



Federal Trade Commission

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

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**based on remarks presented at the
Bates White Fourth Annual Antitrust Conference
Washington, D.C.
June 25, 2007**

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 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

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 *Sylvania* 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

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.

increasingly difficult to articulate.⁷ The Court responded to this problem by imposing heightened standards for proof of a vertical “agreement” on prices – standards that were virtually impossible to satisfy in practice.⁸ In *Monsanto*, the Court held that the per se rule applied to resale price maintenance claims only when there was proof of a “conscious commitment to a common scheme designed to achieve an illegal objective.”⁹ It required evidence that an agreement on prices was sought and that there was a “communicated acquiescence.”¹⁰ The Court went on to say that absent direct evidence of an agreement, the circumstantial evidence must “tend to exclude the possibility of independent action.”¹¹ In *Sharp*, the Court went even further and held that an agreement between a manufacturer and a distributor to terminate another distributor of the manufacturer’s products because it was undercutting the first distributors prices was not *per se* illegal, unless there was an additional agreement on “prices or price levels.”¹²

The Supreme Court has overlaid these rules for proving an “agreement” with the need for rule of reason analysis. In *Khan*, decided in 1997, the Court replaced the *per se* rule against maximum vertical price-fixing with the rule of reason.¹³ Now with *Leegin*, the Court has done

⁷ See *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 728 (1988).

⁸ See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Sharp*, 485 U.S. at 724.

⁹ *Monsanto*, 465 U.S. at 764 (quoting *Edward S. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir. 1980)).

¹⁰ *Id.* at 764 n 9.

¹¹ *Id.* at 768.

¹² *Sharp Electronics*, 485 U.S. at 735-736.

¹³ *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

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

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

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.”)

refusals to deal where there was a pre-existing relationship between the parties.²³ Nevertheless, the decision echoes the skepticism and concerns with private antitrust litigation that is a hallmark of the Court's recent jurisprudence.

In *Twombly*, decided earlier this year, the Court went further than almost anyone expected it to go in defining the pleading requirements for a complaint alleging a horizontal conspiracy.²⁴ Petitioners and the Solicitor General had argued that mere allegations of parallel business conduct were insufficient to state a claim; they urged the Court to require specific allegations that supported an inference of an illegal agreement.²⁵ The Court instead essentially imported the summary judgment standard described in *Matsushita* where the pleading of a horizontal conspiracy is involved. That is to say, it held that “allegations of parallel conduct . . . must be placed in context that raises a suggestion of preceding agreement, not merely parallel conduct that could just as well be independent action.”²⁶

Finally, in *Credit Suisse* issued two weeks ago, the Court held that immunity could be

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> (“A Section 1 complaint must allege, at a minimum, facts providing concrete notice of the claimed wrongdoing and some objectively reasonable basis for inferring that an unlawful agreement may explain the parallel conduct.”)

²⁶ *Twombly*, 127 S.Ct. at 1966.

implied when application of the antitrust laws might create a conflict with the competing federal regulatory regime.²⁷ The decision contrasts with the Supreme Court’s stern admonition that “[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.”²⁸

These decisions of the last 30 years, and particularly the Court’s recent decisions, reflect a discomfort with the costs and burdens of private antitrust litigation as well as a distrust of juries and to a lesser extent of judges to “get it right” in private antitrust cases. This is not merely a concern held by those associated with the “Chicago School.” As Commissioner Kovacic has observed Professors Areeda and Turner, the two pre-eminent antitrust scholars of our time, voiced these same concerns prior to 1980.²⁹

Professor Areeda and many courts, including the Supreme Court itself, have lamented the costs and burdens of discovery in private antitrust actions.³⁰ For example, in *Monsanto*, the

²⁷ Credit Suisse Securities LLC v. Billing, 127 S.Ct. 2383 (2007). The case marked a rare rejection by the Court of the Solicitor General’s position on an antitrust issue. The Solicitor General had urged the Court to remand the case to the district court to allow it to determine whether there was an actual conflict between the private antitrust claim and the regulatory regime. In doing so, the Solicitor General noted that the court might require the plaintiff to allege additional facts that would clarify that the allegations were not based on immune conduct. Brief of United States as Amicus Curiae Supporting Vacatur, *Credit Suisse Securities LLC v. Billing*, (Sup. Ct. No. 05-1157) (filed Jan. 2007) available at <http://www.usdoj.gov/atr/cases/f221000/221024.pdf>.

