

The FTC's UMC Policy Statement: Untethered from Consumer Welfare and the Rule of Reason

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On Nov. 10, 2022, the Federal Trade Commission (FTC) issued a new policy statement¹ regarding the scope of “unfair methods of competition” (UMC) under Section 5 of the FTC Act. The new statement fills the gap left by the Commission’s July 2021 rescission² of its 2015 policy statement.³ Democratic appointees Chair Lina Khan and Commissioners Rebecca Slaughter and Alvaro Bedoya voted in favor of the new policy statement, while Commissioner Christine Wilson, a Republican appointee, dissented.⁴

The new statement describes the policy changes that the Commission majority previewed in 2021: the FTC will target a much broader range of conduct than it has in the past, as it untethers “unfair methods of competition” from, *inter alia*, consumer welfare, the rule of reason, and actual or likely harm to competition.

The policy statement sketches an architecture for UMC determinations that, on closer inspection, is ephemeral or, at best, radically unspecified. Under the new statement, unfair methods of competition mean “conduct undertaken by an actor in the marketplace—as opposed to merely a condition of the marketplace, not of the respondent’s making, such as high concentration or barriers to entry.”⁵ That seems largely unhelpful. But for the suggestion that, following established law, monopoly (or high concentration) or structural barriers to entry are still not to be deemed prohibited in or of themselves, this seems a statement that conduct will not be deemed unfair unless it is, in fact, commercial conduct. The contrast with “competition on the merits” lacks content: the FTC

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¹ *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, FEDERAL TRADE COMMISSION (Nov. 10, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [hereinafter “2022 UMC Policy Statement.”]

² *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*, FEDERAL TRADE COMMISSION (Jul. 1, 2021), available at https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf [hereinafter “2021 Withdrawal Statement.”]

³ *Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act*, FEDERAL TRADE COMMISSION (Aug. 13, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

⁴ *Dissenting Statement of Commissioner Christine S. Wilson*, FEDERAL TRADE COMMISSION (Nov. 10, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf [hereinafter “Wilson Dissent.”]

⁵ 2022 UMC Policy Statement, *supra* note 1, at 8.

has no statutory charge to define competition on the merits, except in the breach; it has not defined “competition on the merits” in the past and it does not do so in the present policy statement.

We are provided with a necessary conjunction. Conduct will only be deemed unfair if it is both:

1. “unfair”; and
2. “tend[s] to negatively affect competitive conditions.”⁶

The first term of the conjunction is satisfied by conduct fitting under a complex, if vague, disjunction: conduct that is “coercive, exploitative, collusive, abusive, deceptive, predatory” or acts that “involve the use of economic power of a similar nature,” or conduct that “may” be “otherwise restrictive or exclusionary.”

The second term is noteworthy mostly for what it is not. It does not specify either harm to competition or harm to consumers, but rather a tendency (not necessarily a likelihood) to “negatively affect” (perhaps to harm) “competitive conditions.”

We are told UMC will apply only to conduct that satisfies both sides of the conjunction, but we are also told that the FTC will evaluate conduct under these two complex criteria on a sliding scale, such that, where the markers of “unfairness” are clear, a lesser showing of a tendency to have a negative impact on competitive conditions may suffice for a finding of liability, and vice versa.

Before we try to unpack the conditions proffered by the Commission’s new policy statement, we are told to disabuse ourselves of familiar terms and standards. First, the Commission expressly abandons the consumer welfare standard. In its place, we have a sort of any-party-in-the-marketplace standard, concerned with effects on “consumers, workers, or other market participants.”⁷ Second, whether conduct “tends to” affect (negatively) any party “does not turn to whether the conduct directly caused actual harm in the specific instance at issue.” Effects need not be “current” or “measurable” or even “actual,” the distinctions between “unmeasurable” and “immeasurable,” and between “actual,” “likely,” and “possible,” notwithstanding,

Some of this relaxation of standards is supposed to be necessary to get at incipient harms under Section 5, and not just under Section 7 of the Clayton Act. But there’s a bit of a fudge on established notions of incipiency, and on the broader antitrust notion of actual or likely harm. An invitation to collude may be more or less likely to succeed, but it is, in any case, an attempt to do something that is *per se* unlawful; that is, something that is extremely likely to cause actual harm to competition and consumers should it come to fruition. There is no procompetitive rationale for an invitation to collude. But here, incipiency is divorced even from the notion that a given course of conduct by some specific party is likely to harm competition and consumers, whether it comes to fruition or not.

