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The *Intel* Cases—Legal Convergence or Leaps of Faith?

Kent Bernard
Fordham Law School

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I. INTRODUCTION

Intel has managed to find itself in the cross-hairs of the antitrust authorities in Brussels and in Washington D.C. It is doubtful if that was a part of its corporate goals at any recent time.

With its decision dated May 13, 2009,² the European Commission held that Intel violated what was then Article 82 by abusing its dominant position in a market defined as Central Processing Units (“CPUs”) of the x86 architecture. Intel allegedly did so by offering various kinds of rebates to potential customers for the units, some of whom were the world’s largest computer manufacturers. The Commission fined Intel a record EUROS 1.06 billion. While that case raises many issues, some of which will be discussed below, the basic legal structure is not being touted as something totally new. The Commission claims that, although it is running a new “effects based” analysis using the “as efficient competitor” test, it also is applying its traditional Article 82 legal approach to the facts as found. However, a careful review of what is known to date suggests that the Commission is indeed trying to move in a new direction, and it is a roadway that was paved in U.S. law some 35 years ago. Whether it can get there is up to the courts. Whether it should get there, will be discussed below.

On December 16, 2009 the U.S. Federal Trade Commission (“FTC”), not to be outdone, brought its own action against Intel.³ The FTC’s administrative complaint charges that Intel carried out an anticompetitive campaign, using threats and rewards aimed at computer manufacturers, to coerce those manufacturers not to buy rival computer CPU chips. The FTC also alleges that Intel used exclusive- or restrictive-dealing provisions to prevent computer makers from marketing any machines with non-Intel computer chips.

Finally, it is alleged that Intel secretly redesigned key software, known as a compiler, to degrade the performance of competitors’ CPU chips. On this theory, Intel could, and did, truthfully tell customers that software performed better on Intel CPUs than on competitors’ CPUs,

¹ Adjunct Professor, Fordham University School of Law. BA 1972 Colgate University; JD 1975 University of Pennsylvania.

² Intel, COMP/ 37.900 (13 May 2009), non-confidential version at http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf (hereinafter “Intel Opinion”). This is a very fact-intensive case, and what is available is the non-confidential draft. It is hard to evaluate a specific argument based on dominance (see, e.g., the conclusions in ¶ 852) when even basic market share data is redacted, see ¶ 842. See also the arguments and analyses at ¶¶ 1145-1150. Intel did publish a detailed, and fact-heavy rebuttal to the Commission’s decision on the Intel website, at http://www.intel.com/pressroom/legal/docs/Intel_Response_to_Redacted_Decision.pdf.

³ In re: Intel Corporation, Dkt. 90341, available at <http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf> (hereinafter “Intel Complaint”).

but they failed to disclose that these differences were due largely or entirely to Intel's compiler design.

Unlike in the Commission proceeding, the FTC Complaint and, especially, the statements issued by two Commissioners,⁴ acknowledges there is a new legal approach being taken (albeit alongside some traditional allegations). And, completing the analytical circle, that new U.S. approach seems to adopt a view of Section 5 of the FTC Act that is borrowed in large parts from the Commission Article 82 cases (while resolutely claiming that this approach is what the drafters of the U.S. statute some 96 years ago intended all along).

While this article will discuss the allegations and analyses of the European and the U.S. cases, our focus will be on what appears at first blush to be an odd convergence of legal theory across the Atlantic Ocean. Our question is not simply whether the point at which both systems seems to be aiming is a "correct" one. What concerns us is whether if both sides approach, but do not reach their goals, they will make things far worse rather than better.

II. INTEL IN BRUSSELS

The first thing that has to be noted here is that this case has moved on a geologic time schedule. The Complaint was filed by AMD in October of 2000. It was not pursued by the Commission the first time, and was refiled after AMD used the discovery process in the U.S. Courts to obtain information that it passed on to the Commission.⁵ The Commission adopted its decision in May of 2009 and imposed a record fine of EUROs 1.06 billion. The non-confidential version of the decision is over 500 pages long. At this rate, the appeals may well not be decided within 21 years of all lives in being.

