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A Solution in Search of a Problem

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I. INTRODUCTION

The fundamental problem with the "unfair methods of competition" prong of Section 5 is that it is hopelessly vague. The language is almost meaningless, and there will never be a body of case law to give it meaning in the way that the thousands of antitrust cases have given meaning to the Sherman and Clayton Acts. That is not a serious problem when there is an understanding that, just as countless other laws are not enforced, Section 5 will not be enforced beyond the reach of the Sherman Act. But when Federal Trade Commissioners make clear that they intend to apply Section 5 to conduct that is not reachable by the Sherman Act, its vagueness sends to the business community uncertain signals about the boundaries of permissible conduct that could, because of their uncertainty, deter lawful and pro-competitive conduct. The vagueness of Section 5 also creates a specter of law enforcement activity driven largely by the unpredictable whim of whatever majority of Commissioners happens to exist at any particular time.

II. TWO ESSENTIAL REQUIREMENTS: CLEAR FRAMEWORK & SIGNIFICANT ANTITRUST HARM

Commissioner Wright's Proposed Policy Statement is a valuable step toward addressing the vagueness problem. The Statement begins from the premise that the Commission should not ignore Section 5 but rather should try to give it meaning. The first two of what seem to be three key components of the proposed policy are, to my eyes at least, unquestionably correct and important.

The first is that the Commission "must articulate a clear framework" for the application of Section 5. Such a framework, binding on the Commission with respect to all conduct that takes place while the Statement is in effect, is necessary to give Section 5 needed predictability.

The second is that Section 5 can be violated only by conduct that results or is likely to result in "significant harm to competition as that term is understood under the traditional federal antitrust laws." This requirement both reflects the sparse Section 5 case law and is necessary to ensure that Section 5 does not undermine antitrust objectives by interfering with market conduct for reasons other than to prevent harm to competition.

III. DEFINING A CONDUCT REQUIREMENT

The "harm to competition" requirement, focuses on the effects of the conduct in question. While necessary, it is not sufficient to give Section 5 an acceptably clear meaning because harm to competition, manifest for example in the exit or weakening of rivals, can be a result of desirable competition on the merits. There needs to be a third component – a conduct

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requirement that defines the kind of conduct that, if it has or is likely to have the requisite effect on competition, will violate Section 5.

The Statement tries to address this need by adding a requirement that conduct may be found to violate Section 5 only if it does "not generate cognizable efficiencies." The Statement says that this requirement will ensure that Section 5 is clear and predictable, will apply to conduct most likely to harm consumers, and will not deter welfare-enhancing conduct. If properly applied, a "no efficiencies" requirement would have the first and third of these benefits. And, although such a requirement would be doctrinally new, it would be less stringent than might first appear.. Few Sherman and Clayton Act cases, at least those dealing with exclusion of competitors, find both efficiencies and a violation. Instead, courts commonly condemn narrow aspects of the defendant's conduct that do not themselves generate efficiencies, even where other, lawful aspects of the conduct do generate efficiencies. But because a "no efficiencies" requirement would exclude from the reach of Section 5 conduct with even insubstantial efficiencies regardless of its effect on competition, it is far from clear that such a requirement would ensure application of Section 5 to the conduct most likely to harm consumers.[2]

The "no efficiencies" requirement is likely in any eventto be a political nonstarter. For one thing, a "no efficiencies" requirement would no doubt be criticized for putting cases of substantial net harm beyond the reach of Section 5 whenever there are even trivial efficiencies, while encouraging application of Section 5 to cases with only insubstantial harms and no efficiencies. Moreover, if the "no efficiencies" requirement were understood to make Section 5 clear and to give wide berth to conduct with welfare-enhancing properties, it would likely be criticized for permitting Section 5 to be applied to only the easiest cases and, thus, leaving too small a role for Section 5.

The third key component of the Statement, the conduct requirement, thus seems to fall short. That is not surprising. Earlier efforts by others fell short as well; and it is not easy to imagine a conduct test that is sufficiently clear, furthers the objectives of the antitrust laws, and carves out a meaningful role for Section 5.

