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FTC v. Intel: Applying the "Consumer Choice" Framework to "Pure" Section 5 Allegations

Robert Lande[1]

I. INTRODUCTION

Much of the Federal Trade Commission's ("FTC's") Complaint against Intel is identical or similar to charges in cases filed by the European Commission and by others, which dealt only with CPU chips. These allegations, if supported by the evidence, involve anticompetitive conduct that significantly harmed consumers worldwide.[2] This Intel behavior should be found to violate Section 2 of the Sherman Act, and should cause the corporation to be subject to an injunction and treble damages liability. If all the FTC had done was to echo these CPU chip-centered lawsuits, its filing would have been in the public interest. But it probably would not have been the subject of this symposium. The Commission, however, added significant issues to the mix.

First, the FTC alleged similar exclusionary conduct involving another important relevant chip market, the market for graphic processing ("GPU") chips. These are extremely important allegations. The affected GPU chip market is huge and growing in importance. If Intel has been employing exclusionary tactics identical or similar to the tactics it has been charged with implementing in the CPU chip market, an FTC case only involving the GPU market would have been one of the most important antitrust cases filed during 2009. If Intel used the same or similar techniques in the GPU market, this conduct also should be found to violate the Sherman Act.

The FTC also charged anticompetitive conduct that goes beyond Sherman Act violations. The Commission charged conduct that violates Section 5 of the FTC Act, but does not necessarily violate the Sherman Act:[3] "pure" or "stand alone" Section 5 allegations.

II. THE FTC ACT IS BROADER THAN THE SHERMAN ACT.4

When Congress enacted Section 5 of the FTC Act it intended the law to be more far reaching than the Sherman Act.[5] The legislative history and Supreme Court decisions clearly demonstrate that Section 5 was intended to cover: incipient violations of the other antitrust laws,

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[1] Venable Professor of law, University of Baltimore School of law, and Director, American Antitrust Institute. The author is grateful to Bert Foer for helpful comments. The American Antitrust Institute receives contributions from a wide variety of sources, including a number of high tech companies, one of which is AMD, a rival of Intel.

[2] *See, for example*, "Robert H. Lande, *The Price of Abuse: Intel and the European Commission Decision*" GCP:, 6(2) THE Online Magazine for Global Competition Policy, No. 2CPI ANTITRUST CHRONICLE, June 2009, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434985.

[3] In the Matter of Intel Corporation, Docket No. 9341, Dec. 16, 2009 (hereafter "Intel Complaint"), ¶ 97.

[4] *See generally* Robert H. Lande, *Revitalizing Section 5 of the FTC Using 'Consumer Choice' Analysis*, 8 ANTITRUST SOURCE 3 (February 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287218 The Section 5 analysis in this article has been adapted from this earlier piece.

[5] *See generally* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 233, 251, 271 (1979-1980).

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.[6]

Some might question the propriety of subjecting conduct to a different, tougher legal standard when it is challenged under Section 5 of the FTC Act. For example, one might ask why an implied- or partial- exclusive dealing arrangement should be evaluated under an incipiency standard when challenged under the FTC Act, but not when challenged under the Sherman Act? One answer is that Sherman Act violations lead to automatic treble damages and award of attorneys' fees to victorious private plaintiffs.[7] By contrast, there is no private right of action under the FTC Act, and FTC Act violations are not precedents that lead to automatic liability in private litigation unless a Commission decision specifically finds a Sherman Act or Clayton Act violation; a "pure" FTC Act violation would not do this.[8]

The Commission might well have charged that certain conduct violated the FTC Act, but did not necessarily violate the Sherman Act, because it did not want to subject Intel to the nearly automatic private treble damage liability that would follow from a Commission finding that Intel violated the Sherman Act. As the Statement of Chairman Leibowitz and Commissioner Rosch noted, a pure Section 5 violation "has the potential to protect consumers while at the same time limiting Intel's susceptibility to private treble damages cases."[9]

