FTC Rulemaking Risks Expansion Of Unfair-Method Bounds

By **Sean Gates** (January 24, 2022)

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There's a battle brewing at the Federal Trade Commission. And the outcome could affect businesses far and wide.

Over two blistering dissents, FTC Chair Lina Khan reiterated the commission's intent to issue rules defining unfair methods of competition under Section 5 of the FTC Act. This has never been done.

Some say the FTC lacks the power to do so. And there are fierce debates over the wisdom of using rulemaking for this task.

One aspect of the debates, however, is a blast from the past.

According to the commission's recent statement of regulatory priorities, rulemaking is necessary because "the case-by-case approach to promoting competition" through adjudication "has proved insufficient."[1] The statement echoes Khan's academic writings.

For instance, in an article for the University of Chicago Law Review called "The Case for 'Unfair Methods of Competition' Rulemaking," Khan and co-author Rohit Chopra asserted that:

> Case-by-case adjudication yields a system of enforcement that generates ambiguity, unduly drains resources from enforcers, and deprives individuals and firms of any real opportunity to democratically participate in the process.[2]

Discontent with the case-by-case approach isn't new. Eight years ago, then-commissioner Joshua Wright — whom no one would put in the progressive camp — argued in a law review article that after 100 years of FTC enforcement, the case-by-case approach has not only failed to define unfair methods, but is incapable of doing so.[3]

In a 2013 statement, Wright insisted that guidance on what constitutes unfair methods of competition is needed, saying:

> To strengthen the agency's ability to target anti-competitive conduct and provide clear guidance about the contours of the Commission's Section 5 authority.[4]

What to do?

Differing Solutions

Back in 2015, the solution was to rein in Section 5 with a statement setting forth principles to guide the commission in deciding whether to challenge conduct as an unfair method of competition.[5]

The goal of the "Statement of Enforcement Principles on 'Unfair methods of Competition'" was to circumscribe the outer reaches of unfair methods. The statement affirmed that Section 5 enforcement would be "guided by the goal of promoting consumer welfare" and that the commission would rely on the "rule of reason" framework developed under the antitrust laws.[6]

At the time, the 2015 policy statement was relatively uncontroversial. True, then-commissioner Maureen Ohlhausen dissented, arguing that the statement failed to sufficiently constrain the scope of the unfair methods of competition.[7]

But the statement was largely consistent with the "broad consensus," discussed in Wright's 2014 law review article, that unfair methods include only conduct that "harms or is likely to harm competition," that Section 5 should not cover conduct "merely injures small business, violates public morals, or otherwise contravenes public policy based upon some set of non-economic considerations," and that "the FTC must consider efficiencies justifications" in determining whether conduct is an unfair method.[8]

So much for consensus. In 2021, the commission, now led by Khan, withdrew the 2015 policy statement, contending that the statement "contravenes the text, structure, and history of Section 5" and that "subjecting Section 5 to a framework similar to the rule of reason, the Commission hamstrings its enforcement mission."[9]

Indeed, Khan has argued against the consensus underlying the 2015 statement, asserting that the antitrust laws:

- Should not be focused on promoting consumer welfare;
- Should not consider efficiencies; and
- Should consider other noneconomic considerations.[10]

The 2021 commission also took the 2015 statement to task for assuming the case-by-case approach and failing "to address the possibility of the Commission adopting rules to clarify the legal limits that apply to market participants."[11]

The new commission's prescription? It's no surprise that it's rulemaking — which would expand, not circumscribe, the bounds of unfair methods.

At this point, it's worth asking whether the case-by-case approach is really so bad.

The Uncertainty Justification

Both the 2015 policy statement and the current push for rulemaking reflect the concern that the case-by-case approach creates too much uncertainty over the bounds of Section 5's proscription on unfair methods of competition, which could deter pro-competitive conduct.

But is that true? As Ohlhausen noted in 2015, Section 5 may theoretically reach "bad faith, fraudulent, or oppressive" conduct "without any possible relation to competition." In actual practice, however, "the Commission has not relied solely on a non-competition rationale to support [an unfair methods] violation for forty-some years."[12]

That statement remains true today. Moreover, the case-by-case approach is subject to judicial review, and the courts have reigned in the FTC's prior Section 5 misadventures, which reduces uncertainty.

In all likelihood, uncertainty about the scope of Section 5 deters no one. Antitrust counselors base their advice on existing precedent, not fanciful theoretical applications of ambiguous statutes.