⁶ 2022 UMC Policy Statement, *supra* note 1, at 9.

⁷ *Id.*

Second, the Commission expressly disavows the rule of reason, calling it “open ended” and capable of delivering “inconsistent and unpredictable results.”⁸ At the same time, the new statement lacks any limiting principle, and it is hard to see how it could be more consistent or in any way predictable in application.

When we come to positive criteria, we find the unfairness laundry list catalogued above. Yet most of those terms lack any clear meaning under U.S. antitrust law, even if they occur here and there *in dicta* in Supreme Court or lower-court opinions. For example, after reeling off six terms of the “unfair” disjunction (coercive, exploitative, collusive, abusive, deceptive, and predatory), the statement first cites *Sperry & Hutchinson* for the proposition that Section 5 reaches conduct “shown to exploit consumers.” True, 50 years ago, the Court did wax expansive on the scope of Section 5.⁹ In doing so, the Court opined that a showing of the exploitation of consumers—harm to consumers—could constitute a violation of Section 5. But the current policy statement does not require harm to either competition or consumers; and the notion that the Court would today sustain a finding of UMC liability absent harm to *either* competition or consumers is dubious. Moreover, the *Sperry & Hutchinson* Court’s discussion of “exploitation” was in no way necessary to its decision in that matter; that was, namely, that the Commission had not made its case without the bounds of the antitrust laws:

The opinion is barren of any attempt to rest the order on its assessment of particular competitive practices or considerations of consumer interests independent of possible or actual effects on competition. Nor were any standards for doing so referred to or developed.¹⁰

In brief, the Court’s hoary discussion of “exploitation” has no clear precedential value. But if it did, the discussion would give no guidance to industry or the bar on the question what today’s Commission means by “exploitation.” The Commission’s statement offers no clue at all about the limits to the conduct the Commission purports to proscribe.

Elsewhere in the statement, the Commission cites *Leegin* in support of the proposition that Section 5 reaches “parallel exclusionary conduct that may cause aggregate harm.” The citation seems inapt, at best, given *Leegin*’s holding, “that Dr. Miles should be overruled and that vertical price restraints are to be judged by the rule of reason.”¹¹ The Commission characterizes *Leegin* as “holding that the extent of adoption of resale price maintenance across the industry is relevant to legality.” The Court does opine that “the number of manufacturers that make use of the practice in a given industry can provide important instruction” in a rule-of-reason inquiry into the legality of a practice.¹² But that is

⁸ 2021 Withdrawal Statement, *supra* note 2, at 3.

⁹ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

¹⁰ *Id.*, at para. 40.

¹¹ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

¹² *Id.*, at 17.

not the holding in *Leegin*, which reversed a 5th U.S. Circuit Court of Appeals decision applying a *per se* standard of liability, as had the trial court below it. *Leegin* emphasized the importance of the rule of reason (rejected by the current policy statement) and consumer welfare (rejected by the current policy statement) and noted that conduct such as retail price maintenance “may not be a serious concern unless the relevant entity has market power”¹³ (again, rejected by the current policy statement). The Commission might also recall the 9th U.S. Circuit Court of Appeals’ decision in *Boise Cascade*: “to allow a finding of a Section 5 violation on the theory that the mere widespread use of a practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior.”¹⁴

Having provided an essentially vague and open-ended account of “unfair methods of competition,” the Commission rejects the notion that it must consider any justifications for conduct it deems facially violative of that “standard.” It may, but the statement is clearest on the question of what will *not* suffice. Neither a demonstration of “net efficiencies” nor a “numerical cost-benefit” test will suffice;¹⁵ neither will benefit in another market, no matter how inextricably tied to the one in which there’s a purported tendency to foster the open-ended harms. We are told that “[s]ome well-established limitations on what defenses are permissible in an antitrust case apply in the Section 5 context as well”—as if, perhaps, we wondered whether pretextual justifications might do when net efficiencies or net consumer benefits would not.

