FTC Charges Intel with Unfair and Anticompetitive Conduct Under FTC Act Section 5

On December 16, 2009, the Federal Trade Commission (the "FTC" or "Commission") issued a complaint[1] against Intel Corporation ("Intel") pursuant to the Commission's authority under Section 5 of the FTC Act ("Section 5")[2] alleging unfair and anticompetitive conduct from 1999 through the date of the complaint. The complaint alleges that Intel's conduct was "designed to maintain Intel's monopoly in the markets for Central Processing Units ('CPU's') and to create a monopoly for Intel in the markets for graphics processing units ('GPU's')." Intel's market share for the period exceeded 80% of the market in CPU's and 50% of the market for GPU's. Notably, the complaint does not charge Intel with monopolization or attempted monopolization under the Sherman Act.[3] The FTC complaint against Intel is the most recent and high profile example of what may become a trend of using stand-alone Section 5 claims to pursue anticompetitive conduct.

The facts surrounding the complaint have already resulted in significantly publicized events: the European Commission imposed a fine against Intel of €1.06 billion (nearly $1.5 billion), Intel settled monopolization claims with rival Advanced Micro Devices for $1.25 billion, and New York Attorney General Andrew Cuomo recently issued a complaint to recover for harm caused by Intel's allegedly anticompetitive conduct. The FTC's complaint, though, alleges even broader anticompetitive practices. Where previous complaints focused on rebate programs and exclusionary conduct within the CPU industry, the Commission's complaint echoes and elaborates upon this conduct, while adding accusations that the conduct extended into the GPU market.

What is perhaps most notable about the FTC's complaint is that it seeks redress under the FTC Act, and not the Sherman Act[4] which prohibits monopolization.[5] This complaint could portend a more aggressive trend of usage of Section 5 by the FTC, as was expected when Jonathan Leibowitz was appointed as Chairman of the FTC by President Obama in February 2009.[6]

I. Section 5

Section 5 was enacted in 1914 and in plain and arguably sweeping language prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." It was a congressional response to what the legislature deemed to be lax enforcement of the Sherman Act by the federal courts.[7] The FTC has interpreted Section 5 to

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1 *In the Matter of Intel Corporation*, Docket No. 9341, *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.

2 15 U.S.C. § 45(a)(1).

3 *In the Matter of Intel Corporation*, Docket No. 9341, *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.

4 Note that Clayton Act or Robinson-Patman Act claims can also be brought alongside Section 5 claims, but these are not at issue in the *Intel* case.

5 Section 2 of the Sherman Act states: "Every person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...." 15 U.S.C. § 2.

6 Remarks by Commissioner Jonathan Leibowitz, *Tales from the Crypt: Episodes '08 and '09: The Return of Section 5 ("Unfair Methods of Competition in Commerce are Hereby Declared Unlawful")*, Section 5 Workshop, October 17, 2008 ("So the same rationale that motivated Congress to create the FTC in the first place and give us the authority to stop unfair methods of competition, requires us to use that statute again today.").

7 *Id.* (comparing the "*laissez faire*" approach to antitrust enforcement in 1914 to the current status of "cramped

reach more broadly than the Sherman Act's mandates against restraints of trade and monopolization.[8] However, Section 5 has several components which restrict its usage. Only the FTC can bring an action under Section 5; there is no private right of action. A corollary of this is that treble damages and attorneys' fees are not available under Section 5.[9] Additionally, any finding by the FTC of a stand-alone Section 5 violation may provide less support for subsequent private treble damage actions.[10]

The Supreme Court's decision in *FTC* v. *Sperry & Hutchinson Co.*[11] was the first Supreme Court case to state that Section 5 could be enforced independent of other antitrust claims. In that case, the Court ruled that there can be a violation of the section even if there was no independent violation of the Sherman Act if "public values" were undermined by the defendants' conduct.[12] In 2008, the Commission issued a complaint in a standard-setting case solely on the basis of Section 5 claims[13] and over the strenuous objections of then-Chairman Majoras who noted that the FTC had historically been wary of issuing complaints on stand-alone Section 5 claims.[14] FTC Commissioners have also suggested using stand-alone Section 5 cases to prosecute claims that certain patent dispute settlement agreements between branded and generic drug companies are anticompetitive,[15] which several circuit courts have made very difficult to prosecute as violations of the Sherman Act.[16] Thus, there is an emerging opinion within the FTC that stand-alone Section 5 claims can be an effective enforcement tool.[17]

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reading of the Sherman Act that we see in federal courts today").

8 *Id.*

9 Remarks of J. Thomas Rosch, *Pay-for-Delay Settlements, Authorized Generics, and Follow-on Biologics: Thoughts on How Competition Law Can Best Protect Consumer Welfare in the Pharmaceutical Context*, Before the World Generic Medicine Congress, November 19, 2009, at 14.

