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There is a real danger that the Federal Trade Commission (“FTC”) actually believes its stated rationale for bringing its case against Intel under Section 5 of the FTC Act.² Frankly, I’d prefer if its arguments were just the callous and disingenuous *post hoc* rationalizations of a powerful agency, undeterred by effective oversight. But I fear this is not the case. While there may be good reasons for bringing some cases under Section 5, the reasons put forth by Chairman Leibowitz and Commissioner Rosch to explain the decision in Intel’s case reflect a worrisome disregard for the central role of the judiciary in constraining well-meaning-but-overly-confident technocratic enforcement and the fundamental role of error cost analysis in a well-ordered antitrust enforcement regime.

Commissioners Rosch and Leibowitz have been making noise about Section 5 for some time, and I think it likely that they saw the *Intel* case as the perfect opportunity to put Section 5 to the test—to make some new law that would favor the Commission in cases like this one where it “knows” there is injury but the Sherman Act case law makes prevailing difficult. They have found their case for bolstering the role of Section 5 in FTC enforcement, and Intel, its shareholders, consumers, and competition generally will suffer mightily for their hubris. And, in the end, the Commission may suffer as well.

Chairman Leibowitz’ defense of the use of Section 5 is astonishingly bold.³ First is the implicit defense that the use of Section 5 is justified by the greater likelihood of a positive result under the Act—as if the Commission is saying, “we can’t win under settled Sherman Act law, so we’ll find a new law where our chances are better. We are doing good after all, and if the law stands in our way, we should find a way around it.” Commissioner Rosch has made similar claims in the past.⁴ I find this degree of hubris to be appalling and dangerous—and indefensible precisely against a backdrop where government antitrust enforcers do not take seriously the error cost analysis at the heart of the antitrust enterprise.⁵

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² Administrative Complaint In the Matter of Intel Corporation, File No. 0610247 available at <http://www.ftc.gov/os/adjpro/d9341/index.shtml>.

³ 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>

⁴ See, e.g., “The FTC’s Section 5 Hearings: New Standards for Unilateral Conduct?,” Remarks of J. Thomas Rosch before the ABA Antitrust Section Spring Meeting, March 25, 2009, available at www.ftc.gov/speeches/rosch/090325abaspring.pdf.

⁵ See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); see also Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1490849.

Second is the remarkable claim that Sherman Act jurisprudence is a(n unintended) problem for the agency only because the courts have taken the law's teeth away in order to stymie abusive private litigation process—and the FTC is not susceptible to those process problems, so an emasculated Sherman Act should not constrain the FTC. As Chairman Leibowitz stated in an interview shortly after bringing the case against Intel:

The courts have pared back plaintiffs' rights in antitrust cases. They're concerned about what they believe to be the toxic combination of class actions, treble damages and a very aggressive plaintiffs' bar. The problem for us as an agency is we come under those restrictions, [too]. So how do we do what we're supposed to do, which is stopping anticompetitive behavior? One tool in our arsenal is using what's known as our Section 5 authority to stop unfair methods of competition.⁶

But, in addition to reflecting an unjustified surfeit of confidence, this claim does not hold up. In the Supreme Court, Sherman Act jurisprudence and the concern for error costs that it evidences is about substantive error as well as procedural imbalance; I'd say it is even more about the former.⁷ Read any lower court Sherman Act case and the entirety of the decision (*Microsoft*, for example⁸) is about how and whether, as a matter of substance, we can be sure we're getting it right in assessing speculative harms. Of course there is a responsive procedural element that tips or rights the scales in this assessment, but the claim that this is entirely what Sherman Act jurisprudence over the last thirty years is about is ridiculous on its face. For the FTC to claim that it should not be bound by the substantive, economically-sensible limits of antitrust that courts have developed in their jurisprudence is for the FTC to claim that it is simply above the law—and the economics. And as far as I know there is not, in fact, any case-law precedent for the claim that Sherman Act jurisprudence is all about reining in private litigation and not about getting the economics right.

Take, for example, *Twombly*, mentioned by Chairman Leibowitz as one of the cases that has recently reined in Sherman Act enforcement in order to constrain over-zealous private enforcement (and thus not in a way that should apply to government enforcement). To be sure, *Twombly* was concerned with the private incentives for bringing antitrust strike suits and the costs of such suits.⁹ But the over-zealousness of private plaintiffs is not all it was about, as the Court made clear:

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. Accordingly, we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence.

⁶ Interview: Federal Trade Commission's Jon Leibowitz, WALL ST. J. (January 31, 2010) available at <http://online.wsj.com/article/SB10001424052748704722304575037572444983454.html>.

