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"How To Have A Distinctive And Useful Antitrust Role for Section 5 of the FTC Act"[1]

Thank you very much for inviting me. I am greatly honored and delighted to be here.

I have two points to make. First, Section 5 of the FTC Act, properly construed, is indeed significantly broader and more encompassing than the Sherman Act or Clayton Act. Second, the best - and probably the only - way to interpret Section 5 in an expansive manner is to do so in a way that also is relatively definite, predictable, principled and clearly bounded. This best can be done if Section 5 is articulated using the "consumer choice" framework. Without the discipline and constraints provided by this framework, the FTC Act risks becoming unduly standardless. Unless the Commission uses the choice approach, any attempt to construe Section 5 that goes beyond the other antitrust laws risks being viewed as giving undue discretion to the Commission. For these reasons, an expansive approach to Section 5 that does not use the choice framework would be unlikely to be acceptable to reviewing courts, who demand a relatively clear way to distinguish anticompetitive conduct from procompetitive or benign conduct. But if the FTC does

[1] The author is grateful to Christine Carey for excellent research assistance.

adopt the choice limitations, I believe that reviewing courts would be likely to give the FTC Act the comprehensive interpretation it deserves. After presenting the choice framework, I will give three illustrations of how this could make a difference in practice.

Section 5 is broader than the other Antitrust Laws

There is no doubt that when Congress enacted Section 5 it intended this law to be more expansive than the Sherman Act and the Clayton Act.[2] The legislative history and Supreme Court case law[3] makes it clear that Section 5 was intended to cover incipient violations of the other antitrust laws, conduct violating the spirit of the other antitrust laws, conduct violating recognized standards of business behavior, and conduct violating competition policy as framed by the Commission.[4]

However, this Supreme Court case law verifying this Congressional intent is relatively old.[5] There is no guarantee the Court would interpret Section 5 the same way today. If the Commission were to attempt to promulgate an approach to the FTC Act that was overly vague, insufficiently bounded, or that gave it undue discretion, reviewing courts today might well restrict the scope of Section 5 and make it coterminous with the other antitrust laws, no matter what the legislative history intends and the older case law holds. This would especially be likely to happen

[2] See Neil W. Averitt, "The Meaning of 'Unfair Methods of Competition' in Section 5 of the Federal Trade Commission Act", 21 Boston College L. Rev. 227 (1980).

[3] See, e.g., F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

[4] See Averitt, supra note 2.

[5] Id. The most recent expansive interpretation of Section 5 in a Supreme Court case of which I am aware was more than 20 years ago in FTC v. Ind. Fed'n of Dentists, 476 U.S. 47, 454 (1986) (characterizing Section 5 as including traditional antitrust violations and also "practices that the Commission determines are against public policy for other reasons.").

if the Commission articulates Section 5 condemnation in terms that were relatively non-economic, such as condemning conduct that is "unjust", "oppressive", or "immoral". Fortunately, there is a way for the Commission to minimize the risk of reversal on appeal.

Section 5 Can Be Expansive If, But Only If, It Is Constrained by the Choice Framework

The choice framework would impose the threshold requirement that every Section 5 antitrust violation must significantly impair the choices that free competition would bring to the marketplace. [6] It also would impose the requirement that every Section 5 consumer protection violation must significantly impair consumers' ability meaningfully to choose from among the options the market provides. Construed this way, the two haves of Section 5, operating together, ensure that consumers have the two ingredients needed to exercise effective sovereignty— a competitive array of options and the ability to choose meaningfully from among these options. Antitrust law prevents restraints that would restrict the competitive array of options in the marketplace, insuring they are undiminished by artificial restrictions such as price fixing or anticompetitive mergers. Consumer protection law then ensures that consumers are able to make a reasonably free and rational selection from among those options, unimpeded by artificial constraints such as deception or the withholding of material information. In this way, the two halves of Section 5 together protect a free market economy.

Conduct not causing either type of problem should not violate Section 5 of the FTC Act. Conduct not unduly restricting the options available in the marketplace should not be an antitrust

[6] See Neil W. Averitt & Robert H. Lande, "Using The 'Consumer Choice' Approach To Antitrust Law," 74 Antitrust L. J. 175 (2007).

violation, and conduct not unduly restricting consumers' ability to chose from among these options should not constitute a consumer protection violation.

The choice approach to antitrust - instead of a price or efficiency approach - has the advantage of explaining accurately, simply and intuitively, in a way that everyone can understand, why antitrust is good for consumer welfare.[7] Under a consumer choice standard, factors like innovation, perspectives, quality and safety would in effect be moved up from the footnotes, where they are all too-often forgotten, into the text, where they would play a more prominent role in the antitrust evaluation. When antitrust is construed and applied within the consumer choice framework it will change some antitrust analysis as it gives greater emphasis to such short term issues as quality and variety competition, and long term issues including competition in terms of innovation, ideas and perspectives. It would make a difference in several broad categories of cases where a price or efficiency approach to antitrust often would lead to the wrong result.[8] But it would do so in a predictable, principled manner.

