Section 5 as a Bridge Toward Convergence

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1. The FTC should use Sec. 5 as a bridge toward convergence with Europe.

Our interest today is in practical applications of Section 5 that go beyond the other antitrust laws. The context for the ideas I will raise is international. One of the primary missions of the antitrust enterprise in the coming years must be to move toward a system of enforcement that has coherence and practical workability on a global playing field. I intend to focus on some ways in which Section 5, with its particular potential for prospective clarification of the law, can be used to bridge gaps with the European Union and other civil law jurisdictions.

This context is important because there are now more than one hundred nations with their own antitrust laws and there is no overarching institution for formally harmonizing these laws or for resolving disputes involving cross-border transactions and/or behavior. With

principal international issue was the extent of our extraterritorial reach and I was head of an FTC task force looking into allegations that our antitrust laws had become an obstacle to a strong US presence in an increasingly global economy.[1] (We concluded, incidentally, that the charges were mostly wrong but that there were adjustments that the Commission should consider in light of increasing cross-border trade.) I believe that if the US and the EU can now work together to formulate and present more of their competition policies in a common language, they together will have a better chance of achieving what I take to be their common goal of strengthening the role of antitrust throughout the world.

At the current time, it seems to me that, philosophically, the FTC is considerably closer to Rue Joseph II in Brussels than to its neighbor on 10th and Pennsylvania. Although there are undeniable complexities if the FTC stakes out positions too different from the DOJ's, I believe that the two institutions are intended to be different and that Section 5 and the processes that permit its interpretation to evolve make it and the Commission a better candidate than the Sherman Act and the DOJ for attempting to bridge the gap between European and American competition policies. The DOJ's ideological constraints could be loosened in the future. In the meanwhile, I urge the FTC, while consulting with DOJ, to take the initiative in seeking modes of convergence with the EU.

2. Sec. 5 and Article 82 have similarities that can be emphasized through various mechanisms of guidance that will give common structure to their inherently vague meanings.

Let us begin by recognizing a few important similarities between Sec. 5 and Article 82 of the Treaty of Rome. One deals with "unfair" methods of competition, the other with "abuse" of a dominant position. Both "unfair" and "abuse" are open-ended words that are normative in nature, certainly not restricted to a narrow

[1] See Albert A. Foer, "International Implications of Section 7 Enforcement," 50 Antitrust L.J. 819 (1981).

[2] Einer Elhauge and Damien Geradin, Global Antitrust Law and Economics, (2007), 268. Andrew I. Gavil, William E. Kovacic, and Jonathan B. Baker, Antitrust Law in Perspective (2002): "…EC policy and jurisprudence tend to define dominance as occurring at market share thresholds of 40 to 50 percent—considerably lower than the 70 percent or so that American courts usually associate with monopoly power in Section 2 cases." 676.

[3] The US Supreme Court has indicated that market shares above 66% indicate monopoly power without clearly specifying the lower boundary. See US v. duPont, 351 US 377 at 379 (1956). The EU expects to release a guidance document shortly on how it intends to interpret Article 82. The initial public draft indicated that market dominance could be found as low as 25%, effectively creating a safe harbor below that.

[4] Early case law in the EU "seems quite parallel to the U.S. formulation of a power to exclude competition or control prices, and raises similar issues." Elhauge and Geradin at 267. More modern cases have

The EU is currently on the verge of releasing a detailed guidance document on its interpretation of Article 82.[5] When this new "guidance" becomes public, it will provide a basis for detailed comparisons. Hopefully, the FTC will be able to work jointly with the EU or at least with the EU's approach in mind, to provide comparable, if not identical guidance, through adjudicated cases, speeches, guidelines, formal rules, and other forms of guidance, which can be directed at specific categories of abuse.

In this way, the FTC can help bridge a gap that has probably been exaggerated in the past, when a small proportion of high profile cases were decided in different ways by the DOJ and the EU. In recent years, as the EU has moved in the direction of more and better use of economic science and a new emphasis on the importance of effects rather than structure, and as the FTC has developed its own jurisprudence that does not always go lock step with the DOJ,[6] the potential convergence between the FTC and the EU has become a reachable and desirable objective. I do not mean to imply by this that the FTC can ignore the DOJ or act as if it were a sovereign and I do not mean to suggest that the FTC should take its marching orders from Europe; rather, I am suggesting that as the FTC gives renewed consideratis [illegible]

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that the basic test of a dominant position is whether a firm has the "power to behave to an appreciable extent independently of [its] competitors or to gain an appreciable influence on the determination of prices without losing market share." Id. This may be somewhat broader than what the Sherman Act cases hold.

[5] The US has no such document, although the Horizontal Merger Guidelines reflects a similar approach to spell out how a major section of the antitrust law is to be interpreted. Such guidelines are more typical of a civil law than a common law approach, and indicate a potential pathway for convergence.

[6] I applaud the Commission for not allowing the DOJ's recent statement on Section 2 stand unchallenged as an expression of the Section 5's approach to unilateral conduct. However, DOJ's publication suggests the desirability of an FTC statement providing guidance on its interpretation of Section 5.