⁷ A long line of recent Supreme Court cases demonstrates this. See *Credit Suisse (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2005); *Bell Atlantic Corp., et al. v. Twombly, et al.*, 550 U.S. 544 (2007); *Pac. Bell. Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109 (2009). Notably, all of these cases were supermajority or unanimous decisions by the Court; this is not a contested issue.

⁸ *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

⁹ But I note in passing that, while the specific monetary incentive at issue in the case might not apply to the government, the government, too, certainly has incentives to bring cases that may be weak. In other words, the analysis is not completely inapposite. Meanwhile the costs of protracted litigation are just as high if the plaintiff is the government as if it is a private party.

* * *

Hence, when allegations of parallel conduct are set out in order to make a §1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. [Citations omitted].¹⁰

The Court was clearly and appropriately concerned with the ability of decision-makers to separate pro-competitive from anticompetitive conduct. Even when the FTC brings cases, it and the court deciding the case must make these determinations. And, while the FTC may bring fewer strike suits, it isn't limited to challenging conduct that is simple to identify as anticompetitive. In fact, it's quite the opposite. The government has incentives to develop and bring suits proposing novel theories of anticompetitive conduct and of enforcement (as it is doing in the *Intel* case, for example). The claim that the FTC should be exempt from sensible limits on antitrust policy rests on faulty implicit claims that the FTC is not susceptible to errors of enforcement and that courts interpreting FTC cases are not likely to make errors in those cases.

We've seen this kind of hubris before—when antitrust enforcers have pursued tenuous and costly cases despite massive uncertainty and copious conflicting evidence: *IBM* and *Microsoft* come to mind. I still cherish Lawrence Lessig's admission that he “blew it on Microsoft” because he couldn't anticipate the future—a future that Microsoft told Lessig, the DOJ, and the court was inevitable and coming quickly.¹¹ But now we have the Commission's reading of Section 5 to support another speculative case—this time one almost certain otherwise to fail under the current law.

Some have claimed that there is, in fact, a role for Section 5 “independence” rooted in the FTC's institutional comparative advantage in certain areas over that of private litigants. Dan Crane writes, for example, that there are appropriate occasions for the FTC to declare Section 5 independence—for example, where the Commission may have prophylactic powers in cases of incipient conduct. Professor Crane writes that “perhaps this is because the Commission is better than the courts at predicting likely effects of emerging market forces,” although he forcefully disclaims this advantage in the *Intel* case.¹² But even where the FTC may have an advantage—and I do not know of any evidence to suggest that it does, in fact, have a greater ability to predict likely effects of emerging market forces, although it may have a greater incentive than private litigants to bring such cases—it is not clear that its advantage should not be exercised within the sensible confines of the Court's Sherman Act jurisprudence. In other words, if the FTC really does have an advantage in certain types of cases, then it should also have a better chance of winning those cases, even within a system designed to minimize overall errors. The economics doesn't change because “FTC” is in front of the “vs.” in the caption; it is still, in fact, difficult to distinguish pro-competitive from anticompetitive conduct.

Chairman Leibowitz has also argued that Section 5 is actually more efficient than Sherman Act:

¹⁰ 550 U.S. 544, 554, 557 (2007).

¹¹ Lawrence Lessig, *I Blew It on Microsoft*, WIRED, available at <http://www.wired.com/wired/archive/15.01/posts.html?pg=6>.

¹² *Section 5 Act Blog Symposium: Comments of Dan Crane* available at http://lawprofessors.typepad.com/antitrustprof_blog/2010/01/section-5-ftc-act-blog-symposium-comments-of-dan-crane.html.

The other advantage of this authority is, because it's not an antitrust statute, it's going to limit follow-on, private treble-damages law suits. I think in the end, if we use this statute effectively to stop anticompetitive behavior, the business community is going to end up supporting it very, very strongly. Because what they're most concerned about is follow-on, private, treble-damages litigation. They're not so much concerned about cease-and-desist [orders], which is the kind of thing we're often looking at when we use our Section 5 authority. I don't think big business should be worried. I think they should embrace this trend.¹³

In the first place this is an under-theorized trade-off. Certainly it is the case that potential antitrust targets *ex ante* (and, even more so, actual antitrust targets *ex post*) would prefer their liability exposure limited to only a single case, all else equal. But because Leibowitz does not acknowledge that the FTC may get it wrong—and is more likely to get it wrong under a law unconstrained by sensible error-cost jurisprudence—he does not consider that potential antitrust defendants may prefer fewer erroneous-but-successful antitrust theories even at the risk of more follow-on cases on the same theory. It may well be that the marginal potential antitrust defendant prefers the world of the Sherman Act where it more likely bears no litigation or enforcement costs to the world of Section 5 where it bears some.

