Today, for the first time in its 100-year history, the FTC issued enforcement guidelines for cases brought by the agency under the Unfair Methods of Competition ("UMC") provisions of Section 5 of the FTC Act.

The Statement of Enforcement Principles represents a significant victory for Commissioner Joshua Wright, who has been a tireless advocate for defining and limiting the scope of the Commission's UMC authority since before his appointment to the FTC in 2013.

As we've noted many times before here at TOTM (including in our UMC Guidelines Blog Symposium), FTC enforcement principles for UMC actions have been in desperate need of clarification. Without any UMC standards, the FTC has been free to leverage its costly adjudication process into settlements (or short-term victories) and businesses have been left in the dark as to what what sorts of conduct might trigger enforcement. Through a series of unadjudicated settlements, UMC unfairness doctrine (such as it is) has remained largely within the province of FTC discretion and without judicial oversight. As a result, and either by design or by accident, UMC never developed a body of law encompassing well-defined goals or principles like antitrust's consumer welfare standard.

Commissioner Wright has long been at the forefront of the battle to rein in the FTC's discretion in this area and to promote the rule of law. Soon after joining the Commission, he called for Section 5 guidelines that would constrain UMC enforcement to further consumer welfare, tied to the economically informed analysis of competitive effects developed in antitrust law.

Today's UMC Statement embodies the essential elements of Commissioner Wright's proposal. Under the new guidelines:

1. The Commission will make UMC enforcement decisions based on traditional antitrust principles, including the consumer welfare standard;
2. Only conduct that would violate the antitrust rule of reason will give rise to enforcement, and the Commission will not bring UMC cases without evidence demonstrating that harm to competition outweighs any efficiency or business justifications for the conduct at issue; and
3. The Commission commits to the principle that it is more appropriate to bring cases under the antitrust laws than under Section 5 when the conduct at issue could give rise to a cause of action under the antitrust laws. Notably, this doesn't mean that the agency gets to use UMC when it thinks it might *lose* under the Sherman or Clayton Acts; rather, it means UMC is meant only to be a gap-filler, to be used when the antitrust statutes don't apply at all.

Yes, the Statement is a compromise. For instance, there is no safe harbor from UMC enforcement if *any* cognizable efficiencies are demonstrated, as Commissioner Wright initially proposed.

But by enshrining antitrust law's consumer welfare standard in future UMC caselaw, by

obligating the Commission to assess conduct within the framework of the well-established antitrust rule of reason, and by prioritizing antitrust over UMC when both might apply, the Statement brings UMC law into the world of modern antitrust analysis. This is a huge achievement.

It's also a huge achievement that a Statement like this one would be introduced by Chairwoman Ramirez. As recently as last year, Ramirez had resisted efforts to impose constraints on the FTC's UMC enforcement discretion. In a 2014 speech Ramirez said:

> I have expressed concern about recent proposals to formulate guidance to try to codify our unfair methods principles for the first time in the Commission's 100 year history. While I don't object to guidance in theory, I am less interested in prescribing our future enforcement actions than in describing our broad enforcement principles revealed in our recent precedent.

The "recent precedent" that Ramirez referred to is precisely the set of cases applying UMC to reach antitrust-relevant conduct that led to Commissioner Wright's efforts. The common law of consent decrees that make up the precedent Ramirez refers to, of course, are not legally binding and provide little more than regurgitated causes of action.

But today, under Congressional pressure and pressure from within the agency led by Commissioner Wright, Chairwoman Ramirez and the other two Democratic commissioners voted *for* the Statement.

Competitive Effects Analysis Under the Statement

As Commissioner Ohlhausen argues in her dissenting statement, the UMC Statement doesn't remove all enforcement discretion from the Commission — after all, enforcement principles, like standards in law generally, have fuzzy boundaries.

But what Commissioner Ohlhausen seems to miss is that, by invoking antitrust principles, the rule of reason and competitive effects analysis, the Statement incorporates by reference 125 years of antitrust law and economics. The Statement itself need not go into excessive detail when, with only a few words, it brings modern antitrust jurisprudence embodied in cases like *Trinko*, *Leegin*, *and Brooke Group* into UMC law.

Under the new rule of reason approach for UMC, the FTC will condemn conduct only when it causes or is likely to cause "harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications." In other words, the evidence must demonstrate net harm to consumers before the FTC can take action. That's a significant constraint.

