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I. INTRODUCTION

The Federal Trade Commission's ("FTC's") new legal attack on Intel threatens to leave the company a shell of its former self. The Commission claims that Intel violated Section 5 of the FTC Act by giving discounts and rebates to customers in a manner that harmed its main rival AMD, by designing its products in a way that disadvantages rivals, and acting too aggressively in protecting its intellectual property. The remedies the FTC is seeking would impose broad restrictions on pricing, product design, and protection of intellectual property.

The FTC's claims are not well founded in U.S. antitrust law, though they have been embraced in the European Union. Unlike the European Commission, the FTC has to go to court and prove its claims, and will have to do so against a background of U.S. case law that ranges from wary to hostile to its theories. The U.S. courts have been reluctant to use antitrust law to micro-regulate pricing and product design decisions, and to interfere with the protection of intellectual property. The FTC's likelihood of victory, after all of the dust kicked up in the litigation process has settled, is low. So one has to wonder what's behind this enforcement action.

The most likely reason is that the FTC is hoping for a settlement with Intel that will result in the imposition of at least some of its proposed restrictions. The agency will then be able to claim that it has enhanced the regulatory power of antitrust law, and effectively moved the law to a position closer to that in the European Union. In the meantime, the law on the books will not have changed a bit. The FTC expects to prove that by threatening litigation based on theories that are outside of the law, the agency can effectively impose regulations on firms that are also outside of the established law.

II. LAW ON THE BOOKS VERSUS AGENCY PROCESS LAW

For antitrust traditionalists, who think the law should be made clear by the courts and enforced by agencies, the FTC's strategy is troubling. It threatens to undermine settled law and make every large firm fear that conduct that appears to be lawful under established antitrust doctrine could be the basis for an enforcement action by the FTC.

Of course, one could argue that the FTC has operated in this fashion in the merger context for a long time. The merger notification process permits the FTC to challenge a proposed merger and hold it up until the parties agree to modifications demanded by the agency. Some firms refuse to make concessions and take the agency to court. In some cases they win (e.g., Oracle-PeopleSoft merger). However, most firms offer the necessary concessions to the agency, because they would rather make a deal and get on with the merger than spend years litigating in court. In the course of this process, the agency has been able to impose conditions that would not have been supported by courts if the agency had litigated each case to a final judgment. As a result, the merger law on the

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ground, which means at the agency level, is more restrictive than merger law on the books. The reason is that any firm that wants to acquire another firm would rather give up $1 in concessions to the FTC than spend $2 in litigation.

But this process of making demands and getting concessions outside of formal litigation has not been part of the FTC's business in the bread-and-butter parts of antitrust enforcement, the parts associated with Sections 1 and 2 of the Sherman Act. Section 1 prohibits price-fixing and Section 2 prohibits monopolization. The courts have largely prevented the agency from launching enforcement actions under Section 5 of the FTC Act based on theories that are not well founded in the law of Sections 1 and 2. As a result, the FTC has acted imaginatively on the merger front, but not on the antitrust enforcement front.

Of course, the economics of enforcement are the same in both the merger and antitrust enforcement settings: in both, the defendant has to pay large sums in agency proceedings up front, before getting into the federal appellate courts. There should be a strong incentive to settle with the agency in both settings. But the pressure to settle and move on is probably greater in the merger context than in the enforcement context. The parties who seek to merge typically hope to make their concessions with the agency and then go back to business with the whole merger process in the rearview mirror. In the enforcement context, accepting the agency's demands could mean being unable to do business, so there is no sense in which a firm can expect to settle and simply go back to business as usual.

It is this asymmetry in incentives to challenge the agency that has acted, along with the oversight of courts, to constrain the FTC in its antitrust enforcement for many years. As a result, the agency generally has not attempted, outside of the merger setting, to create antitrust law "on the ground" that differs greatly from antitrust law on the books.

III. CHANGING THE EQUILIBRIUM

By all accounts, the scope of the agency's demands against Intel is beyond anything lawyers in the enforcement community have seen in recent years. It appears that the agency has decided to use this case to create a set of restraints that are substantially more burdensome on large firms than U.S. antitrust law itself could be interpreted to impose. What explains this change in the agency's strategy?

The European Union is the most likely reason. It is probably not a coincidence that the FTC's complaints mirror those brought by the EC.

There are other possible reasons of course, such as the new enforcement policy announced by Department of Justice in 2009. But the new enforcement policy is just talk, and talk is cheap. The FTC would have no reason to believe that it might be more successful in getting a settlement that imposes highly restrictive conditions simply because of some new statements on enforcement intentions from the Justice Department. The DOJ antitrust head can say whatever she wants, but if the courts are not going to back it up, no firm with the resources to litigate should worry much.