I suggested a few years ago a possible requirement that conduct would violate Section 5 only if it would be found to be anticompetitive and likely to injure competition by application of ordinary methods of antitrust analysis but is, for some formalistic or legal reason, beyond the reach of those laws. Under this requirement, Section 5 might apply, for example, to invitations to collude that are thought to have risked competitive harm, to lack redeeming value, and to be beyond the reach of the Sherman Act in the absence of monopoly power or a proven agreement. And it might have applied to asset acquisitions prior to 1980, when the Clayton Act covered only

[2] In a very thoughtful speech, Commissioner Ohlhausen suggests that Section 5 might reach conduct where the harms are "disproportionate" to the benefits, at least if the remedies are confined to cease and desist orders, Maureen K. Ohlausen, *Section 5: Principles of Navigation* (July 25, 2013), *available at* http://www.ftc.gov/speeches/ohlhausen/130725section5speech.pdf. Commissioner Ohlausen seems to recognize that a disproportionality test, which could entail ad hoc after-the-fact balancing and uncertain measurement, does not solve the ambiguity problem and thus goes on to say that the Commission should issue a policy statement that provides further guidance on the meaning of Section 5 so that a firm would be "reasonably able to determine [whether] its conduct would be deemed unfair at the time it undertakes the conduct."

stock acquisitions. This requirement would ensure that Section 5 is broadly compatible with the antitrust laws, but it is not clear that it would leave Section 5 with a meaningful role.

Moreover, applying Section 5 to conduct beyond the reach of the Sherman and Clayton Acts would risk undermining the purpose of whatever statutory provisions limit the reach of those laws. That problem would not arise if the limitation on the reach of the antitrust laws was inadvertent, but that is probably uncommon. Indeed, that might not even be the case with respect to unsuccessful invitations to collude, which are widely thought to be the conduct most suitable for application of Section 5, if the agreement requirement in Section 1 and the monopoly power requirement in Section 2, which place much of such conduct beyond the reach of the Sherman Act, were intended to provide substantive protection against false positives.[3]

It is tempting to imagine a rule that would permit application of Section 5 more broadly to conduct that is beyond the reach of the Sherman and Clayton Acts for reasons that are thought to be inapplicable to Section 5 because of some institutional advantage that the Federal Trade Commission has over federal court adjudication. For example, the substantive reason for the agreement requirement in Section 1 suggested above might be inapplicable to administrative proceedings before the Commission if federal courts were thought to be more susceptible to false positives either because of relative institutional competence or because neither Section 5 nor the Commission's administrative proceedings is available to private plaintiffs.

There is, however, little empirical basis on which to conclude that administrative proceedings before the Commission are superior to federal court adjudication and some reason to find the contrary.[4] Moreover, it is not clear which, if any, limitations on the reach of the Sherman and Clayton Acts were intended to be or might prudently be applied only to antitrust cases brought in federal court or by private plaintiffs. Clarity about that issue would be necessary in order for application of Section 5 on an institutional competence rationale to be sufficiently predictable.

IV. ANTITRUST CASE LAW AND SECTION 5

The Statement suggests, almost in passing, that Section 5 should not be used where there is "well-forged" antitrust case law. It is not clear what that means; but the Statement appears to contemplate, as does the cited case from which the term was taken,[5] settled case law. It does seem sensible not to use Section 5 where antitrust law is settled because Section 5 would in that case either be superfluous or provide an end-run around settled law that would introduce uncertainty and otherwise undermine the antitrust laws.

It does not seem sensible, however, to make the availability of Section 5 depend on whether the law is settled. For one thing, doing so would introduce uncertainty about whether

[3] The exception is an invitation for collusion among rivals that when acting in concert would have monopoly power in the relevant market. Such an invitation could be challenged as attempted monopolization under Section 2 of the Sherman Act. *See* United States v American Airlines, 743 F.2d 1114 (5th Cir. 1984).

[4] *See* Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, and A. Douglas Melamed, *Paradigm Shopping: Section 5, the FTC, and the Courts*, both in THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION (James C. Cooper, ed., 2013).

[5] Boise Cascade Corp. v. FTC, 637 F.2d 573, 582 (9th Cir. 1980).

the law in a particular area is truly "settled." Moreover, the boundary would be arbitrary if, for example, Section 5 could be used for loyalty discounts but not bundled discounts, on the ground that the law as to the latter is settled but the law regarding the former is not, or could have been used for bundled discounts in 2000, when the law was unsettled, but can no longer be applied to them because the law is now thought to be settled.

