

**Remarks by Maureen K. Ohlhausen  
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The Pros and Cons of Antitrust in Deregulated Markets  
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Good morning. I would like to thank the Swedish Competition Authority for the invitation to be here today. As an initial matter, please note that the opinions and perspectives I present today are my own and do not represent the views of the Federal Trade Commission, nor any individual Commissioner.

My general topic is antitrust in deregulated markets, which I will discuss in the context of the excellent paper by Michael Harker and Catherine Waddams Price, *Consumers and Antitrust in British Deregulated Energy Markets*. I will first touch on the intersection of consumer protection and competition concerns that occur in connection with regulation and deregulation. Then, I will then talk about the American perspective on some specific competition issues and how recent case law (for example the Supreme Court's decision in *Trinko*<sup>1</sup>) influences current theory on related issues. Finally, I will discuss some of the work that the Federal Trade Commission has done to pursue advocacy efforts in the area of regulation.

I found this paper particularly interesting because the subject involved both consumer protection and competition matters. Many of you are probably familiar with the antitrust enforcement done by the U.S. Department of Justice Antitrust Division and the Federal Trade

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<sup>1</sup> *Verizon Communications Inc., v. Law Offices of Curtis V. Trinko, LLP*, 124 S.Ct. 872, 879 (2004).

Commission. The FTC has a mission in addition to antitrust enforcement, however, which is consumer protection. While some might wonder whether it makes sense for one Commission to pursue both missions, I believe that combining these two missions is a key strength of the FTC. Consumer protection and competition share the common aim of improving consumer welfare, and they complement each other. Thus, I was pleased to see that that the British Office of Gas and Electricity (Ofgem) is also tasked with competition and consumer protection missions and that one of its primary duties is “protecting consumers wherever appropriate by promoting effective competition.”

I am the Acting Director of the Office of Policy Planning at the FTC and one of my office’s main areas of expertise is in the intersection of competition and consumer protection issues. In this capacity, we often examine proposed restrictions on commercial practices that state legislatures or state professional associations are considering. Many times, those proposing these restrictions claim that they are necessary to protect consumers when, in reality, consumers are not suffering any harm from these practices. In some cases, the private parties pushing the restrictions are really looking for shelter from competition by prohibiting new competitors from entering the market.

To implement deregulation and introduce competition in Britain, consumers were allowed to switch suppliers from the incumbent monopolist. This switching process raises a number of interesting issues. I would like to focus on two issues, information search costs and switching costs, that may call for different responses, non-regulatory and regulatory.

The paper observed that while in retail energy markets, there are no financial costs of

changing suppliers, the product is homogenous, and there are no compatibility issues, consumers still did encounter some barriers to switching. For example, they had to educate themselves about the possibility of exercising choice in a new market. This barrier to switching presented a classic consumer protection issue: difficulty in gathering information with which to make an informed choice. In the British example, the Ofgem addressed this issue by providing consumers more information and thus reducing their information search costs. It sounds like even more education may be necessary to overcome consumers' apparent reluctance to switch, perhaps because they perceive the difficulty to be greater than it is.

An additional issue is whether there has been vigorous advertising by competitors urging consumers to switch energy providers. The FTC believes that in all markets, advertising that provides truthful, non-misleading information about products can benefit consumers and competition. Accordingly, the Office of Policy Planning has co-authored a number of staff comments to the U.S. Food and Drug Administration in connection with the advertising and labeling of foods and drugs. For example, in the area of truthful health claims for foods, we argued that such information empowers consumers to make better-informed choices about the health consequences of the foods they eat. As consumers become more aware of health consequences of foods, food marketers have a strong incentive to develop and market foods based on their nutritional attributes. This spur to competition among food marketers can then lead to even healthier products and more information about the health effects of foods. Our comments to FDA cited to a study done by the FTC's Bureau of Economics in the 1980s concerning cereal advertising that discussed the benefits of fiber in connection with cancer risk. This advertising not only increased consumer awareness of the link between fiber and cancer

risk, it also lead to an increased demand for high fiber cereals, which, in turn, caused manufacturers to expand the range of high fiber cereals available to consumers in the market.<sup>2</sup> Notably, the study found that the advertising reached least-educated populations, who often were not reached by government health messages, and that these populations showed the most improvement in their fiber consumption.

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<sup>2</sup> P. Ippolito & A. Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market*, FTC Bureau of Economics Staff Report (1989).

