Federal Trade Commission

Observations on Evidentiary Issues in Antitrust Cases

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before the

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Good afternoon. I am especially pleased to participate in this discussion of standards of proof, burdens of proof, and standards of judicial review because the discussion thus far – which has concerned those matters in European competition jurisprudence and practice – has been both enlightening and thought-provoking.

Let me begin by emphasizing that the European system of competition law is radically different than our own in the United States. First, the laws are different. Sections 1 and 2 of the Sherman Act, for example, prohibit the willful creation or maintenance, but not the exploitation, of monopoly power, as well as attempts to monopolize. Article 82, on the other hand, prohibits a dominant firm from exploiting its power, and there is no counterpart to the attempted monopolization offense in Article 82.

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, Amanda Reeves, for her invaluable assistance preparing this paper.

Second, we have different histories and cultures. For example, until recently the United States had fewer state-owned enterprises than Europe has had (although that gap may be narrowing substantially, given our federal government's intervention in the banking, insurance and automobile sectors). Concomitantly, state aid had historically been less closely scrutinized in the United States than in Europe (although that gap may narrow too, as government investments become more prevalent in the United States).

Third, it is arguable that the United States and Europe analyze antitrust questions against a backdrop of different economic principles. Damien Nevins may disagree with me, but I have remarked before that Europe seems more open to embracing post-Chicago School theories of rational, but predatory, conduct like practices designed to raise rivals' costs and/or to exclude rivals' cheaply.[1] Europe may also more warmly embrace some of the "new" economics like experimental economics or behavioral economics.[2] At least some of the most provocative discussions I've seen on those subjects recently have emanated from Europe.

Fourth, and most fundamentally, we have very different enforcement regimes. In the United States, we have private, as well as public, enforcement. Although Ms. Kroes

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[1] *See* J. Thomas Rosch, "I say Monopoly, You say Dominance: The Continuing Divide on the Treatment of Dominant Firms, is the Economics?" (September 8, 2007), *available at* http://www.ftc.gov/speeches/rosch/070908isaymonopolyiba.pdf; J. Thomas Rosch, "Has the Pendulum Swung Too Far? Some Reflections on U.S. and EC Jurisprudence" (June 25, 2007), *available at* http://www.ftc.gov/speeches/rosch/070625pendulum.pdf.

has recently taken some tentative steps toward initiating private litigation in Europe, it remains far from clear (especially given the U.K.'s recent rejection of class action litigation) how far that initiative will proceed. Personally, in view of Europe's antipathy toward opt-out class actions and toward pre-trial discovery and the potential for abuses of both in the United States, I am dubious about whether Europe can – or should – emulate the United States in this respect.

Beyond that, our system of public enforcement in the United States is an adversarial system: the Justice Department and the state attorneys' general must prosecute their challenges brought under federal antitrust law in the federal courts. Indeed, even the FTC, which acts as both prosecutor and judge, must use administrative law judges in administrative proceedings and make requests for preliminary injunctions in the federal courts. The federal courts and administrative law judges are all independent fact-finders, and their fact-finding processes include vigorous cross-examination and are subject to judicial review.

By contrast, the system of public enforcement in Europe is administrative to the consternation and dismay of experienced practitioners like Jim Venit, Mario Saragossa, and Ian Forrester, the Commission (and its counterparts in the member states) not only act as prosecutor and judge, but make decisions without cross-examination and with ostensibly limited judicial review. This may make the EC more concerned about under-enforcement as compared with the EC's counterparts in the United States. Moreover, as Philip Lowe and Claus-Dieter Ehlermann have observed, Europe is not going to abandon that administrative system anytime soon.

Yet, despite these radical differences between Europe and the United States, I am struck by the fact that the issues raised regarding our competition law enforcement regimes are remarkably similar. Of course, the reason we are discussing standards of proof, burdens of proof, and standards of judicial review today is because they were on our agenda. But these are the very same issues that we are discussing in the United States with regard to our adversarial system of competition law enforcement.