While it is tempting to use Section 5 to bring cases that might fare badly if subject to inconsistent or unclear antitrust precedents, or where the lack of antitrust precedent might be thought to be an obstacle to prevailing on a sophisticated new theory, it would be better for the agencies to use their resources to promote the sound development of the antitrust laws than to bring occasional one-off cases under Section 5. The Commission's campaign against reverse payments in Hatch-Waxman cases was certainly more valuable under the antitrust laws than it would have been had the Commission relied on Section 5.

While the Statement's reference to "well forged" antitrust law thus does not itself define a sound role for Section 5, it does focus attention on the right question—the boundary between Section 5 and the antitrust laws and, more precisely, whether Section 5 is needed to supplement the antitrust laws.[6] The draft Statement assumes that Section 5 is intended to reach beyond the antitrust laws and attempts to articulate principles to cabin its reach. The basis for that assumption is straightforward: When enacted nearly 100 years ago, Section 5 was intended to reach beyond the antitrust laws as they were then understood.

It is not clear, however, that there is today a need for Section 5 to reach beyond the antitrust laws or that the Congress of 1914 would have perceived such a need if it had understood the antitrust laws the way they are now understood. It makes more sense, as a matter of policy even if not as a matter of law, to ask whether there is a competition policy need for Section 5 to be applied more broadly than the antitrust laws, instead of assuming that it should be applied more broadly. What is the problem an expansive reading of Section 5 is supposed to solve?

V. THE REMAINING QUESTIONS

Whether Section 5 is needed to supplement the antitrust laws would seem to turn on a number of subsidiary questions. The first is whether there are kinds of anticompetitive conduct that ought to be illegal but could be reached by the Sherman or Clayton Acts only if they were amended. Implicit in this formulation is the idea that Section 5 should not be used to circumvent undesirable antitrust case law or to compensate for the absence of antitrust case law addressing a matter within the reach of the antitrust statutes. Using Section 5 that way might undermine the antitrust laws and would divert from Commission efforts to enhance the evolution of those laws.

The second is whether, if there is such conduct, Section 5 provides the best means of addressing it. If other agencies were better able to address the conduct or if, for example, the conduct were thought to be widespread and warrant enforcement tools whose use would be more likely than Section 5 to deter the conduct, Section 5 might not be the solution.

[6] Commissioner Ohlhausen in her speech, *supra* note 2, and Professor Hovenkamp in a recent article, *The Federal Trade Commission and the Sherman Act*, available at http://www.uiowa.edu/~ibl/documents/SSRN-id1531136.pdf, address variations of this question.

The third is whether, even if Section 5 is the best solution, applying Section 5 to such conduct would undermine objectives of the antitrust laws or would create uncertainty or other costs that outweigh the benefits. Professor Hovenkamp has explained, for example, that applying Section 5 to address "cartel-like behavior" that lacks an agreement necessary for a violation of Section 1 of the Sherman Act might be imprudent because of the risk of false positives.[7]

Conduct that meets these tests would be appropriate for Section 5, assuming that the conduct or the principle by which it would be condemned can be articulated with sufficient precision to meet the "clear framework" standard set forth in the Statement. Absent such articulation, the problem of uncertainty about the reach of Section 5 and the resulting deterrence of lawful conduct would remain.[8]

VI. CONCLUSION

Commissioner Wright has done a great service by his thoughtful discussion of the issues and by his persuasive insistence that Section 5 enforcement requires a clear statement of Commission policy and is appropriate only where there is harm to competition as that term is understood under the antitrust laws. The remaining issue, defining the conduct subject to Section 5, is best answered by asking whether, and if so where, the antitrust statutes are not able to further sound competition policies and Section 5 is well-suited to fill the void. Absent a good answer to that question, Section 5 will remain a solution in search of a problem.

[7] *See* Hovenkamp, *id*.

[8] Some have suggested that the deterrence problem can be avoided by permitting only forward-looking remedies for violations of Section 5. The idea is evidently that fear of such remedies is not likely to have much deterrent effect. If it were really correct that Section 5 enforcement had no deterrent effect on third parties and mattered only to those directly affected by a couple of cases each year, it would be hard to justify the costly enforcement apparatus of Section 5. It is more likely, however, that Section 5 enforcement does have a deterrent effect and could thus result in overdeterrence, even if the only remedies were cease-and-desist orders. Such remedies can significantly restrict a firm's way of doing business and can, in some cases, be more costly to the firm than treble-damage remedies. Also, as long as plaintiffs' lawyers can imagine a plausible damage theory, even a standalone Section 5 case is likely to trigger private class action litigation alleging that the conduct also violates state or federal antitrust laws.