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Section 5 of the FTC Act and the Need for Guidelines

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FTC Commissioners Wright and Olhausen recently have argued that the FTC should issue a policy statement or guidelines regarding enforcement of Section 5 of the FTC Act to create liability for unfair methods of competition beyond the Sherman Act's reaches.[2] I have previously articulated my own views on what the substantive principles governing the reach of Section 5 should be.[3] In this essay, I wish to join forces with Commissioners Wright and Olhausen in calling for the promulgation of guidance from the FTC on Section 5 enforcement. I will argue that, like Ulysses, the Commission should bind itself to the mast, not merely to decrease its temptation to heed the Sirens' call but, ultimately, to increase the likelihood that its Section 5 decisions will buck the trend of history and survive judicial review.

The starting point in most contemporary discussions of an independent Section 5 is a history of defeat in the courts associated with names like *Official Airlines Guides*, *Boise Cascade*, and *Ethyl*.[4] A commonly held view, one reinforced by a statement made by the Second Circuit in *Ethyl*, is that the Commission's failure was to provide sufficient notice to the relevant industries to allow them to conform their behavior to the Commission's standards.[5] But while notice of the law is certainly desirable, that is not the most compelling reason to promulgate Section 5 guidelines.

The idea that Commission guidelines will help business people to plan better is a bit of a fiction, for two reasons. First, much of the borderline conduct at issue is would not be deterred by clearer policy statements from the Commission. For example, when an executive calls up her competitor to solicit a price-fixing agreement, she's hoping to enter into an agreement that would be fully illegal under Section 1 of the Sherman Act. There is no need to deter her from trying to do something that would be illegal if she were successful. Second, whatever guidelines the Commission might articulate on Section 5 probably wouldn't help business people in planning their activities, unless they were very specific as to particular types of business conduct (*i.e.*, if a patentee makes a FRAND commitment to an SSO, it must precisely honor that commitment by granting a license on the following terms . . .). And any guidelines the Commission could agree on would probably be quite broad.

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[2] Joshua D. Wright, *Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority*, http://www.ftc.gov/speeches/wright/130619section5recast.pdf; Maureen K. Olhausen, *Section 5: Principles of Navigation*, http://www.ftc.gov/speeches/ohlhausen/130725section5speech.pdf.

[3] DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST LAW 135-141 (2011).

[4] *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980); *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

[5] 729 F.2d at 139 ("[T]he Commission owes a duty to define the conditions under which conduct . . . would be unfair so that business will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability.")

The most important reason for promulgating Section 5 guidelines is to articulate principles of self-restraint that Article III courts can invoke in reviewing Commission decisions applying Section 5 in spaces that Sections 1 and 2 of the Sherman Act would not apply under current judicial doctrine. Courts jealously guard their interpretations of the Sherman Act and, as history suggests, are reluctant to allow the FTC effectively to override them based on assertions of Section 5 independence. By articulating principles that delimit how far the FTC can go under Section 5, the FTC would provide courts assurances that meaningful judicial review can still occur.

The Commission needs to articulate principles not just about how far it can go under Section 5 but also about how far it *cannot* go. It needs to say, in effect, "courts, here is how you will know if we crossed the line." These limitation principles need to be concrete enough that defendants have a reasonable opportunity to show through objective evidence that their conduct does not contravene the statute. In other words, the Commission needs to explain how its view of Section 5 independence is not a plea for greater administrative discretion, which courts will be unlikely to afford, but for an expanded scope of antitrust coverage under principles that can be fairly contested in litigation.

The FTC has been most successful in securing judicial endorsement of the standards it has proposed when those standards articulated an objective framework for analysis that can be realistically applied both offensively and defensively. For example, in its 1988 decision in the *Massachusetts Board*[6] decision, the Commission articulated a structured approach for determining whether an agreement in restraint of trade is unlawful. This burden-allocation framework articulates burdens of proof for the Commission and opportunities for rebuttal by the defendant.[7] In *Polygram*,[8] the D.C. Circuit endorsed the Commission's framework, finding that it comported with Supreme Court precedent and provided the defendant a fair opportunity to challenge the FTC's assertion. Although the Court didn't say as much explicitly, its endorsement of the *Massachusetts Board* framework was no doubt facilitated by that framework's allowance for significant judicial review.

Proponents of vigorous Section 5 enforcement need to be realistic about the role of the Commission in creating new antitrust norms. As the Supreme Court has recognized, Section 5 was designed to give the Commission a prophylactic role in determining the content of the

[6] *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988).

[7] The *Massachusetts Board* framework is a follows: "First, we ask whether the restraint is 'inherently suspect.' In other words, is the practice the kind that appears likely, absent an efficiency justification, to 'restrict competition and decrease output'? ... If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (*e.g.*, by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a *third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry—there are no likely benefits to offset the threat to competition." 110 F.T.C. at 604.

[8] *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35-36 (D.C. Cir. 2005).

antitrust laws.[9] But a prophylactic role is very different than discretion to enforce without meaningful judicial review—something that the courts have not been, and will not be, willing to give up. By announcing guidelines that invite judicial adoption and administration, the Commission would significantly increase the likelihood of succeeding in future Section 5 enforcement.

[9] *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986) ("[T]the standard of unfairness under the FTC Act . . . encompass[es] not only practices that violate the Sherman Act and the other antitrust laws . . . but also practices that the Commission determines are against public policy for other reasons.").