FTC Issues Policy Statement on the Reach of Section 5 of FTC Act

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The FTC on August 13, 2015 issued a policy statement on the reach of Section 5 of the Federal Trade Commission Act (FTC Act), which prohibits unfair methods of competition.[1] The FTC Act is separate and distinct from the two federal antitrust statutes – namely, the Sherman Act and the Clayton Act – known as "the antitrust laws." The extent to which the FTC Act extends beyond the scope of the antitrust laws has been fiercely debated for much of its 100-year history. In a 4-1 vote, with Commissioner Maureen Ohlhausen dissenting, the Commission sought to advance this debate. As Commissioner Ohlhausen noted, though, this brief statement may raise as many questions as it answers. For businesses concerned about the potential for an activist FTC to apply Section 5 in novel ways, this statement provides little comfort.

Background

During its century of existence, the FTC has explored the breadth of its enforcement authority with varying levels of enthusiasm. The 1970s witnessed the height of FTC activism, particularly in its use of Section 5 as an enforcement tool on a standalone basis (i.e., untethered from the Sherman Act). For example, the FTC pursued cases to dismember the cereal and oil industries; both cases were later dismissed by the agency in the early 1980s.[2] The FTC also fully litigated three cases in the 1970s designed to explore the reach of Section 5 of the FTC Act beyond the Sherman Act. In each case, federal circuit courts of appeal emphatically rejected the agency's attempts to broaden the scope of Section 5.[3] Following these rebuffs, and except for an occasional consent agreement challenging an alleged invitation to collude, the FTC for decades did not attempt to assert jurisdiction beyond the antitrust laws. This streak was broken in 2008 when, in a 3-2 vote, the Commission challenged the patent-related conduct of N-Data based on Section 5 alone.[4]

In the next few years, the FTC staff prepared drafts of guidelines explaining the reach of Section 5. Although multiple versions were prepared,[5] the full Commission never promulgated guidelines, perhaps because the political and policy environments following the 2010 congressional elections were less conducive to an attempted expansion of the FTC's authority. In 2013, though, the FTC provisionally accepted two consent agreements involving alleged misuse of standard essential patents that were based on Section 5 and not the antitrust laws.[6]

Also in 2013, then-professor Josh Wright took a seat on the Commission. A leading antitrust scholar, Commissioner Wright made guidelines restraining the reach of Section 5 his highest antitrust priority. Shortly after joining the Commission, he released a proposed draft set of Section 5 guidelines. Commissioner Ohlhausen, a vet-

eran of several FTC staff positions who became a Commissioner in 2012, followed Commissioner Wright in proposing Section 5 guidelines of her own. Commissioner Ohlhausen had dissented in the standalone Section 5 cases brought early in her tenure; Commissioner Wright, not yet on the Commission, did not participate.

The new Section 5 statement contains a clear endorsement of FTC jurisdiction beyond the Sherman Act.

Commissioner Edith Ramirez, who was elevated to Chairwoman in 2013, had long viewed Section 5 guidelines as unnecessary. In one speech, she noted, "I have expressed concern about recent proposals to formulate guidance that seek to codify our 'unfair methods' principles for the first time in the Commission's 100-year history. While I do not object to guidance in theory, I am less interested in prescribing our future enforcement actions than in describing the broad enforcement principles revealed in our recent precedent."[7]

Today's Statement on the Scope of Section 5 of the FTC Act

Against this backdrop, several aspects of today's statement on the scope of Section 5 are noteworthy:

- *Brevity of the statement*: The statement is only three paragraphs long and uses just over 300 words. In contrast, past Commission policy statements – including those on deception, unfair acts and practices, and merger review – were considerably longer and contained much more extensive discussions of the relevant law and policy.

- *Clear endorsement of FTC jurisdiction beyond the Sherman Act*: The first paragraph of the statement explains that Section 5 encompasses acts or practices that "contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act." Thus, the statement fully endorses the controversial "incipiency" doctrine – proscribing certain conduct before it becomes an actual antitrust violation – as part of Section 5 jurisprudence. The second paragraph endorses the view that Section 5 will be developed by the FTC "as an expert administrative body" applying "the statute on a flexible case by case basis."

