Volume 11 No.1
Fall 2013

Pondering Single-Firm Guidance in a Two-Agency World

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The Federal Trade Commission (FTC or Commission) and Department of Justice (DOJ or Antitrust Division) have a commendable track record of jointly issuing guidance in areas where they share enforcement authority, such as horizontal mergers, international operations, health care (including a separate joint policy statement regarding accountable care organizations), intellectual property, and competitor collaborations. Single-firm conduct is an important and complex area of U.S. antitrust law, and agency guidance on such conduct could be enormously helpful to large businesses and the practitioners who advise them. Still, formal guidance on unilateral conduct eludes us.

The absence of single-firm conduct guidelines is not for lack of effort or interest. In 2006, the agencies commenced joint year-long, comprehensive hearings on Sherman Act Section 2.[1] After the hearings concluded, staff from both agencies collaborated on a Section 2 report that ultimately was endorsed only by the DOJ in 2008. The FTC did not join the report, and sharply criticized it: a majority of then-sitting Commissioners accused the DOJ of "plac[ing] a thumb on the scales in favor of firms with monopoly or near-monopoly power."[2] The Antitrust Division formally withdrew its report only eight months later.[3] This year, two FTC Commissioners have called for the Commission to issue some type of formal guidance or policy statement on the reach of its standalone FTC Act Section 5 authority to prosecute unfair methods of competition.[4]

Against this backdrop, the question is not *whether* formal guidance can play a role in unilateral conduct enforcement policy, but *what kind* of guidance would be most useful to businesses? The substantive and procedural divergence between the FTC and DOJ suggests that harmonized guidelines encompassing both Section 2 and Section 5 is untenable, at least in today's enforcement environment. Guidance on the reach of the FTC's standalone Section 5 authority, however, would be a worthwhile undertaking.

Is Guidance on Unilateral Conduct Inherently More Difficult?

There would be several benefits to having formal agency guidelines on unilateral firm behavior: (i) guidelines can provide businesses with useful transparency into the agencies' likely enforcement intentions; (ii) they can signal to foreign competition authorities how multi-national firms' conduct will be viewed in the U.S., which in turn may facilitate convergence among global authorities; and (iii) they can provide judges – the ultimate arbiters of challenged conduct – with persuasive authority for framing court opinions. Guidelines would also provide companies with a single reference document to help shape their conduct, rather than require them to scour fact-specific business review letters, advisory opinions, and consent orders for piecemeal agency insights.

One wonders, then, why no such guidance exists to date. Some would suggest that guidance on unilateral conduct is inherently more difficult than for other areas of antitrust. As part of a 2007 OECD roundtable discussion, the U.S. submitted that "[p]roviding useful guidance to business on [single-firm exclusionary conduct] presents a challenge 'because the means of illicit exclusion, like the means of legitimate competition, are myriad.'"[5] Courts and practitioners have also indicated that unilateral conduct presents uniquely difficult challenges – that distinguishing between the vigorous competitor and the exclusionary monopolist is particularly hard.[6]

[1] *See* Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition, *available at* http://www.ftc.gov/os/sectiontwohearings/.

[2] "Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice," *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf (Sept. 8, 2008).

[3] "Justice Department Withdraws Report on Antitrust Monopoly Law," *available at* http://www.justice.gov/atr/public/press_releases/2009/245710.htm (May 11, 2009).

[4] *See* Remarks of Maureen K. Ohlhausen Before the U.S. Chamber of Commerce, "Section 5: Principles of Navigation" (July 25, 2013); Remarks of Joshua D. Wright Before the New York State Bar Association's Antitrust Section, "Section 5 Recast: Defining the Federal Trade Commission's Unfair Methods of Competition Authority" (June 19, 2013).

[5] Written Submission from United States, OECD Policy Roundtable on Guidance to Business on Monopolisation and Abuse of Dominance, DAF/COMP(2007)43, at p. 53 (June 2007) (citing *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (additional internal quotation omitted)).

[6] *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) ("difficult to discern" whether monopolist's act is exclusionary or competitive); *see also* Remarks of Chairman Majoras at FTC/DOJ Sherman Act Section 2 Joint Hearing (June 20, 2006) ("Unilateral or 'single-firm' conduct, however, still vexes us.") *and* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 81 (2007) ("How to evaluate single-firm conduct under Section 2 poses among the most difficult questions in antitrust law.").

