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From the Editor

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From the Editor

Firms with market power engage in a variety of business practices that harm their rivals. Under what circumstances should the antitrust laws condemn these practices because they will harm consumers? This long-standing question is being discussed with renewed intensity both in the European Community and in the United States. The European Commission's Directorate-General for Competition (DG COMP) has been working on a document explaining its views on this question for more than a year. In December 2005, it released the draft of a discussion paper (Discussion Paper) on which it has sought comments.[1] Meanwhile, in the United States, the Antitrust Modernization Commission and, more recently, the U.S. Federal Trade Commission (FTC), have focused on this question. In both jurisdictions, the debate has been stimulated in part by controversial court decisions concerning so-called loyalty rebates.[2]

Our first issue of 2006 begins with a symposium that contributes to this discussion. Alden Abbott and Michael Salinger, both with the FTC, begin by examining tying-a practice that is often treated as a restraint of trade under the U.S. antitrust laws and as an abuse of dominance under Article 82 of the EC Treaty. They question the approach taken both by the courts and by their fellow economists. Professor Herbert Hovenkamp, of the University of Iowa, College of Law, looks at predatory pricing.[3] He observes that the U.S. courts tend to leave practices they do not understand to juries. He argues that as the courts become more familiar with the new variants of predatory pricing claims, such as those involving loyalty rebates, they will limit the ability of plaintiffs to put these claims in the hands of juries, much as they did for traditional predatory pricing allegations.

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1 European Commission, DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (Dec. 2005), *available at* http://europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf.

2 *See* Symposium, *A Symposium on Loyalty Rebates*, 1(2) Competition Pol'y Int'l 89 (2005).

3 *See* H. Hovenkamp, The Antitrust Enterprise: Principle and Execution (2006).

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The symposium then switches to Europe. Two articles by leading practitioners of EC competition law consider the Commission's recent Discussion Paper. Bill Allan, of Linklaters, provides an overview and critique of the Commission's Discussion Paper. He argues that the Discussion Paper does not go far enough. In his view, the analysis of exclusionary abuses should examine whether they significantly lessen competition in a way that can be remedied by the application of the antitrust laws. Frank Montag and Alicia Van Cauwelaert, of Freshfields Bruckhaus Deringer, focus on the Commission's examination of refusals by dominant firms to supply other firms with access to their physical or intellectual property. They argue that the Discussion Paper improperly widens the scope of refusal to supply abuses and advocate a "no economic sense" test to limit the application of this abuse.

Lastly, we present a paper by a group of economists who were asked by DG COMP's Office of the Chief Economist to provide their advice on how to apply competition law. The Economic Advisory Group for competition policy (EAGCP), consisting of Professors Jordi Gual, Martin Hellwig, Anne Perrot, Michele Polo, Patrick Rey, Klaus Schmidt, and Rune Stenbacka, argue for an effects-based analysis founded on economic theory and empirical evidence.

The next part of this issue consists of an article on the "trading services" industry, which consists of financial exchanges and other businesses that facilitate the trading of financial instruments. Bernhard Friess and Sean Greenaway of DG COMP examine this industry and find that, given the inherited structures, both regulation and monitoring by competition authorities is warranted to deal with a variety of market failures.

Our Autumn 2005 issue had a provocative exchange on vertical restrictions between FTC and U.S. Department of Justice economists Cooper, Froeb, O'Brien and Vita in one camp and Professors Scherer and Winter in another camp.[4] The discussion continues in this issue.

In this third issue of *CPI*, we start a new feature-short articles that examine recent significant legal decisions around the world. William Rooney, of Willkie Farr & Gallagher, looks at the U.S. Supreme Court's decision in *Volvo Trucks*,[5] a case that concerned price discrimination under the U.S. Robinson-Patman Act. Shaun Goodman, of Cleary Gottlieb Steen & Hamilton, reviews the European Court of First Instance's decision in *General Electric/Honeywell*.[6] That case concerned an appeal of the European Commission's decision to block the merger.

4 *See* Colloquy, *A Colloquy on Vertical Restrictions,* 1(2) Competition Pol'y Int'l 45 (2005).

5 Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. ___, 126 S.Ct. 860 (2006).

6 Commission Decision 2004/134/EC, General Electric/Honeywell, 2004 O.J. (L 48) 1.

While there is still, as these articles show, room for respectful disagreement over the application of the antitrust laws to particular cases, there has emerged widespread agreement that enhancing long-run consumer welfare is the singular goal of competition policy. The debate, therefore, can focus on how to achieve that objective. The emergence of this agreement was hastened, at least, by the highly influential article by Robert Bork, which we reprint in this issue, along with an introduction by Chief Judge Douglas Ginsburg of the U.S. Court of Appeals for the DC Circuit. Judge Ginsburg observes that scholars have seriously questioned Bork's position that promoting consumer welfare was the intent of the U.S. Congress in adopting the Sherman Antitrust Act of 1890. Nevertheless, Bork's view that consumer welfare should be the sole objective of the antitrust laws has been widely embraced by the courts and others and has led to efficiency-enhancing decisions.

On behalf of the journal's readers and its editorial team, I am delighted to extend my thanks to all the contributors of this issue.

Richard Schmalensee
Editor-In-Chief