²⁸ United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 350-51 (1963).

²⁹ William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 51-54 (2007).

³⁰ See II P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 332, p. 154 (1st ed. 1978) (“[C]lass action[s] . . . can consume massive judicial resources, result in enormous costs for all parties, and threaten gigantic recoveries. A class action can be the vehicle for strike suits

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

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.”)

has increased over the years as class actions have proliferated. In my experience, a class action plaintiff who survived a motion to dismiss would generally file a motion to certify a class immediately; the courts would generally not bifurcate or stay merits discovery pending adjudication of the motion; and many courts would certify a class as a matter of course. In the meantime, the plaintiff would seek massive discovery, made all the more burdensome and expensive with the development of electronic discovery. The upshot would be that a defendant was faced with the Hobson's choice of either spending many millions of dollars in litigation or settling the claim. The costs of litigation, when added to the risk factor, would produce settlements that frequently did not have much to do with the merits. (That said, there is a certain amount of irony here. When the challenge is to a vertical restraint, much of the burden and expense derives from application of the rule of reason, which the defense bar, myself included, urged upon the courts.³⁴)

The second concern – about the vagaries of jury verdicts and non-specialized court rulings – is also reflected in the Supreme Court's decisions. For example, the Court explicitly voiced its concern on this score in *Credit Suisse*.³⁵ There is also a definite undercurrent of

³⁴ J. Thomas Rosch, *The State of Antitrust*, 60 ANTITRUST LAW JOURNAL 3, at p.6 (Spring 1991).

³⁵ *Credit Suisse*, 127 S.Ct. at __; 2007 U.S. LEXIS 7724, 31 (“Further, antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to assure that the different courts evaluate similar fact patterns consistently. The result is an unusually high risk that different courts will evaluate similar factual circumstances differently.”).

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 deliberated after only a couple of hours of presentations by plaintiff and defense counsel. But I was involved in a number of treble damage jury trials where skilled counsel presented their stories and cases to lay juries over many weeks. In those cases, I thought the juries (and judges) did a very good job of "getting it right." I should also add that although mistrust of lay juries and non-specialized courts should not influence antitrust jurisprudence respecting a specialized agency like the Federal Trade Commission, there is a danger that it may do so since (with the notable exception of Section 5 of the FTC Act) we enforce the same laws invoked by private plaintiffs.

In a nutshell then, one can argue that our Supreme Court has demonstrated a proclivity for exalting predictability over precision in its antitrust jurisprudence. It is arguable that the Court's fascination with economics and its concerns about the burden and expense of private

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.")

treble damage litigation and about the dangers of false positives being generated by lay juries and non-specialized courts, have led the Court to create rules of *per se* legality *de facto*, if not *de jure*. Conversely, one can argue that it is DG Comp and the European courts that have prized precision (i.e. “getting it right”) even at the expense of predictability of outcome. During the last five years, they have moved away from *per se* rules (of illegality or legality). To be sure, especially in merger cases, European courts have increasingly focused on the economic theories and opinions underlying a challenge by the Commission.³⁷ However, in Article 82 matters, the European courts (and DG Comp) have not focused on those theories and opinions to the exclusion of all other evidence (except, of course, in determining whether “dominance” exists; that requires market definition and market share determinations in every Article 82 case since Article 82 only applies when there is a challenge to the conduct of a dominant firm or group of firms that are collectively dominant). To the contrary, DG Comp and the European courts have considered, in addition to economic theory, such factors as 1) whether the defendant's conduct included multiple kinds of exclusionary practices,³⁸ 2) whether the defendant's course of conduct “targeted” certain competitors,³⁹ and 3) whether the defendant's documents evidenced an