The switching issue also implicates a consumer protection issue that occurs less frequently but which the FTC has dealt with previously. The issue is the need for consumers to get permission from their current provider to switch to a competing provider. The paper identifies this problem with the debt-blocking provisions, which the incumbent supplier could use to retain consumers and impose high switching costs on them. The FTC encountered a similar issue in connection with sales of contact lenses. Since eye care providers can sell contact lenses to patients, this creates an incentive to withhold the prescription and prevent the consumer from purchasing lenses elsewhere. By refusing to release prescriptions, eye care providers forced consumer to either buy their lenses from that provider or to undergo the expense of getting an eye exam from a different doctor, who would release the prescription. This customer retention strategy imposed high switching costs on consumers and Congress, in 2003, passed the Fairness to Contact Lens Consumers Act,<sup>3</sup> which requires eye care providers to release contact lens prescriptions. The Act charges the FTC with rulemaking and enforcement duties and represents a regulatory-type approach to this type of consumer protection problem. I do not know enough about the situation in Britain to recommend a greater regulatory role regarding the debt-blocking provisions but it may warrant further inquiry.

Turning from consumer protection concerns, I will now address some competition issues relevant to switching and offer some observations on the differences between the U.S. and the European views of these issues. The application of competition law to dominant firms in the U.S. and EU are different – and these differences may lead to different answers with regard to the ability and desirability of antitrust to police the move from regulated monopoly to

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<sup>3</sup> 15 U.S.C.A. §§ 7601-7610.

deregulation.

Art. 82 is concerned with *abuse* of dominance; it is aimed at preventing a dominant firm from exploiting its market power. As the European Court of Justice put it in *Michelin I*, and which was reaffirmed recently by the Court of First Instance in *Michelin II* – a dominant firm “has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market . . . irrespective of the reasons for which it has a dominant position.”<sup>4</sup> For example, Art. 82 explicitly forbids “unfair” prices, and price discrimination by dominant firms. And as the *Hilti* case points out, the prohibition on price discrimination extends to above-cost prices targeted at rivals’ customers. Moreover, the recent *Michelin II* and *British Airways* cases seem to place a blanket prohibition on loyalty rebates by dominant firms.<sup>5</sup>

It may be fair to say, then, that the goal of Art. 82, is to assure that a dominant firm acts as if it were non-dominant. In this way, Art. 82, may be well suited to provide ex post regulation in a newly deregulated market because it is designed to rein in a dominant firm’s power in much the same way as ex ante regulation does.

Section two of the Sherman Act, on the other hand, focuses on how a dominant firm

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<sup>4</sup>Case 322/81, *Michelin v. Commission*, 1983 ECR 3461 (“*Michelin I*”), at ¶ 57.

<sup>5</sup>Case T-219/99, *British Airways Plc. v. Commission*, 2003 ECR \_\_\_, 2003 ECJ CELEX LEXIS 659 (Dec. 17, 2003); Case T-203/01, *Michelin v. Commission*, 2003 ECR \_\_\_, 2003 ECJ CELEX LEXIS 489 (Sept. 30, 2003).

acquires and maintains its dominant status. It is not concerned with the monopoly *per se* and does not impose any limits on a lawful monopoly's ability to charge a supra competitive price or otherwise exploit its market power. Indeed, as the U.S. Supreme Court noted this year

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.<sup>6</sup>

Only the possession or maintenance of monopoly power through *unlawfully exclusionary means* implicates section two of the Sherman Act. Of course, distinguishing “unlawfully exclusionary” from “competitive” conduct is something with which courts and scholars continue to struggle. This difficulty, and an empirically-founded belief that competition benefits consumers with lower prices, higher quality, and more choice, have led U.S. courts to avoid fashioning rules that risk deterring firms from engaging in legitimate competition for fear of antitrust liability.

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<sup>6</sup>*Verizon Communications Inc., v. Law Offices of Curtis V. Trinko, LLP*, 124 S.Ct. at 879.

Nowhere is this caution more evident than in the Supreme Court’s section 2 jurisprudence with regard to claims involving price-cutting. Although there may be legitimate theories of above and below-cost price predation, under Sherman § 2 above-cost pricing by a monopolist – even discriminatory prices that steal business from competitors – is *per se* legal, and predatory pricing claims are subject to a stringent standard.<sup>7</sup> The hesitancy to subject price cutting to potential antitrust liability stems from an acknowledgment of two realities: (1) price cutting is the hallmark of vigorous competition; and (2) successful anticompetitive price cutting schemes are likely to be rare. Consequently, it is extraordinarily difficult – if not impossible – for a court to weed out the small number of anticompetitive price cutting strategies from competitive price cutting that occurs everyday for the benefit of consumers. As the Supreme Court has acknowledged, “The mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition.”<sup>8</sup> A rule that too easily condemns price cutting is likely to subject some legitimate competition to antitrust liability, thus deterring firms from competing in the first place.<sup>9</sup> Clearly, this is a stark

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<sup>7</sup>See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (above cost price predation schemes are “beyond the practical ability of a judicial tribunal to control”).