This might be especially important for conduct that is anticompetitive but has never before been declared a Sherman Act violation. Perhaps the better result from a public policy perspective is for the Commission to first declare certain conduct illegal only under Section 5, with no ensuing damages. Then, in time, after the business community has been put on fair notice that this conduct is illegal, firms that subsequently engage in similar behavior should be found to violate the Sherman Act, with nearly automatic treble damages in private follow-up suits. Alternatively, or in addition, the Commission might believe it should not have to undertake the tremendous evidentiary burdens necessary to establish a Sherman Act violation (a theme that will be elaborated *infra*). Regardless, three examples from the *Intel* complaint illustrate the Commission's wisdom in charging pure or stand alone Section 5 violations.

III. SECTION 5 ALLEGATIONS IN THE *INTEL* COMPLAINT

A. Incipient Exclusive Dealing

The Commission charged Intel with practices identical or similar to exclusive dealing arrangements.[10] Exclusive dealing arrangements certainly can violate the Sherman Act. There is, however, substantial uncertainty over the market share and amount of foreclosure necessary for a Sherman Act exclusive dealing violation.[11] 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 an "exclusive dealing" arrangement.[12]

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[6] *Id.* at 228-38, 242, 251, 271, 275. *See also* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-44 (1972).

[7] *See* 15 U.S.C. §15(a).

[8] *See* Averitt, s*upra* note 5, at 251 n.112, 253 n.116, 299 n.303.

[9] *See* ¶ 2.

[10] Intel Complaint at ¶¶ 93. 94 c, d, and e.

[11] *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE Ch. 10 (3d ed. 2005).

[12] *See* EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS AT 623-33 (2007).

The traditional market share requirements, and the uncertainty over whether an effective exclusive dealing arrangement will be found, should be relaxed when the case involves a defendant with a significantly larger market share than its rivals. In these incipient exclusive dealing situations, incumbents often will be able to disadvantage significantly smaller competitors or would-be entrants, and thereby impair consumer choice, because their market power is larger, even if it is not large enough for a traditional Sherman Act violation.

Suppose, for example, a small company introduces a new brand of super-premium ice cream. Suppose the largest seller of super-premium ice cream has 30 percent of this market, and also another 30 percent of the premium and non-premium ice cream markets. Suppose the large incumbent firm tells supermarkets they have to choose between all of the established firm's products, and the newcomer's products. No efficiencies would arise if the established firm's demands were met.

The facts in the ice cream hypothetical, including defendant's relatively low market share, might not constitute an exclusive dealing arrangement that violates Section 2.[13] Moreover, the market power or foreclosure issues would be extremely difficult, lengthy, and costly to litigate. However, if the incumbent's exclusionary strategy succeeded, consumer choice in this market, in terms of varieties of ice cream on the market, would be diminished in the short term. Successful exclusion would also risk diminishing incentives to innovate and enter by non-incumbents in the long term. This conduct should violate Section 5 as an incipient exclusive dealing arrangement, regardless whether it violates the Sherman Act.

B. Preventing Significant Innovation

Second, the Commission charged Intel with blocking or preventing innovation in the relevant markets.[14] I am not aware of any case holding that this type of conduct, by itself, violates the Sherman Act. If the Commission's allegations are true, however, blocking or preventing innovation should, under certain circumstances, be found to be illegal even if this conduct might not rise to the level of a Section 2 violation. Perhaps the Commission believes that the first time this type of conduct is held to violate an antitrust law, defendant should not be exposed to treble damages liability.

Moreover, for this type of conduct to violate the Section 2 of the Sherman Act, the government would have to prove a number of truly burdensome requirements, such as that defendant possessed either monopoly power or the dangerous probability of monopoly power in a relevant market, and perhaps that defendant would recoup the costs of its predation. Blocking or preventing significant innovation, however, should be a Section 5 violation even if it does not yet rise to the level of a Sherman Act violation. Although a firm with only a small market share that prevents innovation should be allowed to do so, the Commission should be given deference to develop reasonable criteria that identify when this conduct by larger firms would threaten consumer welfare. Unless Intel provides a pro-competitive explanation for its conduct, any significant blocking or preventing of a reasonable likelihood of an important innovation should violate Section 5, even if these actions had not at the time risen to the level where they helped Intel monopolize or maintain a monopoly in a relevant market.

