Can Section 5 and Article 82 Converge?

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Thom Miller and Ryan Marth of Robins, Kaplan, Miller & Ciresi LLP presented their paper that argues that an expanded use of Section 5 of the FTCA can lead to convergence between the U.S. and EU approaches to dominant firm conduct. FTC Commissioner Wiliam Kovacic and Professor Rudy Peritz commented on the paper. Professor Robert Lande served as moderator.

Miller argued that convergence in the treatment of dominant firm conduct is necessary because the two regimes have reached different results with respect to various types of conduct, sometimes dramatically so. The recent EC Guidance on Article 82 answered critics that the EC approach elevated form over substance, and moved in the direction of the U.S. emphasis on harm to consumers, while the U.S. has moved further away, as illustrated by the DOJ Report on Section 2 (recently rescinded by Assistant Attorney General Varney). The consequence of divergence is that the U.S. runs the risk of losing influence to Europe in the development of competition law around the world. Moreover, divergence is harmful for businesses that operate globally because it leads to less predictability.

Miller argued that Section 2 is inadequate to the task of reaching convergence because it tends to require greater market power than Article 82, and the Supreme Court has seriously narrowed the scope of exclusionary conduct under Section 2 in a series of recent cases. Section 5 of the FTCA can provide a "third way" to achieve convergence because Section 5 was designed to go beyond the Sherman Act and courts give more deference to the FTC as the expert agency when it operates under Section 5. Significantly, courts may be more receptive to actions under Section 5 because only the FTC can bring such actions, and they do not expose defendants to the risk of follow on private treble damages suits; relief is remedial and not punitive. While the courts of appeals were hostile to the expansive use of Section 5 in the early 1980s, Marth argued that they are more likely to be receptive today. Their paper explores how Section 5 might be applied in three doctrinal areas – multiproduct bundling, unilateral refusals to deal, and abuse of buyer power – to go beyond current treatment under Section 2 and move towards common ground with the EC.

Commissioner Kovacic said he was sympathetic to the notion that Section 5 must go beyond Section 2; otherwise the FTC is essentially a nullity. However, he questioned whether Miller and Marth had made a sufficient case for convergence. Did they favor convergence for the sake of uniformity, or because it would lead to better results? Suppose the EC adopted a less aggressive enforcement posture that converged with the U.S. courts' approach to Section 2? While praising the paper for getting the conversation started, Kovacic suggested that what was missing was the history of the FTC and its enforcement of Section 5. The initial vision of Congress was that the FTC, with its expertise, was to provide an upgrade on the Sherman Act, and that the agency would play a dominant role in defining anticompetitive conduct. However the vision has never been fulfilled. Why? Because the Sherman Act proved to be more elastic than the framers of the FTCA had anticipated; it was expanded by the courts to cover conduct thought to be problematic, while the FTC was pushed to the fringe. Beginning with *Berkey Photo* in 1979, courts began to pull back on Section 2 as they focused on the risks of overdeterrence and began to see private rights of action as overreaching. At about the same time, the appeals courts were hostile to the FTC's attempts to expand Section 5 in *Official Airline Guides*, *Ethyl*, and *Boise Cascade*. Although they recited that the FTC was due deference, the courts in fact shot the FTC, even though *Ethyl* for example was a thoughtful and constructive decision, and *OAG* was written by the agency's "best pitcher," Bob Pitofsky. Kovacic questioned whether these cases would receive a kinder reception today given that the Chicago School has a stronger grip on the courts than it did in the early 1980s.

Commissioner Kovacic's diagnosis of the failure of the FTC in these cases was that: (1) the FTC did not articulate any good limiting principles or concepts to guide its vague authority to define unfair methods of competition; (2) courts doubted the agency's actual expertise; and (3) the remedies were not light-handed. Going forward, he suggested that the FTC should establish clear guidelines for defining unfair methods of competition as it did for its unfairness and deception authority. Paradoxically, he said, defining and limiting the FTC's authority will strengthen it. The FTC should also expressly rely on the institutional comparative advantage of Section 5, namely that it does not expose the defendant to treble damages. And finally, the FTC should invest additional resources to ensure that it is indeed the expert agency it seeks to be.

Professor Peritz distinguished between the "domestic question" of whether Section 5 should be interpreted to go beyond Section 2, and the "cosmopolitan question" of whether convergence is desirable and achievable. He focused his remarks on the domestic question; to the extent that an expansive use of Section 5 would foster convergence, that would be a side benefit. He articulated three propositions: First, there is a strong and undisputed historical basis for the view that the FTCA is something different in kind from both the Sherman and Clayton Acts. Second, in this light, the FTC's institutional character is properly understood as a competition commission to investigate, report, advise against, and if necessary stop practices deemed unfair methods of competition, ex ante, in their incipiency. The FTC is not an antitrust agency like the DOJ Antitrust Division. Third, federal court decisions beginning in the 1960s unanimously support the view that the FTCA and its enforcement by the Commission legitimately serve competition policy understood more broadly than antitrust law, i.e. than the Sherman Act. In sum, Peritz said that FTC has a long-standing Congressional mandate and judicial invitation to be bold, to push past the antitrust laws, to investigate and stop in their incipiency "unfair methods of competition." He added that the Commission should be an innovator and investigator rather than an enforcer, working at the cutting edge of economic theory and legal doctrine. The FTC mission, properly understood, is to engage in research and development of competition policy at the forefront of changing commercial circumstances.

During the brief discussion period, Marth explained that he and Miller did not favor convergence for the sake of uniformity but for the sake of better policy. He also agreed that defining and refining the standards under Section 5 would make it a more powerful tool. Kovacic noted that while it is nice to say that the agency should be bold, what if the wings keep falling off? Peritz thought that while it was important to improve the FTC, it was more important to get the judiciary up to snuff, with judicial education. He noted the significance of Justice Blackmun's decision in *Kodak* as an example of sophisticated post-Chicago thinking.