<sup>8</sup>*Brooke Group*, 509 U.S. at 224.

<sup>9</sup>See *Trinko*, 124 S. Ct. at 882 (“Mistaken inferences and the resulting false condemnations ‘are

contrast to the treatment of price competition by a dominant firm described in the paper.

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especially costly, because they chill the very conduct the antitrust laws are designed to protect.”) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

An example of the U.S. view is the FTC Office of Policy Planning's competition advocacy against prohibitions on price cutting that appear in state laws that ban below-cost sales of gasoline by retailers. As part of the advocacy program, my office sometimes is asked by local legislators to comment on existing or proposed legislation that makes it illegal for a retailer to sell gasoline below some statutorily defined measure of cost and typically subjects a firm to substantial monetary penalties without a showing that competition is likely to be harmed. Given the high cost of gasoline, it seems ironic that these laws exist on the books of several states and occasionally are introduced as bills in states where there are no such laws. Over the last year or so, the Office of Policy Planning has provided analysis of below-cost sales legislation in North Carolina, New York, Wisconsin, Alabama, Kansas, and Michigan.<sup>10</sup>

In these comments, we try to convey to the requesting legislature four essential points: (1) competition benefits consumers with lower prices, greater variety, and higher quality; (2) subjecting some price cutting behavior to liability is likely to deter retailers from vigorously competing with each other, thus depriving consumers of the benefits of competition; (3) these laws are unlikely to provide any benefits to consumers because predatory pricing schemes that

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<sup>10</sup>See Letter from Todd J. Zywicki et al., Director, FTC Office of Policy Planning, et al., to Michigan State Representative Gene DeRossett (June 17, 2004), at <http://www.ftc.gov/os/2004/06/040618staffcommentsmichiganpetrol.pdf>; Letter from Susan Creighton, Director, FTC Bureau of Competition, et al., to Kansas State Senator Les Donovan (Mar. 12, 2004), at <http://www.ftc.gov/be/v040009.pdf>; Letter from Susan Creighton, Director, FTC Bureau of Competition, et al., to Demetrius Newton, Speaker Pro Tempore of the Alabama House of Representatives (Jan. 29, 2004), at <http://www.ftc.gov/be/v040005.htm>; Letter from Susan Creighton, Director, FTC Bureau of Competition, et al., to Wisconsin State Rep. Shirley Krug (Oct. 15, 2003), at <http://www.ftc.gov/be/v030015.htm>; Letter from Joseph J. Simons, Director, FTC Bureau of Competition, et al., to Eliot Spitzer, Attorney General of New York (July 24, 2003), at <http://www.ftc.gov/be/nymfmpa.pdf>; Letter from Joseph J. Simons, Director, FTC Bureau of Competition, et al., to Roy Cooper, Attorney General of North Carolina (May 19, 2003), at <http://www.ftc.gov/os/2003/05/ncclattorneygeneralcooper.pdf>.

lead to monopoly, especially in the retail gasoline industry, are unlikely; and (4) predatory pricing that is likely to harm competition is already illegal under federal and most state antitrust laws. In several instances, FTC staff comments aided legislators' decisions not to adopt these restrictions.

Returning to the role of antitrust in deregulation, I think that it has to work in tandem with regulation, both sectoral and general. In the U.S., the Supreme Court recently struggled with the proper interplay between these two tools in the context of deregulation in the telecom industry.<sup>11</sup>

It held that failure to abide by a regulation that demands an incumbent local exchange carrier aid its competitors by providing network access cannot form a basis for antitrust liability, because in this case, the regulatory requirements went beyond what antitrust would require.<sup>12</sup>

To sum up, it is clear that U.S. antitrust law encourages aggressive price competition, even by dominant firms. Further, except in the narrowest of circumstances, the Sherman Act does not place a duty on a dominant firm to aid its competitors. Given its focus on how a monopoly comes into being, the Sherman Act does not prevent a monopolist from engaging in legitimate competition that harms rivals – for instance, targeted price cuts or refusals to share common facilities. This means that in the U.S., sector specific regulation protecting entrants from dominant firm conduct legal under the Sherman Act may be necessary to complement antitrust laws in assuring smooth deregulation. Art. 82, however, is different. It does address pricing and other actions taken by a dominant firm that hinder competitors. In this way, it may provide potential entrants with a buffer from competition, perhaps allowing them to gain market

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<sup>11</sup>See *Trinko*, *supra* note 6.

<sup>12</sup>*Id.* at 880-81.

footing more easily. Thus, Art. 82 may require less of a regulatory complement to effect deregulation, although some consumer protection measures may be appropriate, such as informational remedies or reducing restraints on consumers' ability to switch suppliers.