

What is an abuse of market power?

17 April 2005

Introduction by Professor Paul Geroski, Chairman

Welcome. A particular welcome to some of the heads of the ECA who have been attending a conference in London over the last couple of days. This is the third in the series of public lectures that the CC is sponsoring. These lectures—which take place in the spring and in the late autumn every year—are designed to air some of the major issues associated with competition policy and practice, and to stimulate debate among practitioners.

The subject of this evening's lecture is: 'what is an abuse of market power?' This is a subject that could hardly be more topical. The big anti-trust case of the decade in both the USA and in Europe has been the Microsoft case, and it has turned on how to interpret Article 82 (or, in the USA, Sherman 2). As we all know, this is not an easy question to answer either in theory or in practice. It is sometimes very hard to distinguish a very competitive response from one that is predatory or exclusionary. And, as Judge Learned Hand said more than 100 years ago, 'The successful competitor, having been urged to compete, must not be turned upon when he wins'.

The debate on what the right way forward is in this area rages both within Europe as well as across the Atlantic. In its 1981 Michelin decision, the European Court has referred to what it called 'the special responsibility of firms in a dominant position', raising the question of whether dominant firms, or firms with market power, must refrain from harming competitors even when their behaviour is attributable to their own superior efficiency, or where there is an absence of evidence of intent. This is a subject that is currently being debated both within the ECN and at DGComp, and it is possible that we will see some guidelines emerging towards the end of the year.

In the USA Hew Pate at the DoJ has spoken of the need to take a cautious and objective approach when applying the rule of reason to unilateral conduct. In the recent Trinko case, both the DoJ and the FTC advocated a standard under which refusal to assist rivals is not exclusionary unless it makes no sense for the defendant to refuse to supply but for its tendency to reduce or eliminate competition, and the Supreme Court has said that there is no basis in US anti-trust law for a stand-alone essential facilities doctrine.

What I think almost everyone agrees on is that the concept of abuse of market power needs to be grounded in sound economic principles. Further, these sound principles—whatever they are—need to be translated into practical guidelines which help the authorities on the one hand, and the parties to an inquiry on the other, to address the issues that arise in connection with unilateral conduct as clearly and efficiently as possible. As Mario Monti said at Fordham last year, we need to '... examine whether current practice is sound from an economic point of view, and to enhance transparency and legal certainty'.

We are particularly fortunate tonight to have two extremely distinguished speakers who have been very much at the forefront of both intra-European and trans-Atlantic debates on the subject, Ulf Böge and John Vickers.

There is much more I could say about our guest speakers' career but, very briefly ...

Sir John Vickers is Chairman of the Office of Fair Trading. He began his five-year term at the OFT in October 2000. Before that he spent two and a half years as Chief Economist at the

Bank of England and a member of the Monetary Policy Committee. John is currently on leave from the Drummond Professorship of Political Economy at Oxford University.

After a distinguished career in the Federal Ministry of Economics, culminating as Director General for Economic Policy, Dr Ulf Böge moved to become President of the Bundeskartellamt (German Federal Cartel Office) at the beginning of 2000. He is also chair of the International Competition Network (ICN) Steering Group. We in the UK are very keen to have strong links with the ICN and it is a particular pleasure for that reason for me to welcome him here.

Before I ask Ulf Böge to take the floor, I will outline the format for this evening. Ulf Böge and John Vickers will each speak for approximately 20 minutes. There will then be time to ask questions both on this topic but possibly also, if time permits, on the ongoing work of the ICN. For those of you who have previously attended a CC lecture, there is on departure from earlier lectures—we are not making a record of the evening and so are not using a transcript writer—we hope that this will encourage discussion. We shall aim to close the formal part of the evening at around 7.30 pm at which point I will invite you to join the speakers and members of the Commission to a drinks reception in the foyer.

So, without further delay, over to Ulf Böge.