Another possible reason is that the new administration will alter the federal judiciary by appointing judges who are in favor of more interventionist antitrust. But it takes time for this to happen, and the new pro-intervention judges will not be there in time to make a difference in the *Intel* case. Moreover, antitrust policy is only one of many issues that a presidential administration might use to screen judicial nominees, and far from the most salient in terms of politics. It would not be rational for the FTC to change its policy in the expectation that a more interventionist set of judges would be in place to actually implement those policies in the court.

The most plausible explanation for the new aggressive stance is that coordinated litigation is more effective than unitary action. The FTC has adopted the theories of the EC at a time when both the EC and attorney general of New York are prosecuting Intel on the same theories. The FTC's strategy of pursuing Intel at the same time as the EC on roughly equivalent theories has several advantages. First, there is the advantage of repetition: As more enforcement agencies bring the same charges, the more attractive those charges will become to other state attorneys general, and the more plausible the charges will seem to the public. Second, the FTC surely will suggest to Intel that it may be unsuccessful in appealing the EC's decision against it and may as well adopt the same policies in the United States that it will be forced to adopt in Europe. Third, the FTC is aware that the sheer burden of litigation is likely to cause Intel to consider the settlement option. Litigating on multiple fronts against several deep-pocket (taxpayer-funded) opponents will eventually become a drag on the financial and managerial resources of the firm.

In this "wolf pack" strategy, there is no need to have theories that have a firm basis in existing U.S. antitrust law, or even to have a firm reason for believing you will prevail in court. The litigation process itself forces the settlement on terms that may have little to do with the requirements of the law.

The *Intel* case may represent a new chapter of coordinated antitrust enforcement where the EC plays the role of leader. The EC has a greater chance of success in monopolization cases than do the American enforcement authorities, at least as the American law is currently written. In dense, highly formal opinions, the European appeals courts have consistently backed up the EC in its monopolization prosecutions. The theories adopted by the FTC in the *Intel* case are accepted in European law and largely rejected in American law. Under these conditions, when the EC brings an enforcement action against a dominant American firm, the FTC can ramp up the settlement pressure and create new law on the ground, mirroring that of the EU, by bringing a parallel action in the United States based on similar theories. Some state attorneys general may choose to join the coordinated effort (for example, the New York attorney general in this case), putting more settlement pressure on the defendant.

Of course there is no need to attribute such a high level of strategic planning to the FTC. There are private parties petitioning for enforcement in these high-profile monopolization disputes. Those parties know that they should approach the EC in addition to the FTC. The best strategy for them is to approach the EC first, since it is likely to be the most aggressive and ultimately successful, and then the FTC.

One important feature of this change in strategy is that the FTC knows that the EC is likely to be the more aggressive enforcer. In fact, in the Intel case, the FTC knows that the EC has already been more aggressive and that Intel is now currently waging war with the EC in the European Community court system. The FTC need not worry that it will bring an enforcement action only to find that it is waging war on its own, and knowing this it has good reason to believe that it can force settlements based on terms more restrictive than existing law. This is a game of tacit coordination in which the EC acts as leader, because it has the greatest likelihood of success, and the FTC acts as follower, bolstering the probability of success for both enforcement agents.

IV. SECTION 5 AND THE NEW ENFORCEMENT STRATEGY

Core to the FTC's new strategy is the use of Section 5 of the FTC Act as a legal basis for bringing monopolization claims against Intel that would be difficult to prevail upon in a Sherman Act lawsuit. In a very general sense this is consistent with the purpose of Section 5. However, in this case, the FTC's conduct is not entirely consistent with the purpose of Section 5.

Section 5 of the FTC Act empowers the agency to bring lawsuits to enjoin unfair methods of competition. The courts have said that the purpose of Section 5 is to enable the agency to pursue antitrust violations that, because of the high evidentiary demands of the Sherman Act, would be difficult for a private plaintiff to bring successfully in a federal court.

The FTC is on firm ground in using Section 5 when it is pursuing a defendant who engages in conduct that is unambiguously prohibited by the antitrust laws but, for some reason, the evidence needed to prove a violation would be difficult for the agency to gather and produce. The core scenario of this sort is when a group of firms engages in a price-fixing conspiracy, but does so in a manner that cloaks their agreement so well that it is nearly impossible to prove its existence. This is nearly fatal to prosecution under the Sherman Act, which requires proof of agreement in order to find a violation. Even if the evidence in a Sherman Act Section 1 prosecution is circumstantial, it must still support the inference of an agreement.

