DISCUSSANT COMMENTS ON EXPLOITATIVE ABUSES UNDER ARTICLE 82 EC

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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 policy, and competition policy is not necessarily the right tool to wield against every form of market failure.

In elaborating on this point and, more generally, on the appropriate relationship between competition policy and other regulatory tools, I often begin[4] with the scholarly

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[*] These views are those of the speaker and do not necessarily represent the position of the Federal Trade Commission or of any individual Commissioner.

[1] Amelia Fletcher & Alina Jardine, *Towards an Appropriate Policy for Excessive Pricing*, *in* EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC (Claus-Dieter Ehlermann & Mel Marquis eds. forthcoming 2007) (hereinafter 2007 ANNUAL).

[2] Ian S. Forrester, *A Plague on Both Your Houses*, *in* 2007 ANNUAL, *supra* note 1.

[3] Emil Paulis, *Article 82 EC and Exploitative Conduct*, *in* 2007 ANNUAL, *supra* note 1.

[4] *See, e.g.*, William Blumenthal, The Relationship between Competition Agencies and Other Units of Government¸ before International Seminar: Review of Anti-Monopoly Law (May 19, 2006), *available at* http://www.ftc.gov/speeches/blumenthal/20060519Mofcom-ADBFinal.pdf. That speech, which was delivered at a multi-day seminar in Hangzhou to discuss China's proposed Anti-Monopoly Law, was

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

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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 today. Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547 (1979).

[6] *See* BREYER, *supra* note 5, at 192.

[7] *Id.* at 191.

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.

I would respectfully ask you to consider whether that contemplation of even limited intervention against exploitative abuse might be going too far.

In expressing this view, I do not mean to rely on our Section 2, which, unlike your Article 82, declines to recognize exploitative abuse. Nor is the view based on differences in enforcement practices between our jurisdictions. While European and US enforcement officials have sometimes emphasized different factors and considerations in our respective speeches and policy statements, we all recognize the public benefit in permitting vigorous marketplace behavior, and actual instances of intervention have been infrequent on both sides of the Atlantic. I have been heartened at this workshop to hear numerous speakers note the role of private enforcement in the United States; credit our government interventions, some of which are lower-profile and not prominently reported in the media;[8] and generally acknowledge (contrary to what is sometimes said in Europe) that we in the United States have not abdicated enforcement in the field of unilateral conduct.

No, in cautioning against even limited intervention by competition agencies against high prices, I am focusing here principally on considerations of institutional design, with an eye towards the match/mismatch analysis developed by Justice Breyer. Simply put, we need to question whether competition agencies have the competence to engage in classical price-and-profits public-utility-style regulation. As generalist agencies, we lack the right people. We lack the skill sets. We lack adequate industry expertise. Experience has shown that when we've tried to step into the role of utility-style regulators, we've bungled the task.

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[8] *See, e.g.,* Biovail Corp., No. C-4060 (F.T.C. Apr. 23, 2002) (complaint and consent order), *available at* http://www.ftc.gov/os/caselist/c4060.shtm; Union Oil Co. of Cal., No. 9305 (F.T.C. Mar. 4, 2003) (complaint), *available at* http://www.ftc.gov/os/caselist/d9305.shtm, and the related case in Chevron Corp., File No. 051-0125 (Aug. 2, 2005) (complaint and consent order), *available at* http://www.ftc.gov/os/caselist/0510125/0510125.shtm; Bristol-Myers Squibb Co., No. C-4076 (F.T.C. Apr. 18, 2003) (complaint and consent order), *available at* http://www.ftc.gov/os/caselist/c4076.shtm; Valassis Commc'ns, Inc., No. C-4160 (F.T.C. Apr. 19, 2006) (complaint and consent order), *available at* http://www.ftc.gov/os/caselist/0510008/0510008.shtm; Rambus, Inc., No. 9302 (F.T.C. Aug. 2, 2006) (opinion on liability), *available at* http://www.ftc.gov/os/adjpro/d9302/index.shtm; Brief for the U.S. and FTC as Amici Curiae Supporting Plaintiffs-Appellants, In re DDAVP Direct Purchaser Antitrust Litigation, No. 06-5525-cv (2d Cir. filed May 25, 2007); and this administration's continued activity in United States v. Microsoft Corp., Civ. Action No. 98-1232 (CKK) (D.D.C.); United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005); and United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003). The rate of unilateral interventions in the United States is roughly comparable to the rate in the late 1970s. *See* William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property Law*, 30 SEATTLE U. L. REV. 319 (2007), *available at* http://www.ftc.gov/speeches/kovacic/2007intersection.pdf. Kovacic collects statistics and concludes: (a) "Measured simply by the number of cases that allege the Sherman Act § 2 offenses of monopolization or attempted monopolization, the FTC's enforcement actions over the past five years constitute the agency's most ambitious program in roughly thirty years," *id.* at 324-25 (footnotes omitted), and (b) "When the number of cases and the observable outcomes are both taken into account, the FTC's program of monopolization and attempted monopolization cases since 2001 arguably has no parallel in the agency's history," *id.* at 326 (footnote omitted).