Yes, the FTC has, here and there, used Section 5 to go beyond the Sherman Act to address

particular practices — e.g., the 2008 In the Matter of Negotiated Data Solutions LLC decision and invitations to collude — but these occasional frolics weren't off the reservation. None created widespread uncertainty. And just as with any other risk, firms don't demand absolute certainty.

The Expert Agency Justification

Khan has also argued that case-by-case adjudication of unfair methods cases, being subject to judicial review, is inadequate because generalist judges "struggle to identify anti-competitive behavior."[13]

She says she thinks that the FTC, as an "expert administrative agency," should be given near complete deference on defining unfair methods.[14]

But judicial review, unfettered by strict deference, allows multiple tribunals — the commission, the circuit courts and the U.S. Supreme Court — to weigh in on the question rather than just one. The definition of unfair methods could have impact in multiple industries and, indeed, throughout the economy.

Do we want just one agency to set all the rules?

Based on the empirical evidence, the answer is no. A study done by Wright of reversal rates of district court antitrust decisions versus commission decisions found, "contrary to the expertise hypothesis," that "the evidence suggests the Commission does not perform as well as generalist judges in its adjudicatory antitrust decision-making role."[15]

There's more. A 2015 St. John's Law Review article titled "Lessons of Competition Policy Reform in Transition Economies," by former commissioner William Kovacic, thoroughly undermines the expert agency justification:

> The selection of Commissioners of truly outstanding ability in the FTC's areas of responsibility—antitrust and consumer protection—has been unusual rather than routine. For the FTC's first half-century, the overall record of appointments to the agency was dismal. With rare exceptions, the agency became an outlet for the political largesse of the Congress or the President. Although the overall quality of FTC appointments has improved since the late 1960s, it remains the case in the modern era that few appointees have arrived at the agency with significant experience in the fields of antitrust or consumer protection.[16]

The Democracy Justification

Khan also argues that the case-by-case approach is undemocratic because it "deprives both the public and market participants of any real opportunity to participate in the creation of substantive antitrust rules" except through amicus briefs.[17]

But if — as many, including former FTC commissioners and general counsel, contend — Congress didn't delegate rulemaking power to the commission, issuing unfair methods rules would be undemocratic.

As the U.S. Supreme Court has recently reminded us in its 2021 Alabama Association of Realtors v. The U.S. Department of Health and Human Services opinion:

> We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.[18]

The FTC Act doesn't provide such a clear statement. Absent that, Khan's argument would apply to every law passed by Congress and enforced in the courts. Indeed, it would condemn the whole common-law system.

So where does that leave us? In addition to potentially being beyond the FTC's power, rulemaking to define unfair methods isn't justified. The case-by-case approach isn't broken and doesn't need fixing.

Sean Gates is a founding shareholder of Charis Lex PC and a former deputy assistant director at the FTC.

[1] Fed. Trade Comm'n, Statement of Regulatory Priorities (Dec. 10, 2021).

[2] Rohit Chopra & Lina M. Khan, The Case for "Unfair Methods of Competition" Rulemaking, 87 U. Chi. L. Rev. 357, 359 (2020) ["The Case for Rulemaking"].

[3] Jan M. Rybnicek & Joshua D. Wright, Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines, 21 Geo. Mason L. Rev. 1287, 1304-06 (2014) ["Defining Section 5"].

[4] Statement of Comm'r Joshua D. Wright, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013).

[5] Statement of Enforcement Principles Regarding ''Unfair Methods of Competition'' Under Section 5 of the Federal Trade Commission Act, 80 Fed. Reg. 57056.

[6] Id.

[7] 80 Fed. Reg. 57057.

[8] Defining Section 5, supra, at 1290.

[9] Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act 1, 5 (July 1, 2021) ["Withdrawal Statement"].

[10] Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L. J. 710 (2017).

[11] Withdrawal Statement, supra, at 7

[12] A SMARTER Section 5, Remarks of Maureen K. Ohlhausen, Comm'r, Fed. Trade

Comm'n (Sept. 25, 2015).

[13] The Case for Rulemaking, supra, at 359.

[14] Id. at 377.

[15] Joshua D. Wright & Angela M. Diveley, Do expert agencies outperform generalist judges? Some preliminary evidence from the Federal Trade Commission, 1 J. Antitrust Enforcement 1, 22 (2013).

[16] William E. Kovacic, Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy, 74 St. John's L. Rev. 361, 365 (2000).

[17] Id. at 362.

[18] Alabama Assn. of Realtors v. Dep't. of Health and Human Servs., 141 S. Ct. 2485 (2021) (per curiam).