In addition, while the Commission has traditionally applied a very structural approach to conditional rebates, its Article 82 Guidance paper suggested a move away from that formalism toward a more economically-based approach. The case was initiated before the Guidance was published so the Commission decided to analyze the conduct both under the old rules and as if the Guidance Paper applied. This also gave the courts the opportunity to move to the sort of more effects-oriented approach taken in the Guidance, but protected the Commission's flank if the courts wished to stay in the current legal posture. It is key to keep this tension in mind—the Commission may well have refused to concede points that it would have had to under the Guidance approach, because such concessions might have crippled its case if the courts stayed true to the structural approach of prior cases.

While we are going to mostly address conditional rebates, we should not underestimate the potential legal impact of the findings on what the Commission calls "naked restraints;" payments that it characterizes as being made to original equipment manufacturers to delay or prevent commercialization of competing chips. This discussion comes in at the very end of the opinion⁶ but, like a scorpion's tail, may be no less lethal for that. The Commission condemned this conduct

⁴ Statement of Chairman Leibowitz and Commissioner Rosch, *available at* <http://www2.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf>; Concurring and Dissenting Statement of Commissioner Rosch, *available at* <http://www2.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf>.

⁵ This history is summarized in lay language in a blog titled "The Register." The actual article can be found at http://www.theregister.co.uk/2004/06/09/intel_ec_probe/.

⁶ Intel Opinion, *supra* note 1, at ¶ 1641 *et seq.*

as effectively *per se* illegal—non-justifiable and not requiring any showing of consumer harm.⁷ If this *per se* treatment of naked restraints is upheld, and if the facts support the findings that there were such naked restraints, then Intel is going to lose the case although it may well win a modification of the remedy. If it taught us nothing else, the *GE/Honeywell* merger case⁸ should have taught us not to ignore the small, seemingly uninteresting points in a decision.

In *GE/Honeywell* the appeal of the case for legal analysts and scholars was in two areas. First, it was one of those “EU v. U.S.” matters where one side cleared the deal and the other blocked it. And, second, it contained a vigorous debate over the application of the doctrines of conglomerate effects. But while everyone debated those admittedly important issues, the Commission had also found that GE held a pre-existing dominant position in one market (large regional jet engines) that would be strengthened by adding Honeywell’s competing business in that market—a good old-fashioned horizontal analysis. And that finding was upheld, making the conglomerate effects discussion interesting, but ultimately not dispositive.⁹

We may well find that our debate concerning the condition rebates in *Intel* ends up in the same basket. So with that caveat in mind, let’s look at the potentially dispositive “naked restrictions.”

A. Naked Restrictions

It should be stressed that we are taking the facts as presented in the Commission opinion, an opinion that Intel strongly disputes. For the sake of this analysis, we take as given that Intel awarded major OEMs payments that were conditioned upon the OEMs cancelling the launch of products that contained AMD chips, and/or restricting the distribution of AMD-based products. If indeed the payments at issue had justifications beyond those presented by the Commission, then the course of this case should reflect that. But it is not the focus of this article to debate whether Intel or the Commission should win the case as brought. What we are trying to unravel are the approaches taken in Brussels and Washington, D.C.

The Commission decision suggests that a “naked restriction” is one where there is no link between the conduct and any legitimate justification.¹⁰ This looks very much like the kind of hard-core restraint with anticompetitive object and effect that is condemned without extensive inquiry under Article 101 (formerly 81).¹¹ In one sense, the conduct alleged is simply an extension of a

⁷ Intel Opinion, *supra* note 1, at ¶¶ 1669 and 1676. The Commission does, however, expressly disclaim the *per se* terminology, but not the analysis, at ¶ 1672. Perhaps it avoids the terminology so that it does not have to grapple with the concept of the rule of reason as the counterpoint to the *per se* rule.