Similar observations have been made about other areas of antitrust law, however. The Supreme Court has broadly observed that "the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct."[7] Properly applying antitrust concepts to issues such as competitor information exchanges[8] or to the health care industry[9] can be tricky, but the agencies nonetheless managed to issue joint guidance in those areas.[10] More likely, the difficulty in creating useful single-firm guidance stems from the differences between the two agencies that share enforcement authority over unilateral conduct.

Agency Differences Pose Obstacle to Joint Guidelines

Clarity, transparency and predictability are the hallmarks of useful guidance and are especially necessary under a dual-agency regime, particularly for firms whose conduct could conceivably be reviewed by either the Commission or the Antitrust Division (such as high-technology or health care companies). Effective joint guidance is made easier when certain conditions exist; for example, when the FTC and DOJ share authority under the same statute or over the same industry and when their enforcement philosophies somewhat align. For example, although there are procedural and substantive differences between FTC and DOJ merger review, both agencies are ultimately bound by Section 7 of the Clayton Act. Even with respect to joint conduct and horizontal agreements, where the FTC and DOJ enforce different statutes (FTC Act § 5 and Sherman Act § 1, respectively), there is doctrinal agreement on the importance of enforcement in this area.

Single-firm conduct presents different scenario. The FTC and DOJ not only exercise different statutory authority over unilateral conduct, but they also interpret their respective reach over such behavior quite differently. The DOJ has tended to exercise its Section 2 authority conservatively. Its now-withdrawn Section 2 Report suggested enforcement intentions that would not veer outside the bounds of traditional monopolization jurisprudence. Even after withdrawing its Section 2 Report in 2009, the Antitrust Division has initiated only a handful of Section 2 investigations each year[11] and has filed a monopolization complaint only once since 1999.[12] The FTC, by contrast, views its Section 5 power as extending beyond Section 2's reach. Thus, we have seen high-profile challenges to a firm's "course of conduct" when the company's challenged practices, taken alone, would not violate Section 2,[13] as well as the imposition of a consent decree against a company that, according to one then-sitting Commissioner, "did not engage in a general pattern of exclusionary conduct."[14]

Standalone Section 2 Guidance

If jointly issued guidance seems unlikely, then one must ask whether separate Section 2 guidance (from the Antitrust Division) and Section 5 guidance (from the Commission) would be beneficial. As to the former, the body of Section 2 case law is extensive and always evolving. Companies can draw on more than a century of Section 2 judicial opinions spanning nearly every form of unilateral conduct. While some areas of single-firm conduct remain unsettled – particularly the propriety of loyalty discounts offered by monopolists – there is significant judicial guidance from the Supreme Court and the Courts of Appeals.

Generally, administrative agency guidelines are most appropriate and useful when the agency has particular expertise with the subject matter. For instance, both the FTC and DOJ possess considerable experience analyzing mergers – far more than federal judges do – and thus it is unsurprising that courts regard their Horizontal Merger Guidelines as useful resources.[15] It is not apparent, however, that the Antitrust Division is more proficient in the area of Section 2 monopolization than is the

[7] United States v. United States Gypsum Co., 438 U.S. 422, 440-41 (1978).

[8] *Id.* at 441 (exchange of price information among competitors "illustrative" of the difficulty distinguishing acceptable from proscribed behavior).

[9] *See* Remarks of William J. Baer Before the American Bar Association, "Antitrust & Health Care: New Approaches and Challenges," (Oct. 1996) ("peculiar characteristics of health care services ... have posed challenges ... for the enforcement agencies charged with ensuring the competitiveness of those markets.").

[10] "Antitrust Guidelines for Collaborations Among Competitors," (April 2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf; "Statements of Antitrust Enforcement Policy in Health," (August 1996), *available at* http://www.justice.gov/atr/public/guidelines/1791.htm.

[11] *See* Antitrust Division Workload Statistics FY 2003-2012, *available at* http://www.justice.gov/atr/public/workload-statistics.html.

[12] *See United States v. United Regional Health Care System*, Case No. 7:11-cv-00030 (N.D. Tex. Feb. 25, 2011) (Complaint).

[13] *In re Intel Corp.*, Dkt. No. 9341 (Dec. 16, 2009) (Administrative Complaint).

[14] *In re Pool Corp.*, FTC File No. 101-0115 (Nov. 21, 2011) (Dissenting Statement of J. Thomas Rosch).