[7] See Diana L. Moss, "Electricity and Market Power: Current Issues for Restructuring Markets (A Survey)", __Environmental & Energy Law & Policy J. 11, 15-20 (2006), calling withholding "a relatively novel form of market power in an industry that has traditionally been concerned with exclusionary conduct." At 18. It has been shown that market power can be exercised not only during peak periods but during off-peak and shoulder periods too. A recent merger complaint by the DOJ alleges that the potential of withholding capacity would be among the reasons the merger would have been illegal. U.S. Department of Justice, Complaint, U.S. v.Exelon Corp.and Public Service Enterprise Group, Inc., Case No.: 1:06CV01138 (June 22, 2006), paragraphs 34-35, available at
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[9] That the Federal Power Act does not remove the electric industry from antitrust oversight was made clear in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), available at http://supreme.justia.com/us/410/366/.

[10] For example of an FTC case involving withholding, see the acquisition of The Energy Group (Peabody Coal) by PacifiCorp, analysis of proposed consent order at http://www.ftc.gov/os/1998/02/9710091.ana.htm. The analysis shows how withholding for a short period by a vertically integrated energy company can result in a price hike. The remedy here was divestiture.

[11] The Energy Group, note 10 supra.

[12] See Albert Foer, Robert Lande, and F.M. Scherer, "What Do Exit Polls and Flu Vaccine Shortages Have in Common?", FTC:Watch (February 14, 200

In this, one might argue that the Section 5 violation is of a nature that the Sherman Act, pro

A second example of a dominant but not monopolistic firm engaging in an unfair method of competition could be found in the area of buyer power. For a variety of reasons, a power buyer can exercise disproportionate, anticompetitive bargaining power over its suppliers when it has a market share far below that required for a monopolistic seller.[15] The AAI points to the emergence of large buyers as a prominent feature in many sectors of the economy[16] and defines buyer power as "the ability of a buyer to depress the price it pays a supplier or to induce a supplier to provide more favorable nonprice terms."[17] This encompasses both classic monopsony and what the AAI refers to as "countervailing power." Both monopsony and countervailing power can have competitive effects that are beneficial or harmful, which means that outside of the buyer cartel context they need to be assessed under the rule of reason. Monopsony and countervailing power differ in the degree of dominance required to exercise market power:

> Since classic monopsony power is the mirror image of monopoly power—a large degree of market power—classic monopsony power is normally associated with a large share of the relevant market, approximately 70% or more. In contrast, both theory and evidence suggest that a firm can exercise countervailing power in many market settings with a substantial but nondominant share, perhaps as little as 10-20%. Countervailing power, therefore, is likely to be exercised more frequently than classic monopsony power and its effects, whether beneficial or harmful, are likely to be more
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[15] On buyer power, see chapter three, "The New Kid on the Block: Buyer Power," in American Antitrust Institute, The Next Antitrust Agenda (2008), available at www.antitrustinstitute.org.

[16] Id. At 95 (citing the packing of meat, the processing of chicken, the harvesting of hardwood timber in the Pacific Northwest, the employment of professional athletes, the provision of health insurance, and the retailing of toys and games, groceries, and books).

[17] Id., at 99.

[18] Id., 104.

this should be deemed a sufficient degree of dominance to warrant intervention by both the FTC and the EU, in the event that the dominance is abused.

There are undoubtedly difficult questions relating to what would constitute an unfair method of competition or an abuse of dominance by a non-monopsonist power buyer,[19] but if the possibility of anticompetitive effects is realistic and will play an increasingly important role in economic life, as we strongly believe, then the FTC and EU should both be trying to provide guidance as to the line between proper and improper exercise of buyer power. I

[19] Id., 103-130.

[20] See pages 130-135 of the AAI's Next Antitrust Agenda, op. cit. note 16 supra.

[21] Id. At 133: "All that would be required [under an AAI proposal for reforming the Robinson-Patman Act] is proof that competition was sufficiently imperfect that a seller had the incentive and the ability to undertake significant, persistent, unjustified favoritism."

In Europe, Article 82(2(c) offers parallel protection to the R-P Act, prohibiting dominant firms from "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." Elhauge & Geradin, op. cit., 399. Article 82(2)(a) also prohibits a dominant firm from "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions." Id. At 400. We are not endorsing an interpretation of Section 5 that would prohibit exploitation of legitimate market power through excessive pricing.

[22] Leegin Creative Leather Prods. , Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).
This discussion is based on Luc

claims that the RPM will bring about efficiencies. When this occurs, the EU then is forced to show the likely or actual negative effects. If the efficiencies outweigh the negative effects and the other conditions such as the indispensability test are also fulfilled, the agreement is not prohibited.

The EU will be re-evaluating its Vertical Restraints policies in 2010, and the work on this has already begun. The EU case law and practice towards RPM is apparently more flexible than the US *per se* approach that was overturned. It is also more forthright and explicit, in that it contains no Colgate doctrine to confuse and perhaps obliterate any RPM prohibition. I