⁸ *Honeywell v Commission and General Electric v Commission*, Judgment of the Court of First Instance in Cases T-209/01 and T-210/01 (14 December 2005), available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=T-209%2F01&ddatefs=&mdatefs=&vdatefs=&ddatefe=&mdatefe=&vdatefe=&nomusuel=&domaine=&mots=&resmax=100&Submit=Submit>

⁹ See Goodman, Court of First Instance Upholds Prohibition of General Electric/Honeywell, 2 Competition Policy International No.1 (Spring 2006).

¹⁰ Intel Opinion, *supra* note 1, at ¶¶ 1676, 1680.

¹¹ Note, however, the Glaxo pricing case that involved actions that arguably had the object of limiting parallel trade. While the Commission tried to condemn them out of hand, the Court of Justice held that the Courts needed to consider possible article 101(3) [then 81(3)] defenses. See *GlaxoSmithKline*, Joined Cases C-501/06 P, C-513/06 P, C-

conditional rebate. Is there really more than a theoretical distinction between saying to someone "I will give you \$1,000 if you do not buy from AMD" and saying "I will give you a \$1,000 rebate if you buy all of your requirements from me"? Why should one be treated more harshly than the other?

What may be a distinguishing factor is that the naked restriction seems to be something that is put forth after the conditional rebate approach fails. The Commission suggests that these applied to postponing or canceling the launch of products containing AMD chips, suggesting that the OEM had indeed purchased chips from AMD. If you read the allegation in that sense, then you can understand the "no defense" approach taken by the Commission—when competition fails, just pay your customer not to sell the competing product.¹² While it might be arguable to let a small firm do this to break into a market, it is hard to see the justification for allowing a dominant player maintain its dominance by simply making payments to block sale of competing products.¹³ But this raises another issue. What if the customer is threatening to buy AMD chips, as a negotiating tool to get a better price/rebate from Intel? If we prohibit the payment, we effectively raise the price to the customer, which seems counter-intuitive.¹⁴

But even if we concede that competition on products' merits is not enhanced by the so-called naked restraints, what about the conditional rebates? Even if Intel loses on the first ground, can it reform its practices by maintaining a (revised) conditional rebate structure?

B. Conditional Rebates

The European law on conditional rebates, loyalty rebates, and probably most other kinds of rebates, has puzzled U.S. oriented lawyers for years. So many of the cases dealing with the "special obligation" of dominant companies not to act in certain ways seem to have involved conditional rebates¹⁵ that it is difficult to separate out the doctrines.

In *Intel*, the Commission finds that Intel awarded major OEMs rebates conditioned upon the OEMs purchasing all, or substantially all, of their chip requirements from Intel. In a neat little thrust, the Commission notes that many OEM managers thought that AMD chips had some advantages over those from Intel, suggesting that Intel was using its dominance to crush not merely a competitor, but a potentially better product.¹⁶ It always helps to wear the white hat, and the Commission is clearly trying to show that this is not merely an abstract point, but that the conduct at issue is preventing progress and consumer benefit. Intel vigorously asserts that such an allegation is both unfair and untrue.

515/06 P and C-519/06 P, European Court of Justice, (8 October 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0501:EN:HTML>.

¹³ One has to be careful to avoid a false analogy to patent settlement matters. The alleged facts of Intel are very different from a situation where two parties are in litigation over a patent, they settle the case, and part of the settlement involves a recognition that the patent bars market entry for a period of time, which may or may not be accompanied by a payment. The strong societal policies that favor the compromise of claims and the settlement of litigation do not apply in the situation outlined before us here.

¹⁴ See Intel Opinion, *supra* note 1, at ¶ 986.

¹⁵ See, e.g., Hoffman La Roche v. Commission, Case 85/76, 1979, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61976J0085:EN:NOT>

¹⁶ Intel Opinion, *supra* note 1, at ¶¶ 150 *et seq.*, and ¶ 931. While the fact that a restraint is not totally successful (the competitor survives, and even grows) may not be dispositive, the Commission opinion is remarkably light on any discussion of AMD's actual results. On a structural approach, they may not matter. But they are relevant to an effects-based analysis.

