FTC Competition Rulemaking Flunks a Cost-Benefit Test
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There is little doubt that Federal Trade Commission (FTC) unfair methods of competition rulemaking proceedings are in the offing. Newly named FTC Chair Lina Khan and Commissioner Rohit Chopra both have extolled the benefits of competition rulemaking in a major law review article. What's more, in May, Commissioner Rebecca Slaughter (during her stint as acting chair) established a rulemaking unit in the commission's Office of General Counsel empowered to "explore new rulemakings to prohibit unfair or deceptive practices *and unfair methods of competition*" (emphasis added).

In short, a majority of sitting FTC commissioners apparently endorse competition rulemaking proceedings. As such, it is timely to ask whether FTC competition rules would promote consumer welfare, the paramount goal of competition policy.

In a recently published Mercatus Center research paper, I assess the case for competition rulemaking from a competition perspective and find it wanting. I conclude that, before proceeding, the FTC should carefully consider whether such rulemakings would be cost-beneficial. I explain that any cost-benefit appraisal should weigh both the legal risks and the potential economic policy concerns (error costs and "rule of law" harms). Based on these considerations, competition rulemaking is inappropriate. The FTC should stick with antitrust enforcement as its primary tool for strengthening the competitive process and thereby promoting consumer welfare.

A summary of my paper follows.

Legal Risks of Competition Rulemaking

Section 6(g) of the original Federal Trade Commission Act authorizes the FTC "to make rules and regulations for the purpose of carrying out the provisions of this subchapter." Section 6(g) rules are enacted pursuant to the "informal rulemaking" requirements of Section 553 of the Administrative Procedures Act (APA), which apply to the vast majority of federal agency rulemaking proceedings.

Before launching Section 6(g) competition rulemakings, however, the FTC would be well-advised first to weigh the legal risks and policy concerns associated with such an endeavor. Rulemakings are resource-intensive proceedings and should not lightly be undertaken without an eye to their feasibility and implications for FTC enforcement policy.

Only one appeals court decision addresses the scope of Section 6(g) rulemaking. In 1971, the FTC enacted a Section 6(g) rule stating that it was both an "unfair method of competition" and an "unfair act or practice" for refiners or others who sell to gasoline retailers "to fail to disclose clearly and conspicuously in a permanent manner on the pumps the minimum octane number or numbers of the motor gasoline being dispensed." In 1973, in the *National Petroleum Refiners* case, the U.S. Court of Appeals for the D.C. Circuit upheld the FTC's authority to promulgate this and other binding substantive rules. The court rejected the argument that Section 6(g) authorized only non-substantive regulations concerning regarding the FTC's non-adjudicatory, investigative, and informative functions, spelled out elsewhere in Section 6.

In 1975, two years after *National Petroleum Refiners* was decided, Congress granted the FTC specific consumer-protection rulemaking authority (authorizing enactment of trade regulation rules dealing with unfair or deceptive acts or practices) through Section 202 of the Magnuson-Moss Warranty Act, which added Section 18 to the FTC Act. Magnuson-Moss rulemakings impose adjudicatory-type hearings and other specific requirements on the FTC, unlike more flexible section 6(g) APA informal rulemakings. However, the FTC can obtain civil penalties for violation of Magnuson-Moss rules, something it cannot do if 6(g) rules are violated.

In a recent set of public comments filed with the FTC, the Antitrust Section of the American Bar Association stated:

> [T]he Commission's [6(g)] rulemaking authority is buried in within an enumerated list of investigative powers, such as the power to require reports from corporations and partnerships, for example. Furthermore, the [FTC] Act fails to provide any sanctions for violating any rule adopted pursuant to Section 6(g). These two features strongly suggest that Congress did not intend to give the agency substantive rulemaking powers when it passed the Federal Trade Commission Act.

Rephrased, this argument suggests that the structure of the FTC Act indicates that the rulemaking referenced in Section 6(g) is best understood as an aid to FTC processes and investigations, not a source of substantive policymaking. Although the *National Petroleum Refiners* decision rejected such a reading, that ruling came at a time of significant judicial deference to federal agency activism, and may be dated.