10 Analysis of Proposed Consent Order to Aid Public Comment, *In the Matter of Negotiated Data Solutions LLC*, FTC File No. 051-00941 , 2008 WL 258308, n. 8 (January 22, 2008)("It is worth noting that, because the proposed complaint alleges stand-alone violations of Section 5 rather than violations of Section 5 that are premised on violations of the Sherman Act, this action is not likely to lead to well-founded treble damage antitrust claims in federal court.").

11 405 U.S. 233 (1972).

12 *Id.* at 244.

13 *In the Matter of Negotiated Data Solutions, LLC*, FTC File No. 051-0094 (January 22, 2008).

14 Dissenting Statement of Chairman Majoras, *In the Matter of Negotiated Data Solutions LLC*, FTC File No. 051-00941 , 2008 WL 258308, (January 22, 2008)("The majority evidently agrees that respondent's conduct does not amount to improper acquisition or maintenance of monopoly power so as to fall within the ambit of Section 2 of the Sherman Act. Instead, the majority seeks to find liability purely under Section 5 of the FTC Act. This is not advisable as a matter of policy or prosecutorial discretion.").

15 Remarks of J. Thomas Rosch, *Pay-for-Delay Settlements, Authorized Generics, and Follow-on Biologics: Thoughts on How Competition Law Can Best Protect Consumer Welfare in the Pharmaceutical Context*, Before the World Generic Medicine Congress, November 19, 2009, at 14.

16 *See, e.g.*, *In re Ciprofloxacin*, 544 F.3d 1323 (Fed Cir. 2008), *cert. denied*, 129 S. Ct. 2828 (June 22, 2009).

17 *See* Testimony of William C. MacLeod, *Section 5 of the Federal Trade Commission Act: The Most Powerful Weapon Against Competitive Threats*, Before the U.S. House Committee on Small Business, September 25, 2008 ("[T]he most sweeping authority to protect competition in the United States belongs to the Federal Trade Commission with its power to prohibit unfair methods of competition and unfair acts and practices [under Section 5].").

II. Intel Complaint

Chairman Leibowitz and Commissioner Rosch issued a joint statement alongside the complaint justifying its use of the broader Section 5, rather than alleging violations of the Sherman Act. The statement sought to assure the business community that the FTC takes

> seriously our mandate to find a violation of Section 5 only when it is proven that the conduct at issue has not only been unfair to rivals in the market, but, more important, is likely to harm consumers, taking into account any efficiency justifications for the conduct in question. Section 5 is clearly broader than the antitrust laws, but it is not without boundaries, and the Commission will clearly describe and stay within those boundaries if this case comes before it to review.[18]

Using Section 5, the Commissioners wrote, might help avoid the "collateral consequences created by private enforcement" while still prosecuting conduct harmful to consumers.[19]

Commissioner Rosch also issued an accompanying statement which concurred with the joint statement, but dissented to the extent that the Complaint is read to include "tag-along" Sherman Act claims. The statement expressed concern regarding private plaintiffs or even Attorney General Cuomo asserting claims based on the Commission's work. "The Commission should not enable those plaintiffs to free ride off of the Commission's work." Commissioner Rosch also cited the "shrinking" procedural and substantive breadth of Section 2 in the federal courts as reasons why the FTC needed to find other ways to prosecute antitrust violations. He reasoned that a well defined "course of conduct" claim under Section 5 could be just as powerful without a separate Sherman Act claim, considering recent judicial precedent and the other pending civil complaints against Intel. Ultimately, he commented that "although I have also concluded that there is reason to believe that the alleged conduct also violates Section 2 of the Sherman Act, I have concluded that insofar as this case proceeds on the basis of any Sherman 'tag-along' claims, the Commission acts contrary to the public interest."[20]

III. Conclusion

The reasoning in the *Intel* complaint seems to reflect a trend in the Commission's antitrust enforcement. Wary of toughening judicial precedents under the Sherman Act and an aggressive plaintiffs' bar looking to piggy-back on the FTC's efforts, the Commission may look to enforce the antitrust laws more vigorously by using its powers under Section 5 to pursue claims for unfair methods of competition and unfair or deceptive acts or practices. It is, of course, unclear to what degree the courts will condone or endorse the FTC's more aggressive use of the nearly century old Section 5.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Elai Katz at 212.701.3039 or ekatz@cahill.com; or Lawrence A. Reicher at 212.701.3383 or lreicher@cahill.com.

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[18] Statement of Chairman Leibowitz and Commissioner Rosch, *In the Matter of Intel Corporation*, Docket No. 9341, *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf. The statement also indicated that the Commission expected a trial to begin within nine months with a Commission decision within 20 months.

[19] *Id.*

[20] Concurring and Dissenting Statement of Commissioner J. Thomas Rosch, *In the Matter of Intel Corporation*, Docket No. 9341, *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelstatement.pdf.