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 of Article 82 of the Treaty to Exclusionary Abuses (“Article 82 Discussion Paper”), ¶ 116 [2005] *available at* <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>; *see also* Case T-83/91, *Tetra Pak Int'l SA v. Commission*, [1994] E.C.R. II-755 ¶¶ 212, 213; *aff'd*, Case C-333/94P, [1996] 1 E.C.R. 5951.

³⁹ See Case C-62/86, *AKZO Chemie BV v. Commission* [1991] E.C.R. I-3359 ¶¶ 81, 114-115; Case T-219/99, *British Airways plc v. Commission* [2003] E.C.R.; Article 82 Discussion Paper ¶¶ 118, 196, 231.

objective to eliminate competitors and injure consumers which illuminated the likely effects of the defendant's conduct.⁴⁰

I cannot say this is the wrong approach. All of the economic theories that have been proposed in the United States to test Section 2 claims are arguably very “bloppy.” The “profit sacrifice”, “no economic sense” and “most efficient competitor” tests all require illusive determinations about costs and/or profitability that are hard to apply and that yield results that are apt to be imprecise. (The same thing might be said about applying the *Brooke Group* standard to any Section 2 challenge to a pricing practice such as loyalty discounting or bundling programs as some have suggested.) Beyond that, one can argue that some of current economics theories are just wrong. For example, the Chicago School’s “one monopoly rent” theory is often used to justify all tying arrangements. However, as Professor Bernheim has pointed out, that theory is not universally applicable and it ignores the “contract externalities” (or rents that can be derived from third parties) in some tying arrangements.⁴¹

Beyond that, focusing on economics alone, to the exclusion of the other kinds of evidence that DG Comp and the European courts have taken into account, ignores the context in which a practice has occurred. To be sure, some dangers lurk when those kinds of evidence are considered. There is a danger, for example, that evidence of multiple exclusionary practices may degenerate into what has derisively been called “monopoly broth” in which perfectly legitimate

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 Airlines/British Airways* (June 25, 2007).

practices are stitched together to constitute more than the sum of their parts.⁴² Evidence of intent which does not illuminate effects may be misused.⁴³ But these are dangers that can be controlled by judicial instructions and rulings. It is strongly arguable that these dangers are outweighed by the importance of considering the entire context in which a practice has occurred instead of considering the practice out of context.

Let me leave you with several cosmic questions (and sub-questions). The first cosmic question is whether the pendulum has swung too far toward predictability in the United States. As previously discussed, the Supreme Court's antitrust jurisprudence has gone a long way toward creating rules that operate in practice like rules of per se legality in private antitrust litigation, and those rules may impede public antitrust enforcement to some extent as well. Does that jurisprudence threaten the systematic creation of false negatives? If so, is that prudent, at least in cases that involve extraordinarily durable monopolies rooted in, say, first mover advantages or network effects? Or, is the cost of private litigation and the risk of false positives so great as to justify the risk of false negatives?

The second cosmic question is whether we have overemphasized the importance of convergence. The way cases are decided in the EC is different from the Supreme Court's

⁴² See *City of Groton v. Connecticut Light & Power Co.*, 622 F.2d 921, 928-29 (2d Cir. 1981) (“[W]e reject the notion that if there is a fraction of validity to each of the basic claims and the sum of the fractions is one or more, the plaintiffs have proved a violation of section 1 or section 2 of the Sherman Act.”).

⁴³ See *United States v. Microsoft*, 253 F.3d 34, 59 (D.C. Cir. 2001) (“Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct. See, e.g., *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (“knowledge of intent may help the court to interpret facts and to predict consequences”); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)”).

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>