The FTC has prosecuted conduct of this sort in the past, and has been successful in some cases. There are numerous business practices and conventions that could be and have been used to facilitate collusion that would be difficult to prosecute under the Sherman Act. When the agency uses Section 5 to prosecute businesses that engage in these practices, it is simply following the widely acknowledged purpose of that provision. Price-fixing is an unambiguous violation of the Sherman Act, but it is often difficult to prove.

The *Intel* case is different. Now the agency is bringing monopolization claims against Intel based on theories that have been rejected as a basis for Section 2 liability by the U.S. courts. This is not a case in which the underlying violation is clear and the evidence difficult to produce. Indeed, it is just the opposite: The evidence concerning Intel's practices is absolutely clear, while the theory of anticompetitive harm is speculative. Intel made no attempt to hide the fact that it gave discounts to customers or to protect its intellectual property. There is no reason to think that the FTC has to work especially hard to prove any facts in this case. But once the facts have been laid out, the most difficult issues will be generated by the theories of anticompetitive harm at the core of the agency's case, because those theories have been viewed with suspicion by U.S. courts.

This is a worrisome approach for the agency to take to Section 5. It involves using Section 5 to create a new layer of agency monopolization law sitting under the formal law recognized by the courts. This new law will be subject to the varying opinions and identities of FTC Commissioners, and for this reason will be less stable and predictable than the formal law. It is also inconsistent with the recognized purpose of Section 5. The FTC Act was not intended to empower the FTC to create a layer of informal law that goes beyond the restrictiveness of formal monopolization law.

In any event, the federal courts will probably recognize the FTC's strategy and reject it. The *Intel* litigation will arrive in the courts before the new administration has an opportunity to appoint a slate of interventionist judges. The judges currently sitting on the federal courts are likely to notice the inconsistency between the agency's new strategy and the settled function of Section 5.

But this brings us back to the coordinated enforcement strategy. The FTC is well aware of the difficulties it is likely to face in federal court, once the agency process has run its course. But with the EC on the stage, the FTC probably believes that it has a considerably stronger chance of forcing a settlement on its own terms. The end result is that Section 5 will be transformed into a framework of informal agency law regulating the business conduct of large firms in a more restrictive manner than required by the Sherman Act. That informal agency law will largely mirror the law of the European Commission.

Commentators warned during the *Microsoft* litigation that the EC would become the global regulator of business conduct for large firms. This is largely true for Microsoft today, and perhaps other large firms have had to modify their business practices to bring them into agreement with the EC's view of monopolization law. The concern during the *Microsoft* litigation was that U.S. firms would realize that that the cheapest and most successful way to constrain a rival dominant firm that operates globally would be to petition the EC.

The FTC's new strategy promises to bring the EC law much closer to home. Now, the rational strategy for a firm that wants to constrain a dominant firm rival is to petition both the EC and the FTC. If both pursue the case, the costs of litigation for the dominant firm would become prohibitive. After all, Microsoft, a firm sitting on piles of money, has found that it is wiser to settle with the EC rather than tie itself up in years of costly litigation. By settling, Microsoft allows itself to go back to the business of meeting consumer preferences. But at the same time, by settling, Microsoft enables the EC to create a layer of global monopolization law that is more restrictive than what exists in the United States. Moreover, this new layer of global law is largely informal because the EC finds facts and does all of the balancing while the European Courts uphold EC findings on the basis of general principles.

It is not clear how this predicted state of affairs might be avoided. One way is for firms such as Intel to refuse to settle. If the FTC, playing follower to the EC in a coordination game of enforcement, had to go to court and pursue its case all the way through the appeals process, it would lose frequently and eventually become gun shy. As the EC law moved further from established U.S. law, the FTC would understand that its prospects for victory diminished and would substitute toward stronger targets for prosecution. But it would be irrational, in the short run, for dominant firms challenged under the new enforcement strategy to litigate every case, especially given the coordinated enforcement environment.

The scenario that the FTC is betting on in its new *Intel* case is settlement. That creates an informal layer of enhanced regulatory law in the United States. Moreover, it puts U.S. formal antitrust law into a death spiral of sorts. As more large U.S. firms find themselves bound by EU antitrust constraints at home, they will go to U.S. courts to try to slap the same constraints on their smaller, unconstrained home-based rivals. Perhaps over time the U.S. courts will be persuaded to adopt EU law, and there will be little left of U.S. antitrust law.