There obviously are some commonalities between competition enforcement and classical regulation.[9] And competition authorities necessarily must address price considerations in certain other contexts, wholly aside from exploitation. Elsewhere in the dominance field, price/cost relationships obviously matter for assessment of allegations of predation. For dominance cases arising from licensing practices, a benchmark price may be needed to accomplish a one-shot remedy.[10] In the merger context, the divestiture price will sometimes be relevant to assessment of the adequacy of the proffered divestiture. So, too, will be the transfer prices for inputs or outputs to be sold between a divested business and a previously-integrated retained business.

None of these circumstances, however, have the recurring and pervasive character of the regulation that will be needed to redress exploitative abuse in the form of excessive price. The problem is described with thought and candor in the Paulis paper:

> intervening against excessive pricing may entail the risk of a competition authority finding itself in the situation of a semi-permanent quasi-regulator. The authority may have to come back time and again to the pricing of the dominant firm when cost or other considerations change in the industry, something a "generalist" competition authority is much less equipped for than proper regulators with their deep knowledge of and continuous involvement in their industries.[11]

Emil finds "these practical difficulties so convincing and the risk of competition authorities arriving at the wrong result so great that enforcement actions against exploitative conduct . . . should be taken only as a last resort."[12]

Some have suggested that competition authorities could develop the needed competencies and might be superior to classical regulators in intervening against excessive pricing in traditionally unregulated sectors. On this view, competition authorities would be more limited in their interventions. They would be more likely to look to market mechanisms before adopting more intrusive steps, they would be more sensitive to the distortions they were causing, and they would be more willing to recede from intervention after markets had corrected adequately. They also would be less susceptible to capture. All of these points have merit. But as a matter of institutional design, they come at an unacceptable cost. Developing the competencies within the competition agency and adopting a price-control mindset among the staff invariably will affect the character of the agency. It predictably will become more regulatory and less market-focused in its mainstream processes. If it is to succeed in the limited interventions that borrow from classical regulation, it is likely to sacrifice competence or

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[9] The two fields are combined, for example, in certain leading texts. *See, e.g.*, W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST (4th ed. 2005).

[10] *See, e.g.,* Rambus, Inc., No. 9302 (F.T.C. Feb. 5, 2007) (opinion on remedy), *available at* http://www.ftc.gov/os/adjpro/d9302/index.shtm.

[11] Paulis, *supra* note 3, at 3 (manuscript on file).

[12] *Id.*

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.

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[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, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1402, at 9-10 (1986) ("unilateral behavior is not only omnipresent, but also often difficult to evaluate or remedy by any means short of governmental management of the enterprise"). For one useful case study of the difficulties in developing a successful remedy through competition tools, see Martin F. Hellwig, *Excessive Pricing in the Energy Sector*, *in* 2007 ANNUAL, *supra* note 1.