[15] *See, e.g., Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 432 n.11 (2008) ("Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws."); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 52 n.10 (D.D.C. 2011) ("courts in antitrust cases often look to [the Guidelines] as persuasive authority.").

federal judiciary, given the relative dearth of DOJ monopolization cases as compared with the robust body of case law. Indeed, rather than DOJ guidelines being necessary to serve as "persuasive authority" for the courts, it seems that the courts influence the agency's Section 2 analysis. The withdrawn Section 2 Report extensively cited case law, and the competitive impact statement issued with the Department's only recent Section 2 lawsuit cited monopolization cases such as *Microsoft*, *Dentsply*, and *Peacehealth*.[16] If one concludes that formal guidance on unilateral conduct guidance from the DOJ is indeed necessary, then perhaps a mere codification of Section 2 case law is all that is needed.

Standalone Section 5 Guidance

The FTC, on the other hand, should answer the call of current and former Commissioners to articulate some guidance regarding the contours and limits of its Section 5 authority.[17] Quite apart from the Section 2 context (extensive judicial experience coupled with relatively little DOJ enforcement), the FTC has exclusive domain and matchless experience enforcing Section 5. Section 5 analysis is almost entirely found in administrative opinions and consent orders, rather than in judicial opinions. Although some believe that Section 5 guidance should be developed on a case-by-case basis,[18] piecemeal settlements will not provide firms with adequate direction about their conduct in a meaningful way.

To the extent formal guidance will help firms' compliance with Section 5, this is a laudable goal in itself, as it can enable dominant firms to avoid unwanted collateral consequences of a Section 5 violation. Some have argued for the expansion of Section 5 by claiming that Section 5 actions shelter firms from the burden of follow-on treble damage private actions.[19] This argument is undercut, however, by then-Commissioner Kovacic's warning about the risks of state law collateral consequences, given that numerous states have modeled their unfair competition laws on Section 5 and provide for double or treble damages.[20] The argument is further undercut at the federal court level. In March 2010, the Commission entered into a consent decree with Transitions Optical, Inc. after alleging that the firm held an 80-85 percent share in the relevant market and that its exclusive dealing arrangements were anticompetitive. Very soon after the FTC's settlement and press release were made public, the private plaintiffs' bar launched numerous Sherman Section 2 lawsuits based on allegations in the FTC's Section 5 consent. The defendants in what is now *In re Photochromic Lens Antitrust Litigation* would probably disagree with the claim that Section 5 enforcement lacks collateral consequences, as the private litigation has been ongoing for over three years and has incurred burdensome discovery.[21]

Conclusion

Crafting clear formal guidance on as complex an issue as single-firm behavior is no easy task, but it is an important one when the scope of the law that is used to prosecute such behavior is uncertain. The failed attempt to render a joint Section 2 report highlighted real differences between the way the FTC and DOJ view unilateral conduct enforcement. Fortunately, there is a rich and growing body of Section 2 case law to which dominant firms can turn for guidance. The reach of Section 5 over single-firm conduct, however, remains nebulous and seemingly within the exclusive domain of Federal Trade Commission lawyers. The FTC would serve the business community well by issuing guidelines, a policy statement, or some other type of formal guidance regarding what type of unilateral conduct does – and does not – offend Section 5 principles.

[16] *United Regional Health System*, note 12 *supra* (Competitive Impact Statement).

[17] *See* note 4, *supra*; *see also* William E. Kovacic & Marc Winerman, "Competition Policy and the Application of Section 5 of the Federal Trade Commission Act," 76 ANTITRUST L.J. 929, 930-31 (2010) ("we see a need for the Commission ... to issue a policy statement that sets out a framework for the application of Section 5.").

[18] "Interview with FTC Commissioner Julie Brill," *The Antitrust Source* (Feb. 2012), at p. 6.

[19] *See, e.g.*, Remarks of J. Thomas Rosch Before the LECG Newport Summit on Antitrust Law & Economics, "Wading Into Pandora's Box: Thoughts On Unanswered Questions Concerning the Scope and Application of Section 2 & Some Further Observation on Section 5," (Oct. 3, 2009) ("A plaintiff cannot rely on favorable Section 5 case law in a federal treble damage action. Neither can a federal district court rely on such a decision because the FTC alone can avail itself of Section 5 at the federal level.").

[20] *See* Dissenting Statement of Commission William E. Kovacic, *In re Negotiated Data Solutions, LLC*, File No. 051-0094 (2008).

[21] *See, e.g.*, Scott Flaherty, "Transitions Must Produce FTC Probe Docs, Judge Rules," *Law360* (Nov. 6, 2012) ("A Florida federal judge ... ordered Transitions Optical, Inc. to turn over documents related to a Federal Trade Commission investigation into the company's business practices, ruling the information was relevant to antitrust claims made by putative purchaser classes in multidistrict litigation.").