It is at this point that the Commission's analysis begins to look new. Instead of resting on the *Hoffman La Roche* analysis, the Commission takes a more economic look at conditional rebates. The Commission launches an "as efficient competitor" analysis, and now things get really interesting.

The commission looks at three factors: (1) contestable share (how much is actually in play here); (b) the time horizon (stated as being within one year), and (c) a viable measure of cost. The analysis is deceptively simply on its face: If Intel's rebate system requires an as efficient competitor to offer its product below cost to compensate a customer for the loss of Intel's rebate (which applies to the large bulk of purchases), then the rebate could foreclose an equally efficient competitor thereby depriving consumers of choice (and the potentially superior product).¹⁷

This is not simply a sales-below-cost issue. The issue is that because the Intel rebate applies to all purchases from Intel, and AMD is not competing for all purchases, the question becomes one of how low AMD has to price so that the savings (which apply to a small volume of purchases) outweigh the Intel rebate (which applies to a large volume of purchases). And here is where the U.S. experience, discussed below, may be helpful.

To round things off, it is worth noting that under EU decisional law a dominant party cannot legally justify a discount that takes its price below "cost" by claiming that it is simply meeting competition. Finally, the Commission does not need to show that the alleged predator had a reasonable chance to recoup its losses if the predation succeeded, nor can the defendant raise that argument as a defense.¹⁸

Still, it has to be recognized that Intel had what appear to be some very credible arguments against at least some of the allegations.¹⁹ For example, Intel argues that the decision to postpone, or cancel, AMD based products was the computer maker's independent business decision based on the competitiveness of Intel's offer and AMD's failings. However, the Commission seems to say that such facts are irrelevant so long as Intel does not challenge that its offers were conditional on exclusivity and/or postponement or dropping of the AMD- based products.

While a full exploration of this issue would take us well beyond the scope of this paper, it appears that the Commission is having trouble keeping its two lines of arguments distinct. The part of the Commission that might be pushing for adoption of the Guidance approach might well have wanted to respond on the merits here. But the actual response is to pull back behind the walls of the old structuralist approach where once you establish dominance, the actual impact of restraints on competition is not relevant. That combination leads you to some strained analyses, along the

¹⁷ In a perfect world you also would look to the competitor's costs, but since the question is whether the competitor is as efficient as Intel, it makes sense to look at Intel's costs. And Intel is expected to know its own costs, while it likely—the authorities hope—that Intel would not know the detailed costs of its competitors.

¹⁸ *France Telecom SA v. Commission*, Case T-340/03 (Court of First Instance, 30 January 2007), affirmed, Case C-202/07 P (European Court of Justice, 2 April 2009); available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-202/07>. See also, Kent Bernard, *Some Thoughts on Article 82 Jurisprudence – If the Government Always Wins, Should Private Litigants Win as Well?*, 8(1)ANTITRUST CHRONICLE, (2009)

¹⁹ But cf. note 1, *supra*. Intel's arguments deal with the facts, and the redactions in the case make it very difficult to evaluate them.

lines of the discussion of the “as efficient competitor” test which seems to read something like: “We ran the test but we didn’t have to and it is neither necessary nor absolute.”²⁰

Trying to work through the internal tension in the opinion is sort of like watching a boxer who wants to explore a different style of fighting but, when attacked, instinctively resumes the posture and response in which he was trained. The Commission seems to want to explore the range of effects-based arguments, but retreats into a shell when it feels that it might not have all the answers to a defense. On that neo-structuralist view, it is hard to see any material difference between the treatment of conditional- and naked- rebates.

C. Some Transatlantic Thoughts

The law of bundling, or bundled rebates, or loyalty rebates, has an interesting history. For many of us, the seminal decision came back in 1978, in *SmithKline v. Lilly*.²¹ To summarize, Lilly had a range of cephalosporin class antibiotic drugs, all under patent, and all desired by hospitals and doctors. SmithKline launched its own new cephalosporin product, Ancef, under license from a Japanese company. Shortly thereafter Lilly launched its product, Kefzol, under license from the same company.