Before I go further, though, please let me define what those terms mean to me. To me, the "burden of proof" means the standard of production. That is to say, it refers to who has the burden of producing evidence on a substantive element of an offense (or of producing evidence on a substantive element of a defense). Necessarily, then, who has that burden depends on the elements of the offense (or the defense), and whether the burden of production of that element has shifted in a particular case. Thus, whether an offense is a per se offense, a full-blown rule of reason offense, or a truncated rule of reason offense makes a difference in determining the applicable burden of proof.

On the other hand, the "standard of proof" refers in my mind to the probative value of the evidence. At today's session, for example, other contributors have made reference to three possible measurements of the probative value of the evidence: (1) preponderance of the evidence, which roughly requires that the party bearing the burden of proof show that it is more probable than not that it has met the standard of proof it bears; (2) proof by clear and convincing evidence, which requires more probative evidence than the preponderance measurement requires; and (3) proof beyond a reasonable doubt, which requires still more probative evidence and is normally applicable only in cases involving per se illegality (like price-fixing).

The “standard of judicial review” refers, by contrast, to the degree of deference that an appellate court accords to the decision of a competition court or agency. That can range all the way from being a “rubber stamp” and automatically blessing the court or agency decision to reviewing the application facts and law de novo. Some of the practitioners that we have heard from today have asserted that, in reviewing the EC’s decisions, whether those decisions concern liability or the amount of a fine, the EC and/or the European court have accorded the EC too much deference.

But, again, I am struck by the fact that, whatever the differences in the distribution of burdens of proof, standards of proof, and standards of judicial review applicable in particular cases in the United States and Europe, the application of those concepts in similar cases is remarkably similar. Please don’t misunderstand me. I have

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However, one can see the same phenomenon in Section 2 and Article 82 cases. Under the recent EC Guidance, liability under Article 82 turns on the effects of the dominant firm's conduct. The same thing is true of recent Section 2 cases decided by the regional federal appellate courts in the United States – cases like *Dentsply*, *LePage's*, *Microsoft*, *Spirit Airlines*, and *Conwood*[3] (though not, as Barry Hawk has reminded us of Supreme Court Section 2 cases[4])

To illustrate this point, I would like to ask a series of four questions, discuss what the answers would be in the United States and then ask whether the answer would be different in Europe, based on what I've read and heard.

First, does the prospect of liability differ, depending on whether the conduct at issue is a merger or single-firm conduct? I regard this as a question raising the issue whether the applicable standard of proof and the standard of review are the same in cases involving these two types of conduct. Lorenzo Coppi has suggested, for example, that less deference should be paid to prosecutors if single-firm conduct is involved because of the need for certainty respecting the legality or illegality of that conduct. But I don't discern any real difference in the applicable standard of proof or in judicial review of prosecutorial decisions in cases involving the two kinds of conduct in the United States or Europe.

In the United States, the Supreme Court has not decided a merger cases in decades so no conclusions can be drawn from Supreme Court merger jurisprudence. But

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[3] *United States v. Dentsply Int'l Inc.*, 399 F.3d 181 (3d Cir. 2005); *LePage's Inc. v. 3M Corp.*, 324 F.3d 141 (3d Cir. 2003); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); *Spirit Airlines v. Northwest Airlines*, 431 F.3d 917 (6th Cir. 2005); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002).

[4] *See, e.g.*, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S.Ct. 1109 (2009); *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP* 6th Ci1 0 Td (, 34..09 (2009); l)-5(n)- 0 Tc 0 Tw

the regional federal appellate courts in the United States, as well as the CFI and the ECJ, have conducted searching inquiries into procedural positions respecting mergers. See, for example, the decisions in *Baker Hughes* (where DOJ lost)[5] and the CFI decision in Cruise Lines (where the EC lost). That is arguably because the inquiry in those cases was *prospective*, involving the need for predictions, instead of retrospective, where there is no need to predict what will happen because it has happened. I suggested in a concurrence in the Evanston Hospital case that that makes a difference,[6] and appellate courts seem to demand more from the prosecutors where predictions are required.