The U.S. Supreme Court's April 2021 decision in *AMG Capital Management v. FTC* further bolsters the "statutory structure" argument that Section 6(g) does not authorize substantive rulemaking. In *AMG*, the U.S. Supreme Court unanimously held that Section 13(b) of the FTC Act, which empowers the FTC to seek a "permanent injunction" to restrain an FTC Act violation, does not authorize the FTC to seek monetary relief from wrongdoers. The court's opinion rejected the FTC's argument that the term "permanent injunction" had historically been understood to include monetary relief. The court explained that the injunctive language was “buried” in a lengthy provision that focuses on injunctive, not monetary relief (note that the term “rules” is similarly “buried” within 6(g) language dealing with unrelated issues). The court also pointed to the structure of the FTC Act, with detailed and specific monetary-relief provisions found in Sections 5(l) and 19, as “confirm[ing] the conclusion” that Section 13(b) does not grant monetary relief.

By analogy, a court could point to Congress’ detailed enumeration of substantive rulemaking provisions in Section 18 (a mere two years after *National Petroleum Refiners*) as cutting against the claim that Section 6(g) can also be invoked to support substantive rulemaking. Finally, the Supreme Court in *AMG* flatly rejected several relatively recent appeals court decisions that upheld Section 13(b) monetary-relief authority. It follows that the FTC cannot confidently rely on judicial precedent (stemming from one arguably dated court decision, *National Petroleum Refiners*) to uphold its competition rulemaking authority.

In sum, the FTC will have to overcome serious fundamental legal challenges to its section 6(g) competition rulemaking authority if it seeks to promulgate competition rules.

Even if the FTC’s 6(g) authority is upheld, it faces three other types of litigation-related risks.

First, applying the nondelegation doctrine, courts might hold that the broad term “unfair methods of competition” does not provide the FTC “an intelligible principle” to guide the FTC’s exercise of discretion in rulemaking. Such a judicial holding would mean the FTC could not issue competition rules.

Second, a reviewing court might strike down individual proposed rules as “arbitrary and capricious” if, say, the court found that the FTC rulemaking record did not sufficiently take into account potentially procompetitive manifestations of a condemned practice.

Third, even if a final competition rule passes initial legal muster, applying its terms to individual businesses charged with rule violations may prove difficult. Individual businesses may seek to structure their conduct to evade the particular strictures of a rule, and changes in commercial practices may render less common the specific acts targeted by a rule’s language.

Economic Policy Concerns Raised by Competition Rulemaking

In addition to legal risks, any cost-benefit appraisal of FTC competition rulemaking should consider the economic policy concerns raised by competition rulemaking. These fall into two broad categories.

First, competition rules would generate higher error costs than adjudications. Adjudications cabin error costs by allowing for case-specific analysis of likely competitive harms and procompetitive benefits. In contrast, competition rules inherently would be overbroad and would suffer from a very high rate of false positives. By characterizing certain practices as inherently anticompetitive without allowing for consideration of case-specific facts bearing on actual competitive effects, findings of rule violations inevitably would condemn some (perhaps many) efficient arrangements.

Second, competition rules would undermine the rule of law and thereby reduce economic welfare. FTC-only competition rules could lead to disparate legal treatment of a firm's business practices, depending upon whether the FTC or the U.S. Justice Department was the investigating agency. Also, economic efficiency gains could be lost due to the chilling of aggressive efficiency-seeking business arrangements in those sectors subject to rules.

Conclusion

A combination of legal risks and economic policy harms strongly counsels against the FTC's promulgation of substantive competition rules.

First, litigation issues would consume FTC resources and add to the costly delays inherent in developing competition rules in the first place. The compounding of separate serious litigation risks suggests a significant probability that costs would be incurred in support of rules that ultimately would fail to be applied.

Second, even assuming competition rules were to be upheld, their application would raise serious economic policy questions. The inherent inflexibility of rule-based norms is ill-suited to deal with dynamic evolving market conditions, compared with matter-specific antitrust litigation that flexibly applies the latest economic thinking to particular circumstances. New competition rules would also exacerbate costly policy inconsistencies stemming from the existence of dual federal antitrust enforcement agencies, the FTC and the Justice Department.

In conclusion, an evaluation of rule-related legal risks and economic policy concerns demonstrates that a reallocation of some FTC enforcement resources to the development of competition rules would not be cost-effective. Continued sole reliance on case-by-case antitrust litigation would generate greater economic welfare than a mixture of litigation and competition rules.

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