At this point, Lilly had two products that dominated the market, a couple of others that were niche products, and one (Kefzol) that it wanted to push. Accordingly, Lilly revised its rebate structure to lower the regular rebate but add an additional 3 percent rebate on all purchases if the customer bought agreed-upon totals of at least three Lilly cephalosporins. In effect, that meant that hospitals already buying the two dominant products would get a 3 percent purchase rebate on all of these products if they also bought Kefzol.

SmithKline had no other cephalosporins to bundle. Because of Lilly’s volume advantage with the other products, it was calculated that SmithKline would have had to offer rebates of 16-35 percent to make up for the lost Lilly rebates. While there was no express finding on costs to SmithKline (this was before the great invasion of the economists into the antitrust castle), the Court did find on the basis of expert testimony that SmithKline’s chances of remaining in the market on those terms were “poor.”

Further U.S. developments ensued over the years and, while there remains a split among the Courts of Appeals, the current leading case appears to be *Cascade Health Solutions v. PeaceHealth*.²² This case is understood to establish the presumptive legality of bundled discounts that do not exclude a hypothetical, equally efficient producer of competing products. PeaceHealth had a 75 percent share of the relevant market (defined as primary and secondary hospital services in a given county). For European Commission purposes, dominance would be assumed based on this fact. PeaceHealth offered significant discounts on tertiary hospital services to insurance companies that agreed to purchase all hospital services (primary, secondary, and tertiary) exclusively from PeaceHealth.

McKenzie, a small community hospital, only offered primary and secondary services, and it offered them at a lower cost than did PeaceHealth. But McKenzie couldn’t match the bundled

²⁰ See Intel Opinion, *supra* note 1, at ¶¶ 918 *et seq.* The mock quote is an attempt to capture the essence of ¶ 1155, with thanks to Jim Venit for the pithy formulation (he has no responsibility for any conclusions or propositions, much less errors or omissions, in this article).

²¹ 575 F.2d 1056 (3rd Cir. 1978).

²² 515 F.3d 883 (9th Cir. 2008).

discount that PeaceHealth offered. When the case reached the Court of Appeals, that court adopted a discount allocation standard: the discount is attributed only to the product(s) that the less diversified competitor is attempting to sell separately. If the resulting price is above the diversified seller's average variable cost for that product, then the scheme is legally permissible.

The United States Supreme Court has not spoken on the issue, and may well not do so for years,²³ but the consensus view is that the *PeaceHealth* standard is likely to become the prevalent one in the United States over time.

While the European Commission comes from a different legal starting place, if it does end up with a doctrine similar to that in the United States on this issue, many of us will consider that to be a good convergence. There is always a level of discomfort in allowing a dominant player to act against small competitors. But we need to acknowledge that so long as there are sane limits on that range of actions, allowing some room for competition to play out can benefit consumers with lower prices and wider choices.

We need to remember that the antithesis of abuse of a dominant position is not free competition. It is a well-maintained cartel where everyone gets his share and everyone plays nicely with one another. What we are looking for in competition policy is to navigate between those two unpleasant points.

So, if we look at the "as efficient competitor" approach as something worth trying on both sides of the Atlantic, the question becomes whether the European Courts will adopt that doctrine or will reaffirm the somewhat simplistic structural approach that has carried the day so far. The Commission took no chances in Intel, running the analysis on parallel tracks. One can understand that they did not want to spend the time and money on the case and rely solely on the new approach (the proceedings were initiated before the guidance document was published). But it is now up to the courts to accept, or reject, the proposed new approach.

III. INTEL IN THE UNITED STATES

While the European Commission seems to be moving to at least suggesting incorporating some features of U.S. law (admittedly without attribution), at the same time and with the same defendant, the U.S. Federal Trade Commission seems to be trying to incorporate chunks of European law (again without attribution).