Moreover, the claims that FTC enforcement of Section 5 removes the specter of costly (and, implicitly, often-erroneous) private litigation from the equation is simply false. The reality is that many states have “Baby FTC Acts,” modeled on the federal FTC Act and taking enforcement cues—by law—from FTC (and Congressional) interpretation of the Act. And these statutes do provide for private rights of action and treble damages. Although it is technically true that there is no private right of action under the federal FTC Act, this hardly shields antitrust defendants from follow-on liability. And even if such actions have been rare up until now (as Leibowitz claims), that will certainly change if the FTC's precedent-setting enforcement decisions shift toward using the statute as an antitrust enforcement tool in otherwise-unwinnable Sherman Act cases.

Commissioner Kovacic, in his dissent from the *N-Data* settlement, pointed the basic error out to the Commission:

The Commission overlooks how the proposed settlement could affect the application of state statutes that are modeled on the FTC Act and prohibit unfair methods of competition As commentators have documented, the federal and state regimes are interdependent. By statute or judicial decision, courts in many states interpret the state [consumer protection] laws in light of FTC decisions, including orders. . . . A number of states that employ this incorporation principle have authorized private parties to enforce their [] statutes in suits that permit the court to impose treble damages for infringements.

If the Commission desires to deny the reasoning of its approach to private treble damage litigants, the proposed settlement does not necessarily do so. If the Commission's assumption of no spillover effects is important to its decision, a rethink of the proposed settlement and order seems unavoidable. [Citations omitted].¹⁴

¹³ Wall St. J. Interview, *supra* note 6. See also Speech Delivered to the FTC's Section 5 Workshop by Commissioner Leibowitz, October 17, 2008, available at <http://ftc.gov/speeches/leibowitz/081017section5.pdf>; Statement of the Federal Trade Commission, In the Matter of Negotiated Data Solutions LLC, File No. 0510094, available at <http://ftc.gov/os/caselist/0510094/index.shtml>.

¹⁴ Dissenting Statement of Commissioner Kovacic, In the Matter of Negotiated Data Solutions LLC, File No. 0510094, available at <http://ftc.gov/os/caselist/0510094/index.shtml>.

It seems, however, that Leibowitz and other defenders of this alleged “efficiency” rationale for expanded Section 5 enforcement have not addressed this point, and they continue to rely on the claim that Section 5 enforcement will not lead to follow-on, private actions.

To the extent that this claim is based on the assertion that no one brought a private action following the N-Data Consent Order, the claim is actually quite problematic for its proponents. In the first place, N-Data is a sample size of one, and the general claim that follow-on, private litigation is not occurring in response to Section 5 cases is not based on any statistical study that I know of. Even more troubling, however, is the unintended implication from the logic of the claim that there was *no consumer injury* (as required by Section 5) in N-Data. The argument goes like this: State laws often give preclusive or de-facto-preclusive effect to a Section 5 judgment. If there were consumer injury in N-Data, and especially if private plaintiffs are as overly-aggressive as Section 5 supporters claim, then these sharks should be lining up to bring cases all over the country based on N-Data. That they are not suggests one of two things: Either they are leaving a lot of free money on the table, or else they think proving consumer injury in court would be too difficult to merit the attempt, even for treble damages—and I don’t think anyone really believes that the plaintiffs’ bar is passing up free money. As then-Chairman Majoras pointed out in her dissenting statement on N-Data, injury was difficult to find in the case and was only even conceivable, in any event, if one considered large, sophisticated computer manufacturers to be “consumers.”¹⁵ If it is really the case that N-Data has not spawned a raft of private follow-on litigation, it is unfortunately likely so because the FTC’s reliance on Section 5 enabled it to win a consent in the case without substantial consumer injury—a feat that would have been considerably harder under the Sherman Act.

In the end, then, none of the Commission’s stated rationales for the use of Section 5 as a surrogate for Sherman Act enforcement hold up. Moreover, they are rooted in a worrisome and undeserved over-confidence by the Commission in its own efficacy and its immunity from the logic of error-cost decision-making by the courts. Unmooring the FTC’s antitrust enforcement decisions from the constraints of the courts’ Sherman Act jurisprudence—particularly given the FTC’s institutional structure as prosecutor, judge, and jury in its own administrative cases—would be a costly mistake. This is only magnified in cases like Intel’s involving innovative technology and dynamic markets, where both the likelihood and the magnitude of false positives are increased.¹⁶

¹⁵ Dissenting Statement of Chairman Majoras, In the Matter of Negotiated Data Solutions LLC, File No. 0510094, available at <http://ftc.gov/os/caselist/0510094/index.shtml>.

¹⁶ For an extended discussion of the problem of false positives in innovative markets, see Geoffrey A. Manne and Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMP. L. & ECON. ____ (forthcoming 2010).