As noted above, Commissioner Wright originally proposed a safe harbor from FTC UMC enforcement whenever cognizable efficiencies are present. The Statement's balancing test

is thus a compromise. But it's not really a big move from Commissioner Wright's initial position.

Commissioner Wright's original proposal tied the safe harbor to "cognizable" efficiencies, which is an exacting standard. As Commissioner Wright noted in his Blog Symposium post on the subject:

> [T]he efficiencies screen I offer intentionally leverages the Commission's considerable expertise in identifying the presence of cognizable efficiencies in the merger context and explicitly ties the analysis to the well-developed framework offered in the Horizontal Merger Guidelines. As any antitrust practitioner can attest, the Commission does not credit "cognizable efficiencies" lightly and requires a rigorous showing that the claimed efficiencies are merger-specific, verifiable, and not derived from an anticompetitive reduction in output or service. Fears that the efficiencies screen in the Section 5 context would immunize patently anticompetitive conduct because a firm nakedly asserts cost savings arising from the conduct without evidence supporting its claim are unwarranted. Under this strict standard, the FTC would almost certainly have no trouble demonstrating no cognizable efficiencies exist in Dan's "blowing up of the competitor's factory" example because the very act of sabotage amounts to an anticompetitive reduction in output.

The difference between the safe harbor approach and the balancing approach embodied in the Statement is largely a function of administrative economy. Before, the proposal would have caused the FTC to err on the side of false negatives, possibly forbearing from bringing some number of welfare-enhancing cases in exchange for a more certain reduction in false positives. Now, there is greater chance of false positives.

But the real effect is that *more cases will be litigated* because, in the end, both versions would require some degree of antitrust-like competitive effects analysis. Under the Statement, if procompetitive efficiencies outweigh anticompetitive harms, the defendant still wins (and the FTC is to avoid enforcement). Under the original proposal fewer actions might be brought, but those that are brought would surely settle. So one likely outcome of choosing a balancing test over the safe harbor is that more close cases will go to court to be sorted out. Whether this is a net improvement over the safe harbor depends on whether the social costs of increased litigation and error are offset by a reduction in false negatives — as well as the more robust development of the public good of legal case law.

Reduced FTC Discretion Under the Statement

The other important benefit of the Statement is that it commits the FTC to a regime that reduces its discretion.

Chairwoman Ramirez and former Chairman Leibowitz — among others — have embraced a

broader role for Section 5, particularly in order to avoid the judicial limits on antitrust actions arising out of recent Supreme Court cases like *Trinko*, *Leegin*, *Brooke Group*, *Linkline*, *Weyerhaeuser* and *Credit Suisse*.

For instance, as former Chairman Leibowitz said in 2008:

> [T]he Commission should not be tied to the more technical definitions of consumer harm that limit applications of the Sherman Act when we are looking at pure Section 5 violations.

And this was no idle threat. Recent FTC cases, including *Intel*, *N-Data*, *Google (Motorola)*, and *Bosch*, could all have been brought under the Sherman Act, but were brought — and settled — as Section 5 cases instead. Under the new Statement, all four would likely be Sherman Act cases.

There's little doubt that, left unfettered, Section 5 UMC actions would only have grown in scope. Former Chairman Leibowitz, in his concurring opinion in *Rambus*, described UMC as

> a flexible and powerful Congressional mandate to protect competition from unreasonable restraints, whether long-since recognized or newly discovered, that violate the antitrust laws, constitute incipient violations of those laws, or contravene those laws' fundamental policies.

Both Leibowitz and former Commissioner Tom Rosch (again, among others) often repeated their views that Section 5 permitted much the same actions as were available under Section 2 — but without the annoyance of those pesky, economically sensible, judicial limitations. (Although, in fairness, Leibowitz also once commented that it would not "be wise to use the broader [Section 5] authority whenever we think we can't win an antitrust case, as a sort of 'fallback.'")

In fact, there is a long and unfortunate trend of FTC commissioners and other officials asserting some sort of "public enforcement exception" to the judicial limits on Sherman Act cases. As then Deputy Director for Antitrust in the Bureau of Economics, Howard Shelanski, told Congress in 2010:

> The Commission believes that its authority to prevent "unfair methods of competition" through Section 5 of the Federal Trade Commission Act enables the agency to pursue conduct that it cannot reach under the Sherman Act, and thus avoid the potential strictures of *Trinko*.