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[7] The choice framework should also be applied to Sherman Act and Clayton Act cases. Fortunately, there is reason to believe that all antitrust jurisprudence is evolving in this direction. This Sherman Act and Clayton Act evolution might not be moving quickly enough, however, for a variety of reasons. See Averitt & Lande, supra note 6.

[8] The first category involves conduct in markets with little or no price competition, as a result of regulation, joint ventures, or third party payers. In these situations there is no way properly to assess consumer welfare without focusing explicitly on non-price issues. In these cases we care about artificially diminished consumer choice even if prices are competitive, for these markets a price standard would be inadequate.

A second category of cases when a consumer choice approach will work better involves conduct that increase consumers' search costs or otherwise impairs their decisionmaking ability. This conduct tends to cause consumers to obtain products or services less suited to their needs, in addition to producing adverse effects on price. There are a large number of examples, including the advertising restriction cases and similar cases that involve collusion to raise consumer search costs.

Three Examples: Cases Similar to N Data, Invitations to Collude, and Incipient Exclusive Dealing and Tying Violations

I will now provide three examples of ways that Section 5 usefully could be construed more expansively than the other antitrust laws. I will also briefly show how the choice framework would beneficially assist in the analysis of these issues, and make a decision by the Commission in each type of case more likely to be sustained by a reviewing court.

1. Cases similar to N Data

I applaud the Commission's decision in the Negotiated Data Solutions case.[9] I commend the Commission for condemning the anticompetitive post-contractual opportunistic behavior at issue. I also am delighted that the Commission affirmed that conduct can be an antitrust violation of the FTC Act even if it does not violate the Sherman Act.[10]

However, I respectfully believe that the Commission's overall approach to deciding the issues would have been improved if had been supplemented by "choice" limitations that made it

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Finally, there are cases involving markets in which firms compete primarily through independent product development and creativity, rather than through price. These markets may involve high-tech innovation or editorial independence in the news media.

For a detailed explanation of these categories of cases see Averitt & Lande, supra note 6.

[9] *See* In the Matter of Negotiated Data Solutions, LLC, FTC File No. 051 0094 (Jan. 2008).

[10] The conduct at issue might have violated the Sherman Act. However, it arguably involved merely the exploitation, not the actual creation, of monopoly power, in which case it might not have violated the Sherman Act.

The anticompetitive exploitation of market power can, however, violate Section 82 of the Treaty of Rome. See Einer Elhauge & Damien Geradin, Global Antitrust Law and Economics (2007), Chapter 3. If Section 5 were interpreted to prohibit the anticompetitive exploitation of market power, this would beneficially help to harmonize U.S. antitrust law with E.U. competition law.

clearer and more predictable as to why the conduct at issue had been condemned. Doing this would also make future similar decisions more likely to be sustained by reviewing courts on appeal.

The main drawback to the overall "unfairness" standard in the Commission's majority N Data Opinion is that it is not as definite as it could be. The Opinion's description of the key conduct at issue as "unjust", "inequitable", and "contrary to good morals" could be argued to give the Commission too much discretion. This language also can be attacked as not giving sufficient notice to businesses so they can identify conduct in advance that is likely to be illegal.

However, the conduct at issue in N Data did impair artificially the choices that free competition would have been likely to bring to the market in the long run.[11] For this reason it would have been condemned had the Commission utilized the choice approach. Because the choice framework carefully builds upon and updates an extensive body of earlier Commission "unfairness" Policy Statements and Opinions, as well as court decisions, it would have helped provide notice that the conduct was illegal. The choice limitation also would help

[11] If the Commission adopts the self-limiting principle that every antitrust violation must significantly impair the choices that free competition would have brought to the marketplace, in the N Data case the choice option of concern would be the price of the products in question. There was indeed free and fair competition in at the time of the presentations made by the owners of different technologies to the Institute of Electrical and Electronics Engineers ("IEEE"), a standard setting organization. The IEEE's goal was to select for the marketplace the optimal standard, and this apparently meant a standard that forever would be priced at the competitive level (the $1000 price), not a monopoly level.

After roughly 8 years, however, the then-owner of the technology that had been selected competitively by the IEEE started to price like a monopolist. Rather than enjoy a price that had been established through the competitive standard setting process, due to lock-in effects consumers were forced to purchase products priced at the monopoly level. This was a significant change to the (price) choice that competition had brought to the marketplace roughly 8 years earlier. The conduct therefore quite properly was found to be an antitrust violation, and therefore a violation of Section 5 of the FTC Act.

reassure the antitrust and business communities that the Commission is not evaluating conduct on an ad hoc basis.

The N Data majority's opinion utilized an interesting-balancing approach that should remain fully apropos and relevant, and it would constitute a second step in the analysis. But the majority's test should apply only to conduct that first has been found to violate the choice framework.

When a case like N-Data is appealed, the reviewing courts would be more likely to give deference to the FTC's interpretation of Section 5 if "unfairness" is limited to practices that significantly interfere with consumer choice, rather than if the Commission's opinion uses only "fuzzier" concepts such as a condemnation of conduct that is "unjust," "inequitable," or "contrary to good morals". The "choice" limitation also would show that the Commission was not seeking open ended powers, so reviewing courts would be more likely to give the Commission considerable deference when it goes beyond traditional Sherman Act violations.