- *Rejection of non-economic considerations*: The statement identifies "the promotion of consumer welfare" as the appropriate touchstone for cases outside the scope of the antitrust laws. Implicitly, then, the statement rejects non-economic considerations such as protection of small businesses that, many decades ago, were thought to be an important part of FTC jurisprudence.

- *Selection of analytical framework "similar to the rule of reason"*: Except for hard core cartels, antitrust cases are judged under the rule of reason; when fully applied, this analytical framework weighs the competitive harms and benefits of the challenged practice. The rule of reason can also be applied in a "truncated" manner such that the practice itself is evaluated without necessarily defining relevant markets, demonstrating market power, or balancing the benefits and costs of the practice. Although the Sherman Act was enacted 125 years ago, the courts and agencies are still grappling with the appropriate contours of rule of reason analysis, as barrels of ink are still spilled annually on this topic. By invoking the rule of reason, this

statement raises as many questions as it answers. Notably, the Commission committed only to a framework "similar" to the rule of reason, increasing the already considerable ambiguity that can be present in rule of reason cases. Moreover, the statement is silent on whether truncated analysis is permissible, although today invitation to collude cases themselves already apply less than full rule of reason analysis.

- *Obviation of need to show actual injury*: Both critics and some supporters of standalone Section 5 cases have suggested that actual competitive injury should be the touchstone of any FTC action beyond the scope of the antitrust laws. By endorsing the incipiency concept and applying a framework "similar" to the rule of reason, the statement appears to reject such an injury criterion.

- *Maintenance of significant prosecutorial discretion*: Debates over the FTC Act have often considered whether the antitrust laws should serve as the first recourse in challenging suspicious practices. Although unwilling to recognize the absolute primacy of the antitrust laws, the statement does acknowledge that the Commission is "less likely" to rely solely on Section 5 when enforcement of the Sherman or Clayton Acts is sufficient to address the competitive harm. Like the application of the rule of reason, the agency has reserved considerable leeway for itself in determining when use of Section 5 is appropriate.

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It should be clear that application of the statement will depend significantly on the identities of those setting the enforcement agenda. That the Commissioners did not agree to Commissioner Wright's original call for robust guidelines may help explain the brevity of today's statement and the discretion the agency retains. As evidenced by Commissioner Ohlhausen's dissent, which raises concerns not only about the substance of the statement but also the lack of deliberation surrounding its issuance, there is already disagreement on the statement's precise meaning. Nevertheless, this week's statement raises at least the specter of enlarged FTC enforcement – enforcement reaching beyond the bounds of the antitrust laws using the FTC Act as a sword – but the statement's brevity and ambiguity, together with the dissenting statement, suggest that the more probable outcome in the near term is simply more debate.

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1 The press release announcing issuance of the statement is available at https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act.

2 *In re Exxon Corp.*, 98 F.T.C. 453 (1981); *In re Kellogg Co.*, 99 F.T.C. 8 (1982).

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

4 *In re Negotiated Data Solutions, LLC*, No. C-4234 (F.T.C. 2008).

5 *See*, e.g., Neil Averitt, The Elements of a Policy Statement on Section 5, Antitrust Source, Oct. 2013, at 39, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct13_averitt_10_29f.authcheckdam.pdf.

6 *In re Motorola Mobility LLC*, No. C-4410 (F.T.C. final order filed July 23, 2013); *In re Robert Bosch GmbH*, No. C-4377 (F.T.C. final order filed Apr. 23, 2013).

7 Edith Ramirez, Chairwoman, FTC, Keynote Address at the George Mason University School of Law Symposium, "The FTC: 100 Years of Antitrust and Competition Policy" (Feb. 13, 2014), *available at* https://www.ftc.gov/system/files/documents/public_statements/314631/140213section5.pdf.

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