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[13] For the necessary requirements *see* notes 11 and 12, *supra*. Nor would these facts necessarily constitute a tying violation. *Id.*

[14] *See*, for example, Intel Complaint at ¶¶ 94 b and g.

This type of allegation is ready-made for scrutiny under Section 5 as a possible incipient Sherman Act violation, as conduct violating the spirit of the Sherman Act, as conduct violating recognized standards of business behavior, or as conduct violating competition policy as framed by the Commission. The Commission might well have believed that if it decided—apparently for the first time—that under certain circumstances preventing competitors from engaging in significant innovation, without pro-competitive justifications, violates Section 2, with the private damages exposure that would arise from a Sherman Act violation, a reviewing court might not sustain its conclusion.

C. Consumer Protection Violations

As a final example, the Commission asserted a pure consumer protection theory as a Section 5 violation, including much conduct and 40 paragraphs of allegations.[15] This is in addition to the Commission's recognition that deception can help monopolize a market (Intel allegedly used deception to slow the market's adoption of rivals' products as a monopolization technique[16]). This second charge is thus a hybrid of consumer protection and competition law, which the Commission clearly is in the best position to analyze. These alleged pure consumer protection violations, and mixed consumer protection/competition charges, also constitute examples of conduct that the Commission might well believe should be prohibited under Section 5, but might not be found to violate Section 2 of the Sherman Act.

Intel argues that any use by the Commission of Section 5 that goes beyond the Sherman Act is unwise because it is "unbounded"[17] and reflects the Commission's "own subjective value judgments"[18] in a manner that is without "clear and administrable standards."[19] Intel argues that "the Commissioners' new, proposed interpretations of Section 5 do not provide reasonable persons, including Intel, with fair notice of the standards to which they must conform their conduct in the future. The Commission's proposed interpretations of Section are thus unconstitutionally vague on their face and/or as applied to Intel's prior and contemplated conduct."[20]

If, however, the FTC Act is interpreted correctly, as being limited by the consumer choice framework, Section 5 will be seen to be no more indefinite, uncertain, or unbounded than the other antitrust laws.

IV. THE CONSUMER CHOICE FRAMEWORK MAKES SECTION 5 AS BOUNDED, OBJECTIVE, AND PREDICTABLE AS THE OTHER ANTITRUST LAWS

The choice framework would impose a threshold requirement that every Section 5 antitrust violation significantly impairs the choices that free competition brings to the marketplace.[21] The choice framework also would impose the requirement that every Section 5 consumer protection violation significantly impairs consumers' ability meaningfully to choose from among the options the market provides. Construed this way, the two halves of Section 5, operating together, ensure that consumers have the two ingredients needed to exercise effective sovereignty—a

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[15] Intel Complaint at ¶ 103, alleging a number of deceptive acts and practices.

[16] Intel Complaint, ¶¶. 99, 101.

[17] Intel's Answer, page 7, filed Dec. 31, 2009.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 20.

[21] *See* Neil W. Averitt & Robert H. Lande, *Using The "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L. J. 175, 182 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121459.

competitive array of options and the ability to choose meaningfully from among these options.[22] Antitrust law prevents restraints that would restrict the competitive array of options in the marketplace, ensuring these competitive options are undiminished by artificial restrictions, such as price-fixing or anticompetitive exclusion. 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.