On December 16, 2009 the Commission filed an administrative complaint against Intel, with charges under the Sherman Act and separate, independent charge under Section 5 of the Federal Trade Commission Act.²⁴ Like the European Commission, the FTC is running the case on parallel tracks. If a court reviewing any decision out of the administrative action rejects the FTC's Section 5 approach, the Commission will still (it hopes) have made a case under traditional Sherman Act antitrust law.

The FTC complaint²⁵ alleges that Intel engaged in a laundry list of activities that handicapped its rivals' ability to compete—including, but not limited to, bundled discounts, loyalty discounts, predatory pricing, and disseminating false information. Each of the activities alleged

²³ Except under specified, and narrow circumstance, there is no right to have an appeal heard by the U.S. Supreme Court. In many cases, the Court deliberately lets the law develop through conflicts in the Courts of Appeal for some time, before stepping in to rule.

²⁴ 15 U.S.C. Section 45.

²⁵ Intel Complaint, *supra* note 2.

could create liability under standard Sherman Act antitrust case law. However, if it went that route, the FTC would have to deal with previous decisions that set some fairly strict limits on when discounting violates the law. U.S. precedent requires that a plaintiff alleging predatory pricing has to prove that the defendant had a reasonable chance to recoup any losses resulting from the predation (after the predation succeeded in driving out competition).²⁶ Perhaps our friends in Washington looked enviously across to Brussels, where the need to show potential recoupment by the predator is not a requirement.²⁷

In this Complaint, it looks as if the FTC is trying to take the FTC Act to the realm where the Commission law now stands. It is appropriate to see how they intend to get there.

A. What Does the FTC Act Mean?

Commission Chairman Leibowitz and Commissioner Rosch issued a joint statement in connection with their filing of the Intel complaint, and Commissioner Rosch also issued a separate statement. They are worth exploring.

The Joint Statement takes the position that the Commission has not previously taken Section 5 as a separate fount of authority because it did not need to—the antitrust laws have been interpreted in a way that made it unnecessary for the Commission to use Section 5. But now the law governing the Sherman Act is not what the Commission wants. It imposes limitations, and requires elements of proof that make it difficult to win cases. To the Commissioners, because we allow private actions to collect damages under the Sherman Act, courts have limited the reach of substantive antitrust law in order to avoid the excesses of litigation.²⁸

This is a critical point. The FTC view (or at least the view of two Commissioners, with the rest not dissenting) is that it is all right to create broader standards of liability in cases under Section 5 because the law made under Section 5 will not be usable by private plaintiffs in private litigation. So let's turn to that view of Section 5.

B. The S&H Case

The Commissioners start from the basic and correct point that the Federal Trade Commission Act was passed with broad authority, not just over restraints of trade (already covered by the Sherman Act), but also over actions that create “unfair” competition. And indeed, Section 5(a) of the FTC Act expressly covers unfair methods of competition, as well as unfair or deceptive acts in or affecting commerce.²⁹ But the case traditionally used to support broad FTC authority may, upon further examination, be a narrower pillar than the Commissioners might hope. As often happens, looking at the facts helps us understand what the Court did—and did not—mean with this law.

²⁶ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). A company is not going to sell product at a loss (at least not for very long) unless it believes that it will recoup that loss later. Under U.S. law, this is the essence of the situation: Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced; *Brook Group*, *supra*, at 222-224.

²⁷ *France Telecom SA v. Commission*, Case C-202/07 P (European Court of Justice, 2 April 2009) at ¶ 110, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-202/07>; See also, Bernard, *supra* note 18 at pages 7-18.

²⁸ Statement of Chairman Leibowitz and Commissioner Rosch, *supra* note 3, at page 1.

²⁹ 15 U.S.C. Section 45(a).

The Sperry & Hutchinson Trading Stamp Company (S&H) issued and redeemed trading stamps—these were a form of scrip handed out with purchases from cooperating merchants (S&H sold the stamps to the merchants, who gave them to customers typically at the rate of one stamp for every 10 cents in purchases). Customers pasted the stamps into booklets, and could redeem the booklets for merchandise at designated S&H redemption centers. S&H put restrictive notices in booklets, stating that the customers did not own the stamps. Other stamp companies did the same thing. S&H sued merchants who accepted booklets in partial payment for goods (outside of the redemption center context), and sued trading stamp exchanges that sprang up to make the booklets more liquid.

