

Antitrust Advisory

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FTC Commissioners Disagree on Limits of Section 5 Applicability to Conduct Not Otherwise Covered by Antitrust Laws

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The balancing of antitrust enforcement with intellectual property protections is often controversial. Equally controversial is identifying the outer limit of Section 5 of the Federal Trade Commission Act as it may apply to conduct not otherwise covered by the antitrust laws. Both of these controversies are on display in a consent decree recently accepted by the Federal Trade Commission (FTC) on a 3-2 vote.

On November 26, 2012, the FTC issued a proposed consent decree requiring Robert Bosch GmbH (Bosch) to divest a portion of its business to prevent anticompetitive effects from its acquisition of SPX Service Solutions U.S. LLC.¹ According to the complaint, Bosch's acquisition would create a virtual monopoly and cause significant harm to consumers in the market for automobile air conditioning servicing equipment known as "air conditioning recycling, recovery and recharge devices" (ACRRRs).

Despite the Commissioners' unanimous finding that the acquisition would result in anticompetitive effects, two Commissioners voted against approval of the consent decree and complaint. Commissioners Ohlhausen and Rosch disagreed with the Commission's application of Section 5 of the FTC Act to patent injunctions sought by IP owners after committing to standard-setting bodies to license standards-essential patents (SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms. The consent decree prohibits Bosch from reinstating SPX's injunction demands, which Bosch had previously agreed to drop.

Under Section 5, the FTC may challenge "unfair or deceptive acts or practices in or affecting commerce." While designed to be broader than the federal antitrust laws, the exact limit of the FTC's authority under this section is unclear, and has been a much-discussed matter of controversy in recent years.

The Commission's majority statement stressed that an IP owner's effort to enjoin willing licensees of FRAND-encumbered SEPs can be challenged by the FTC as an unfair method of competition if that injunction would undermine the standard-setting process and risk harming consumers. By committing to license SEPs on FRAND terms, a patent holder, like SPX here, gives up its right to seek an injunction against a willing licensee. The fact that injunctive relief may be denied by federal courts or the International Trade Commission (ITC) when the SEP holder breaks its FRAND commitments does not render the conduct beyond the reach of Section 5.

Commissioner Ohlhausen, whose pre-FTC practice focused on IP litigation, issued a dissenting statement expressing her opinion that SEP-related allegations do not constitute a Section 5 violation. In Commissioner Ohlhausen's view, the complaint must allege something more to bring the action within the purview of Section 5. Accordingly, she stated that the FTC's extension of its power in this arena "lack[s] regulatory humility[]" and ignores, invades, and presumes superiority over federal courts' and the ITC's responsibilities. Seeking injunctive relief is presumably protected under the *Noerr-Pennington* doctrine, which immunizes the petitioning of the government from antitrust scrutiny even if the intended effect is anticompetitive.

Commissioner Ohlhausen also stated that the Commission's decision in this respect reflected an about-face from

its prior statements to the ITC that the ITC and federal courts possess the necessary tools to address these issues. The enforcement policy outlined in this consent order fails to set any meaningful limiting principles, and could therefore lead to the FTC policing “garden variety” business disputes. Finally, the Commissioner expressed her dissatisfaction with the Commission’s lack of predictability in its application of Section 5, stating that it should “fully articulate its views about what constitutes an unfair method of competition, including the general parameters of unfair conduct and where Section 5 overlaps and does not overlap with the antitrust laws[.]”

This consent decree demonstrates the FTC’s commitment to ensuring the integrity of standard-setting in order to protect innovation, competition, and consumer choice—rather than simply displacing competition through competitors’ collective decision-making. Yet, with at least two new Commissioners expected in the next year, the issue of the reach of Section 5, and the Commission’s willingness to inject itself into standard-setting and licensing matters, will remain both controversial and unclear.

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Endnotes

¹ *In the Matter of Robert Bosch GmbH*, a corporation, Docket No. C-4377, FTC File No. 121 0081, <http://www.ftc.gov/opa/2012/11/bosch.shtm>.

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