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

The choice approach to antitrust, instead of a price or efficiency approach,[23] also has the advantage of explaining accurately, simply, and intuitively, in a way that is easy to understand, why antitrust is good for consumer welfare.[24] 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 law is construed and applied within the consumer choice framework, it will change some antitrust analysis because it will give greater emphasis to such short term issues as quality and variety competition, and to such long term issues as competitive 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.[25] And it would do so in a predictable, principled manner.[26]

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[22] The converse, however, is not correct. It is not true that everything that reduces consumer choice is an antitrust violation, or that everything that reduces consumers' ability to choose from among the options the market provides is a consumer protection violation. What is true, however, is that every antitrust violation reduces or distorts the choices that are on the market. It also is true that every consumer protection violation reduces or distorts consumers' ability to choose from among the options the market provides. *See* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 715-22 (1997), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134798.

[23] For specific differences between the consumer choice, price and efficiency approaches, *see* Averitt & Lande, *Using the "Consumer Choice" Approach*, *supra* note 17, at 185-89.

[24] 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 slowly evolving in this direction. *Id.* at 263-64.

[25] There are several categories of cases where courts have reached the wrong results, and would be likely to reach the right results if they had used the choice approach. The first category involves conduct in markets with little or no price competition, as may occur with certain types of regulation or in markets with industry-wide joint ventures. In these situations, no avenues exist for properly assessing consumer welfare without focusing explicitly on non-price issues. For these markets a price standard would be inadequate because our main concern is artificially diminished consumer choice. *See Id.* at 196-99.

A second category of cases for which the consumer choice approach would work better involves conduct that increases consumers' search costs or otherwise impairs their decision-making ability. Such conduct tends to cause consumers to obtain products or services less suited to their needs, as well as to produce 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. *Id.* at 199-201.

Finally, there are cases involving markets in which firms compete primarily through independent product development and creativity, or perspective, rather than through price. These markets may involve high-tech innovation or editorial independence in the news media. *Id.* at 201-22.

[26] *Id.*, *passim*, especially at 239-48.

Applying a choice framework to the first two examples from the FTC's Complaint—the alleged restrictions on innovation and the incipient exclusive dealing violations—Intel should be found to violate Section 5 only if it artificially and significantly diminished the choices on or potentially on the market. The conduct involved in the third example, the alleged consumer protection violation, should be found to violate Section 5 only if it significantly impaired consumers' ability to choose from among the choices offered by the market. Thus, whenever the Commission decides to go beyond the Sherman Act, is should use the choice framework to ensure that all Section 5 violations are bounded, relatively predictable, and in the public interest.

There certainly is reason to hope the Commission will do this. The Complaint was concerned with Intel "harming choice and competition at the OEM level and hence depriving consumers of their choice of CPU and GPU chips…."[27] Chairman Leibowitz and Commissioner Rosch wrote that conduct should be found to violate Section 5 only if it "is likely to harm consumers, taking into account any efficiency justifications for the conduct in question."[28] As Commissioner Rosch more explicitly observed, "[M]ost conventional Section 2 cases alleging monopoly maintenance or attempted monopolization rise or fall on proof of higher prices—if for no other reason than that kind of injury is easiest to measure. But that is not the only kind of consumer injury with which a law enforcement agency like the Commission should be concerned. The Commission must also be concerned with whether a course of conduct by a firm with monopoly power reduces consumer choice by reducing alternatives…. [In these cases] Section 5 is the most appropriate vehicle for the analysis…."[29]

V. CONCLUSIONS

The Commission was wise to keep its options open by pleading both pure Section 5 violations and also violations of Section 2 of the Sherman Act. In this way the Complaint allows the Commission to retain its flexibility. Since Section 5 is broader than Section 2, the Commission ultimately can choose whatever mix of Section 2 and Section 5 theories the developing facts suggest. If the Commission does find a pure Section 5 violation, however, it should only do so if it does this while utilizing the consumer choice framework.

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[27] Intel Complaint, ¶ 94F

[28] Statement of Chairman Leibowitz and Commissioner Rosch, ¶ 6.

[29] Concurring Statement of Commissioner J. Thomas Rosch, ¶ 3.