The FTC sued, alleging that these acts were unfair and oppressive. The Fifth Circuit held that the FTC could only move against conduct that was an antitrust violation, a violation of the spirit of the antitrust laws, or repugnant to public morals. The Circuit Court held that the conduct at issue violated neither the letter nor the spirit of the antitrust laws, a finding that was not challenged at the Supreme Court. The Supreme Court ordered the case sent back to the FTC, but it held that the FTC could move against practices that were unfair or deceptive regardless of the impact of those practices upon competition.³⁰

C. What Does This Mean For Intel?

So, if the question is whether the FTC can act on conduct that is unfair in ways that do not violate the antitrust laws, the answer clearly is “yes it can.” But the more interesting question is whether Section 5 can be used to attack conduct if that identical conduct is permitted under the antitrust laws because courts have effectively found that the pro-competitive aspects outweigh the anticompetitive ones. Commissioners Leibowitz and Rosch assert the Commission will limit itself to only acting “responsibly,”³¹ which is welcome but which also bypasses a key issue.

Will Intel be able to argue, for example, that its bundles did not result in any sales below cost (even if “cost” is defined as in the allocated model used in *PeaceHealth* or as adopted by the EC in its decision)? If not, you can have conduct that is expressly allowed as pro-competitive under one statute being condemned as anti-competitive under another statute by an Agency that purports to enforce both. That will never do. Sections of the FTC Complaint suggest that Intel might have some “traditional” defenses, but with higher burdens. For example, Intel might defend by showing the classic rule of reason defense that the pro-competitive consequences outweigh the anticompetitive ones, but it must also show that that its conduct was reasonably necessary to reach the pro-competitive result.³² None of that speaks to the rules for predatory pricing cases, however.

If pushed, the Commission might well rely on the argument that any judgment under Section 5 cannot be used as the basis for a private action in Federal Court, which is correct but may not tell the whole story. Many states have “Little FTC” acts that track the broad language of Section 5 but allow for private suits and, in many cases, attorneys fees.³³ While these have not been

³⁰ 405 U.S. 233 (1972). The FTC had held that the acts did violate antitrust standards, the Circuit Court reversed on that point but also limited the scope of the FTC Act. It was to eliminate that cramped construction that the Supreme Court sent the case back with instructions to send it back to the FTC.

³¹ Statement of Chairman Leibowitz and Commissioner Rosch, *supra* note 3, at page 2.

³² Intel Complaint, *supra* note 2, at ¶ 1.

³³ See the chart at the end of the material submitted by Justin Hakala to the FTC record in the Section 5 Workshop in 2008, reprinted at <http://www.ftc.gov/os/comments/section5workshop/537633-00002.pdf>.

a prolific source of follow-on litigation, it also is true that the FTC hasn't taken the broad and expansionist view of Section 5 that it is proposing here.

IV. CONVERGENCE OR BLIND LEAP?

From a comparative law standpoint, it is fascinating to see how the two legal systems are rushing towards each other in some respects, while selectively ignoring key facts. It is very rare to see this happen in a case involving essentially the same conduct by the same party in both jurisdictions.

In the EC, we have a system in which many of the defenses and justifications that apply in the United States (such as the need for the plaintiff to show that any predatory losses were reasonably probable to be recouped later) do not exist. And the Commission has a body of court decisions that would allow it to bring cases almost without regard to their actual economic impact. To its credit, the Commission seems to be trying to get case law that is based more firmly on real effects rather than pure structure.

In the United States, we have the full panoply of defenses to an antitrust charge, so the FTC is trying to use Section 5 of the FTC Act to almost mirror what the Commission can achieve under Article 102, including cutting off the defenses that would be available here if the actions were brought under the Sherman Act.

