators interpretations of *Trinko*, the Court did not reverse *Aspen Skiing* and it preserved liability for

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[19] Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 485-486 (1st Cir. 1988) ("[the plaintiff] argues that the defendants behaved unlawfully by agreeing to charge high prices on some products, and then used the proceeds of their high price sales to finance below cost coupling prices. The short answer to this claim, however, is that the only important element here for a court to examine at the request of a competitor is the low price. If that price is unlawfully low, if, for example, it is a predatory price, it does not ordinarily matter whether the money to pay for the resulting temporary loss comes from a bank account, a legacy, a lottery prize, or the proceeds of a price-fixing conspiracy in respect to another product; regardless of financing source, the practice would be unlawful."); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 593 (1986) ("Whether or not petitioners have the means to sustain substantial losses in this country over a long period of time, they have no motive to sustain such losses absent some strong likelihood that the alleged conspiracy in this country will eventually pay off. . . [T]here is nothing to suggest any relationship between petitioners' profits in Japan and the amount petitioners could expect to gain from a conspiracy to monopolize the American market").

[20] Plaintiffs won a rare victory when Spirit Airlines convinced the Sixth Circuit to reverse the district court's grant of summary judgment in favor of the defendant. Spirit Airlines, Inc. v. Northwest Airlines, Inc. 431 F.3d 917 (6th Cir. 2005).

[21] Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004)

[22] Id. at 411 ("We have never recognized [the essential facilities doctrine] and we find no need either to recognize it or repudiate it here.")

[23] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); *Trinko*, 540 U.S. at (describing *Aspen Skiing* as "at or near the outer boundary of § 2 liability.").

[24] Bell Atlantic Corp. v. William Twombly et. al., 127 S.Ct. 1955 (2007); see e.g., 92 BNA Antitrust Trade & Regulation Report (May 25, 2007) at 581-582.

[25] Brief for Petitioners, *Bell Atlantic Corp. v. Twombly* (Sup. Ct. No. 05-1126) (filed Aug. 2006), at 24, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/05-1126_Petitioners.pdf ("to state a claim for relief, it is not enough for a plaintiff to allege that defendants engaged in parallel conduct; there must be sufficient *factual* allegations to support the conclusion that defendants conspired"); Brief of United States as Amicus Curiae Supporting Petitioners, *Bell Atlantic Corp. v. Twombly* (Sup. Ct. No. 05-1126) (filed Aug. 2006), at 23, *available at* http://www.usdoj.gov/atr/cases/f218000/218048.htm

Court worried that if complaints to manufacturers about discounters were grist for private treble damage litigation that could chill legitimate, and beneficial, communications.[31] In *Brooke Group*, the Court expressed concern that private treble damage challenges to alleged predatory pricing could chill price-cutting that would benefit consumers.[32] In *Twombly*, the Court explicitly justified toughening the pleading standards by citing the high costs of antitrust litigation.[33]

Frankly, I share that concern. My experience as a private practitioner (almost always on the defense side) was that, if anything, the burden and expense in private treble damage actions

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designed to coerce a settlement."); *see also* DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53, 55 (1st Cir. 1999) ("the price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition."); Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 528, n.17 (1983) ("Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."); Franchise Realty Interstate Corp. v. Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076, 1083 (9th Cir. 1976) ("The liberal discovery rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense that can make the mere pendency of a complex lawsuit so burdensome to defendants as to force them to buy their peace regardless of the merits of the case.").

[31] Monsanto, 465 U.S. at 762 ("A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market. Moreover, it is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in the distributors' resale prices. The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that "freeriders" do not interfere."); *see also* Leegin, Slip Opinion at 15 ("[Per se rules] also may increase litigation costs by promoting frivolous suits against legitimate practices.").

[32] Brooke Group, 509 U.S. at 223.

[33] Twombly, 127 S.Ct. at 1966-1967; *see also* Leegin, Slip Opinion at 25 ("In sum, it is a flawed antitrust doctrine that serves the interests of lawyers.")

mistrust of lay juries and courts in *Twombly*, [36] Reliance on the academy to support this concern is suspect. Although their credentials as antitrust scholars are peerless, I am not aware of whether Professors Areeda or Turner ever tried a treble damage case to lay jury, or for that matter, in a federal district court. If they did, the bases for their views would be at best anecdotal. Nevertheless, their concerns have found traction in the Court's antitrust jurisprudence.

I must say that this mistrust of juries and judges does not square with my own experience. To be sure, I was often shocked by the jury deliberations in mock trials, where the mock jurors

[36] Twombly, 127 S.Ct. at 1967 ; *see also*, id. at 1975 (Justice Stevens writing in dissent noted that "Two practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions.")

[37] *See, e.g.*, Case T-342/99, Airtours plc v. Commission, [2002] E.C.R. II-2585; Case T-310/01, Schneider Electric SA and Others v. Commission, [2002] E.C.R. II-4071; Case T-5/02, Tetra Laval BV v. Commission, [2002] E.C.R. II-4381, aff'd Case C-12/03P, [2005] 1 ECR 987; Case T-210/01 General Electric Company v. Commission [2005] ECR II-5575.

[38] *See* European Commission, DG Competition Discussion Paper on the Application

[40] *See* France Télécom SA v. Commission ¶ ¶ 195-197 [2007] E.C.R. II;Article 82 Discussion Paper, ¶ ¶ 81, 112-113, 171.

[41] Douglas Bernheim, Remarks at the Bates White Fourth Annual Antitrust Conference: *Predatory Foreclosure, Bundled Discounts, and Loyalty Rebates: the case of Virgin 1Tl β**er-6TD.06T*

[42] *See*

antitrust jurisprudence in the United States. But the EC does not (yet) have a private treble damage regime (let alone class actions). Even if one believes that the cost of private litigation and the danger of false positives in jury cases makes the way we do things here right for us, that does not necessarily mean that our regime is right for the EC. Or vice-versa. I, for one, do not think that there is currently any "right" way to resolve antitrust cases regardless whether they arise on this side or the other side of the Atlantic. As I have said on another occasion, it may be that it is best to let the "competition" between our "differentiated products" play itself out.[44]

[44] J. Thomas Rosch, Commissioner, Federal Trade Comm'n, Address at the St. Gallen International Competition Law Forum: *The Three Cs: Convergence, Comity, and Coordination*, (May 2007) at p. 2 *available at* http://www.ftc.gov/speeches/rosch/070510stgallen.pdf