2. Invitations to Collude

Invitations to collude can violate Section 2 of the Sherman Act.[12] However, for the enforcers to prove a Sherman Act violation they must undertake several formidable tasks. They must first prove a relevant market - almost always a difficult issue. Then the enforcers must prove that the conduct would result in either monopoly power or the "dangerous probability" of monopoly power, which of course includes a careful analysis of barriers to entry. Then the possible efficiencies associated with the practices are litigated. Every successful Section 2 case is incredibly complex, lengthy, and costly.

[12] United States v. American Airlines, 743 F.2d 1114 (5th Cir. 1984).

By contrast, naked collusion cases are less complicated. In naked collusion cases the enforcers do not have to prove market definition or any form of market power, and ease of entry is not considered. I am not suggesting that collusion cases are simple. Far from it. I am only suggesting they are less complex than Section 2 cases.

Invitation to collude cases should be as easy to prove as collusion cases. The same jurisprudential reasons that permit the enforcers to dispense with the complex, costly and lengthy market definition and market power issues in collusion cases apply to invitations to collude cases as well. Moreover, invitations to collude can comfortably be characterized as conduct that significantly risks impairing the choices that the marketplace otherwise would provide to consumers, so they fit comfortably within the choice framework. They should violate Section 5 of the FTC Act without the Commission having to prove go through the Herculean tasks of proving the traditional Section 2 requirements. This would save money for the taxpayer and alao lead to faster and more reliable results.

3. Incipient Exclusive Dealing and Tying Violations

There is substantial uncertainty over the market share required to establish a tying violation, and the amount of foreclosure necessary for an exclusive dealing violation.[13] Similar uncertainty exists over how much pressure or inducement, in the form of a discount or other conduct, must exist before an arrangement will be termed a "tying" or "exclusive dealing"

[13] See Lawrence A. Sullivan & Warren A Grimes, The Law of Antitrust: An Integrated Handbook, Section 7.3 (2000); Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice, Chapter 10 (2005). The market shares and market power required can be similar to those required for Section 2 violations. Indeed, Einer Elhauge & Damien Geradin, Global Antitrust Law and Economics 530 (2007) write: "courts require a significantly lower foreclosure share in Sherman Act Section 2 cases than in Sherman Act Section 1 cases".

arrangement.[14] Indeed, even though exclusive dealing and tying arrangements are treated under different legal standards, it often is difficult to classify conduct as one or the other practice.[15]

The traditional market share requirements and degree of certainty over whether an effective "tie" or "exclusive dealing arrangement" should be found to exist should be relaxed when the case involves a defendant with a significantly larger market share than that of the plaintiff. In these "incipient" tying or exclusive dealing situations incumbents often will be able to disadvantage smaller competitors or would-be entrants because their market share is larger, even if it is not large enough for a traditional violation.

Suppose, for example, a company introduces a new band of super-premium ice cream. Suppose also that an existing seller of super premium ice cream has 30% of this market, and also another 30% of the premium and non-premium ice cream markets. Suppose the incumbent firm tells supermarkets that they have to choose between the established firm's products, or the newcomer's products. Suppose there are no efficiencies that would arise if the established firm's demands were met.

For a number of reasons these facts would be unlikely to constitute either a tying or exclusive dealing case. Moreover, market definition and market power or foreclosure issues would be extremely difficult, lengthy, and costly to litigate. Yes, if the incumbent's exclusionary strategy succeeded, consumer choice in this market would be diminished in the short term, and incentives to innovate and enter by non-incumbents would be lowered in the long term. This conduct should violate Section 5 as an incipient exclusive dealing or tying arrangement.

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[14] See Elhauge & Geradin, supra note 13.

[15] Id.

A case where a similar diminution of consumer choice seems to have occurred was J.B.D.L. Corp v. Wyeth-Ayerst Labs. While the case was vastly more complicated than the ice cream hypothetical, the conduct at issue - bundled discounts - was tantamount to an exclusive dealings arrangement. The conduct offered no significant efficiencies and resulted in the serious possibility of diminished consumer choice in the conjugated estrogen market.

The "choice" framework helps explain why incipient tying and exclusive dealing arrangements should violate Section 5. Its focus on actual or potential choice in the marketplace should also increase predictability for the business community and make it more likely that reviewing courts would uphold the Commission's determinations. Moreover, if "incipient exclusive dealing or tying arrangements" were held to violate Section 5, this would help international harmonization in an increasingly globalized economy by beneficially moving U.S. antitrust law in the direction of European Union competition law.[16]

Conclusion

In conclusion, Section 5 should be interpreted to be broader than the other antitrust laws. But it should be utilized only within the choice framework.

[16] See Einer Elhauge & Damien Geradin, Global Antitrust Law and Economics (2007), Chapter 4, especially 496-97, 530-44, 601-03, 618-23.