In this instance, and from the context (followed as it is by a request for Congress to actually

exempt the agency from *Trinko* and *Credit Suisse*!), it seems that "reach" means "win."

Still others have gone even further. Tom Rosch, for example, has suggested that the FTC should challenge Patent Assertion Entities under Section 5 merely because "we have a gut feeling" that the conduct violates the Act and it may not be actionable under Section 2.

Even more egregious, Steve Salop and Jon Baker advocate using Section 5 to implement their preferred social policies — in this case to reduce income inequality. Such expansionist views, as Joe Sims recently reminded TOTM readers, hearken back to the troubled FTC of the 1970s:

> Remember [former FTC Chairman] Mike Pertschuck saying that Section 5 could possibly be used to enforce compliance with desirable energy policies or environmental requirements, or to attack actions that, in the opinion of the FTC majority, impeded desirable employment programs or were inconsistent with the nation's "democratic, political and social ideals." The two speeches he delivered on this subject in 1977 were the beginning of the end for increased Section 5 enforcement in that era, since virtually everyone who heard or read them said: "Whoa! Is this really what we want the FTC to be doing?"

Apparently, for some, it is — even today. But don't forget: This was the era in which Congress actually briefly shuttered the FTC for refusing to recognize limits on its discretion, as Howard Beales reminds us:

> The breadth, overreaching, and lack of focus in the FTC's ambitious rulemaking agenda outraged many in business, Congress, and the media. Even the Washington Post editorialized that the FTC had become the "National Nanny." Most significantly, these concerns reverberated in Congress. At one point, Congress refused to provide the necessary funding, and simply shut down the FTC for several days…. So great were the concerns that Congress did not reauthorize the FTC for fourteen years. Thus chastened, the Commission abandoned most of its rulemaking initiatives, and began to re-examine unfairness to develop a focused, injury-based test to evaluate practices that were allegedly unfair.

A truly significant effect of the Policy Statement will be to neutralize the effort to use UMC to make an end-run around antitrust jurisprudence in order to pursue non-economic goals. It will now be a necessary condition of a UMC enforcement action to prove a contravention of fundamental antitrust policies (i.e., consumer welfare), rather than whatever three commissioners happen to agree is a desirable goal. And the Statement puts the brakes on efforts to pursue antitrust cases under Section 5 by expressing a clear policy preference at the FTC to bring such cases under the antitrust laws.

Commissioner Ohlhausen's objects that

> the fact that this policy statement requires some harm to competition does little to constrain the Commission, as every Section 5 theory pursued in the last 45 years, no matter how controversial or convoluted, can be and has been couched in terms of protecting competition and/or consumers.

That may be true, but the same could be said of every *Section 2* case, as well. Commissioner Ohlhausen seems to be dismissing the fact that the Statement effectively incorporates by reference the last 45 years of antitrust law, too. Nothing will incentivize enforcement targets to challenge the FTC in court — or incentivize the FTC itself to forbear from enforcement — like the ability to argue *Trinko*, *Leegin* and their ilk. Antitrust law isn't perfect, of course, but making UMC law coextensive with modern antitrust law is about as much as we could ever reasonably hope for. And the Statement basically just gave UMC defendants blanket license to add a string of "*See* Areeda & Hovenkamp" cites to every case the FTC brings. We should count that as a huge win.

Commissioner Ohlhausen also laments the brevity and purported vagueness of the Statement, claiming that

> No interpretation of the policy statement by a single Commissioner, no matter how thoughtful, will bind this or any future Commission to greater limits on Section 5 UMC enforcement than what is in this exceedingly brief, highly general statement.

But, in the end, it isn't necessarily the Commissioners' self-restraint upon which the Statement relies; it's the courts' (and defendants') ability to take the obvious implications of the Statement seriously and read current antitrust precedent into future UMC cases. If every future UMC case is adjudicated like a Sherman or Clayton Act case, the Statement will have been a resounding success.

Arguably no FTC commissioner has been as successful in influencing FTC policy as a minority commissioner — over sustained opposition, and in a way that constrains the agency so significantly — as has Commissioner Wright today.

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