On the other hand, in both the United States and in Europe, the regional courts of appeals have been pretty deferential to prosecutors in recent single-firm conduct cases. *Dentsply* and *Microsoft* are examples in the United States.[7] *Microsoft*, *British Airways*, and *France Telecom* are examBe(are ex)a1,ex a5the /MCTuise Li(where the EC lost)2 390.36 65

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“exclusionary” in effect when the practices are employed by firms of that kind than w

suspect.[10] In his Three Tenors opinion he held that the burden of producing evidence to justify them shifted to the defendant(s); if the defendant failed to produce that evidence, it would lose. The CFI's decision in the Microsoft case (and the EC's recent Article 82 Guidance) seem to embrace that analysis.[11]

sides of the Atlantic. Although the initial focus was on the conflict among economists that sometimes cancel out each other's opinions, Simon Bishop and Lorenzo Coppi seemed to agree that the more fundamental problem with many economic analyses is that they are too complex and therefore are incomprehensible. Based on my own experience, that is especially true of simulation studies and regression analyses that involve complex formulae requiring an economist's knowledge of statistics.

By contrast, there seemed to be agreement that direct evidence of the effects of a transaction or practice in the form of a party's own statements or documents is superior to those formulae in terms of their probative value.[13] That also seemed to be true of the explanation by an economist of his or her assumptions and conclusions. Everyone seemed to agree that federal judges, as are members of the European courts, are generally not Ph.D. economists, and that this kind of evidence is more likely to be probative when there is judicial review of prosecutorial challenges.[14] Indeed, it does not

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[13] Indeed, in the U.S., in cases brought under the Sherman Act, the courts are increasingly focused on direct evidence of competitive effects to determine the lawfulness of completed or ongoing conduct. *See, e.g., FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) ("*IFD*"); *Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768, 783 n.2 (6th Cir. 2002) ("Whether a company has monopoly or market power 'may be proven directly by evidence of the control of prices or the exclusion of competition ... .'"); *Microsoft*, 253 F.3d at 51 (stating that in a Section 2 case, if "evidence indicates that a firm has in fact profitably raised prices substantially above the competitive level], the existence of monopoly power is clear"); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 98 (2d Cir. 1993) (market power "may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market"); *Todd v. Exxon Corp.*, 275 F.3d 191, 207 (2d Cir. 2001) ("use of anticompetitive effects to demonstrate market power . . . is not limited to 'quick look' or 'truncated' rule of reason cases").

[14] *See generally* Vaughn R. Walker, *Merger Trials: Looking for the Third Dimension*, 5 Competition Policy International 1 (Spring 2009) (arguing that generalist judges lack economic training (and often interest) and that, as such, if economic evidence is to be persuasive, it must be communicated in a way that a generalist can understand and must be consistent with other evidence).

appear that complex economic analysis has carried the day in many (if any) appeals in the

Similarly, the case law in the United States seems to draw a distinction between "bathtub conspiracy" cases (where public or private plaintiffs seek to establish liability based on multiple acts, most of which are not illegal) and cases in which a liability claim is founded on evidence of multiple potentially illegal practices. Evidence of the former kind has been held by some courts not to be probative on the theory that "zero plus zero cannot equal one." On the other hand, United States courts have considered evidence of multiple potentially illegal acts to be probative. The decisions in *Microsoft* and *LePage's* are examples. The case law in Europe is unequivocal to the effect that such evidence is probative of liability as well.

One question remains: why do we see such similarities, given the very substantial differences in our competition laws and law enforcement regimes? I don't have the answer to that. Perhaps it is because, as Judge Vaughn Walker has said, Europe and the United States share a common "lodestar" in competition law that is called "consumer welfare (and, it might be added, a common focus on the effects of a transaction or practice as opposed to focusing on more subjective matters).

Or, perhaps it is because the appellate courts are reluctant to second-guess triers of fact like federal district judges, administrative law judges or, even the EC who have seen witnesses personally and are better able to assess their credibility as fact witnesses (although that would just explain why appellate courts are willing to be deferential as to the facts, not as to the law). And, it would better explain the United States appellate case law, than the European appellate case law, given that the EC process is not adversarial as it is in the United States.

Or, perhaps, as some of the practitioner or commentators have asserted, it is because the appellate courts greatly respect prosecutors like the DOJ, FTC and EC who have extensive expertise and experience in enforcing competition laws.

Or, perhaps it is some combination of these factors. All I know is that, as I say, it seems to me there is a remarkable degree of similarity in application of the burden of proof, the standard of proof, and the standard of judicial review in competition cases in Europe and the United States.