But when we look at the rationale for what the FTC is doing, it is that there is no private right to sue under the FTC Act, so a broader base for legal liability is acceptable. What the FTC is saying is that it will undertake to use these broad powers responsibly, and that it recognizes that the Courts don't think that private plaintiffs would do so (and, hence, have imposed limits on the substantive law in Sherman Act cases where there is a full private right of action). It wants to expand its substantive law, while recognizing reasons to limit private suits.

But the Commission is moving in a slightly different way. It is taking broad legal standards, trying to tie them to economics, but at the same time (on a different track) trying to encourage creation of broad private rights to sue under whatever law it makes for itself.³⁴

So, if the FTC is right, you can have broad standards of liability in part because there is no private right to sue, and the government will act responsibly in bringing cases. But if the EC is right, then you should make the law more economically coherent and then allow private litigation using those same substantive standards. The problem with the Intel decision is the European Commission is trying to play both a new effects-based hand and the old structural hand at the same time. The result is arguments that start off in one system, but end up in the other.

There is a good argument to be made that a skilled agency charged to protect the public interest should be allowed greater leeway in defining and enforcing the law than should private parties looking out only for their own self interest. After all, criminal sanctions are reserved to government hands. The Commission's actions seem to represent a train of thought that sees no way to limit the substantive law that can be enforced by private parties (if such suits are allowed), but perhaps sees that as less of a problem³⁵ if it can get the law away from the structured formalism

³⁴ Various documents are available at <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>.

³⁵ It may be argued that I am putting thoughts in the Commission's mind here. That is a chance that I will take, since if these thoughts are not in the minds of the Commission I hope that they get there very quickly.

of its Ordoliberal past³⁶ and towards a more flexible set of rules that seek to allow conduct that may be beneficial while still prohibiting conduct that is not.

The FTC approach seems a bit fantastical, since given the U.S. litigation structure it is hard to believe that an FTC finding that some conduct constituted an unfair method of competition will not lead to follow-on cases under state law. At the very least, we will have to deal with the question of estoppels—whether the facts found by the FTC can be re-litigated in follow-on suits

But the fact that both Brussels and Washington are moving towards their goals, with no assurance (and indeed quite a bit of skepticism) that they can reach them, raises the most interesting problem to a bystander. In economics, the “theory of the second best” teaches us that in trying to reach a goal, getting only part way may make things worse than they were.³⁷ The classic example is that you don’t make yourself better off by jumping half way across the Grand Canyon.

The point of this approach is not to suggest doing nothing. It is simply to note that, while some people may think that letting the FTC go far afield under Section 5 is a benefit because it enables the agency to go after more bad conduct, the fact that it may lead to broader private litigation and to the same agency enforcing two laws in ways where the same conduct is permitted under one but banned under the other, may well outweigh the theoretical benefit of the broader range of action. We may find ourselves with the worst of both worlds—broad, vague case law under Section 5, and the full range of private litigation attempting to collect under that law.

And in Brussels, it may be thought that if we can move the courts to make the law more economically coherent then allowing private suits will not be as much of a problem. But the fact that the courts may leave the older precedents alone, or not move fully into the new realm, may again leave us with the worst of both worlds—formalized structural law and broad private litigation.

If we may revert to the Grand Canyon example above, sometimes it pays to look very carefully before you leap out into the unknown. It is not clear that either Commission has taken that careful look.

³⁶ See Bernard, *supra* note 18, at pages 8-12. The Ordoliberal doctrine that seems to underlie much of the Article 82 (now 102) jurisprudence to date does not work well when offered to support private rights to sue.

³⁷ The key text here is R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24(1) REV. ECON. STUDIES, 11-32 (1956 - 1957). For a broader view, see the paper by Ward, at http://salises.mona.uwi.edu/sa61a/Micro_Essay_1_Theory_of_Second_Best.pdf, and Suranovic, *International Trade Theory and Practice*, at <http://internationalecon.com/Trade/Tch100/T100-2.php>.