Regulation and on Effects-Based Analysis" by Michael Salinger** Jevons Society, University College of London FebruaryO21,D2007 "delivered in two parts: (I) Antitrust and Regulation and (II) Eff **thor and do not necessarily reflect the ssion or any individual Commissioner

I. Regulation and Antitrust

First of all, I would like to thank the Jevons Institute for the honor of asking me to be here this evening and of being on the same stage with Damien Nevin, Dennis Carlton, and Amelia Fletcher.

I must, of course, issue the standard disclaimer. What I say reflects my own opinions and not necessarily those of the Federal Trade Commission or any of the individual Commissioners.

Amelia promised me you would be familiar with Dennis the Menace, the comic strip about an impish 5-year old boy. My favorite[1] Dennis the Menace strip is one in which Dennis asks his father, "What causes tides?"

arise, which is why the Commission has sought divestitures in several petroleum industry mergers.[2]

Yet, in the time I have been at the Commission, no industry has occupied more of my time. When prices go up, politicians demand an explanation.[3] By themselves, the inquiries are not economic regulation, and they serve a very useful function. Even if price increases are simply the result of the normal workings of supply and demand, it is important for the public to know that the government is monitoring the situation. In addition, as structurally competitive as the industry is, it would be a mistake to assume that antitrust violations cannot occur. Still, as we follow up each ebb and flow of prices, we are placed in a position similar to economic regulators. We have to judge whether prices are somehow outside the range of what they "should be," which requires that we need to determine a range where they "should be." That is close to what price regulators do.

Moreover, the persistent inquiries about prices have behind them a threat of regulation. Congress might pass Federal price gouging legislation similar to laws already enacted in several individual states.[4] Such legislation would place a limit in some way on the prices that can be charged for gasoline and other necessities in time of emprices that cas8 Tm(3)Tnae Tm1(r)

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on their way out. The U.S. Supreme Court has agreed to hear the Leegin case[10], which will give it an opportunity to revisit the per se condemnation of minimum resale price maintenance, or "RPM." We do not know what the outcome will be. However, the academic literature has widely criticized the per se rule against minimum RPM,[11] and one might reasonably speculate that the Court would not have agreed to hear the case if it did not intend to strike down the per se rule. One other area of U.S. antitrust doctrine in which a per se rule continues to prevail is tying doctrine. In the *Independent Ink* case last year,[12] the Court narrowed the scope of that doctrine by ruling that the ownership of a patent on the tying good did not create a presumption of the monopoly power needed to trigger the per se rule. It did not overturn the per se rule on tying altogether, but some read the wording of the decision to suggest that it might overturn the per se rule should the opportunity arise.

Getting rid of the per se rules on RPM and tying will be a positive development in U.S. antitrust law; but by itself, the switch to a rule of reason will create its own problems. In particular, we need to figure out exactly how the rule of reason analysis is going to be conducted. The per se bans against these practices were formulated when we did not understand as well as we might how these practices might serve pro-competitive ends. It would overstate matters considerably, however, to say that we now completely understand their use and that we know exactly how to tell when they are procompetitive and when they are anticompetitive.

Last fall, I was asked to speak about the legacy of the *Matsushita* decision, which the Supreme Court decided 20 years ago.[13] It was a landmark decision in large part because of the key role that it laid out for economics in antitrust analysis. As I argued at the time, *Matsushita* can be read to imply two quite different roles for economics in antitrust. One is for economic modeling to play a role on a case-by-case basis. An alternative is that economics would help inform somewhat more formulaic rules that are based on a recognition of the risk of error. In my view, the latter is the proper reading of the decision. The Court has refused to outlaw above-cost predation even though an efficient company could drive out a rival by cutting prices below those that maximize its short-run profits but above its own costs; and such behavior could cause long-run harm to consumers.

Whether or not antitrust enforcement with respect to monopolization and abuse of dominance should be effects-based raises similar issues. If we are not confident in our

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[10] *Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 4, Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S.Ct. 763 (2006) (No. 06-480).
[11] Pauline M. Ippolito, *Resale Price Maintenance: Economic Evidence from Litigation: Bureau of Economics staff report* (Washington, DC: Federal Trade Commission, 1988); James C. Cooper et al. "Vertical Antitrust Policy as a Problem of Inference," *International Journal of Industrial Organization* 23, no. 7-8: 638-64.
[12] *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).
[13] Michael A. Salinger, "The Legacy of *Matsushita*: Has This Thing Called Economics Gotten Way Out of Hand?" (paper presented at Loyola University School of Law, Institute for Consumer Antitrust Studies, Chicago, September 29, 2006); "The Legacy of Matsushita: The Role of Economics in Antitrust Litigation," *Loyola Law Journal* (forthcoming).

ability to determine effects on a case-by-case basis, we may want a more structured approach. Structured approaches are not inherently bad. It is just that the past structural approaches certainly in the US and probably in Europe as well have been flawed for two reasons. First we have had the wrong structures. Some legal categories encompass two or more types of behavior that have different effects. There are other legally distinct categories that have similar economic effects. For example, as Justice O'Conner pointed out in her concurring decision in *Jefferson Parish*,[14] the behavior at issue could just as well have been described as exclusive dealing as tying. The standard governing the practice should not have turned on an arbitr