To justify the broad expansion of its interpretation of its UMC authority, the Commission reaches extensively, if selectively, into the legislative history of the FTC Act. The statement argues that, when Congress passed the FTC Act in 1914, it intended the law to be broader than the Sherman Act. That claim, at that level of abstraction, is uncontroversial. The question had never been whether the bounds of Section 5 exceed those of the Sherman Act, to any degree, in any context. Rather, there were live questions about the extent to which Section 5 does so, and the methods by which standalone Section 5 violations might be determined. The FTC portrays the new statement as a “restoration” of “rigorous enforcement” of the ban on unfair methods of competition,¹⁶ but it does so without any rigor of its own, or any clear justification for fixing on some certain days past as halcyon.

As Commissioner Wilson observes in her dissenting statement, the Commission’s selective appeals to legislative history elides the congressional backlash triggered by the FTC’s overplaying its hand in the 1970s. It also ignores much of the past century’s development of antitrust jurisprudence, in which the Sherman and Clayton Acts have proved effective, and the courts (and the antitrust agencies) have developed principles to provide guidance as to what makes conduct unlawful.

¹³ *Id.*, at 18.

¹⁴ *Boise Cascade v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980).

¹⁵ 2022 UMC Policy Statement, *supra* note 1, at 11.

¹⁶ *FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition*, FEDERAL TRADE COMMISSION (Nov. 10, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition>.

It is well-established, as Commissioner Wilson acknowledges, that Section 5 reaches “incipient violations” of the antitrust laws. But eliminating the need to show likely anticompetitive effects, market power, or consumer harm attached to any given course of conduct, along with the repudiation of measurement (or estimation) and efficiency—as the statement does—in favor of a focus on an ill-defined “tendency to generate negative consequences” for some market participant or other can only serve to diminish rigor in FTC analysis and predictability in its conclusions. Rather, as Commissioner Wilson suggests, it is likely to favor the personal views or intuitions of a sitting majority of commissioners.

Commissioner Wilson observes that the statement “resembles the work of an academic or a think tank fellow” with dreams of “remaking the economy.”¹⁷ Adopting only vague notions of the meaning of unfairness, and lacking grounding in established antitrust analysis, the FTC promises enforcement and possible rulemaking based on the idea that appointed “expert” commissioners will be best suited to determine what conduct is unlawful. This increases the odds of arbitrary actions by the FTC. Commissioner Wilson explains that the policy statement reflects an “I know it when I see it” approach “premised on a list of nefarious-sounding adjectives” without antitrust or economic meaning or any clear methodology.¹⁸

Chair Khan responds to Commissioner Wilson by arguing that Congress purposefully created an expert agency that would target conduct outside the scope of the antitrust laws under a definition of unfair methods of competition that the agency itself would create.¹⁹ Perhaps, but in 1914, “outside the scope of the antitrust laws” meant beyond the scope of the 1890 Sherman Act, as then understood, not beyond all antitrust statutes and amendments to follow, come what may. And however the Commission’s UMC authority was (and mostly was not) specified in the FTC Act, it is clear that the agency—as an institution—was supposed to develop its expertise and the notion of UMC with oversight by (and input from) Congress and the courts. Reaching past several decades of established agency practice and decisions of the federal courts, including those of the Supreme Court, was never part of the institutional design. Not incidentally, it calls into question the subject matter of the Commission’s purported expertise.

The FTC has provided some clues as to what it hopes to accomplish, if not by any definite method or subject to any limiting principle. In the new policy statement, the Commission states that the “size, power, and purpose of the respondent” may be relevant to its UMC inquiry.²⁰ Abandoning the protection of consumer welfare, and looking to possible effects on “other market participants,” the FTC is setting its sight on so-called “bigness” and the protection of weaker competitors.

¹⁷ Wilson Dissent, *supra* note 4, at 2.

¹⁸ *Id.*

¹⁹ Statement of Chair Lina M. Khan, FEDERAL TRADE COMMISSION (Nov. 10, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/Section5PolicyStmntKhanSlaughterBedoyaStmnt.pdf.

²⁰ 2022 UMC Policy Statement, *supra* note 1, at 9.

In his supporting statement, Commissioner Bedoya makes plain that the FTC should ensure a “level playing field for small business” and “all competitors,” arguing that it is not the FTC’s job to promote efficiency.²¹ Commissioner Bedoya provides examples of conduct that the FTC may bring under the UMC umbrella, including conduct that may pass muster under the antitrust laws (or specifically, the rule of reason): local price cutting, tying conduct, exclusive contracts, rebates and preferential contracts, dominant control of inputs, manipulation, certain forms of refusal to deal, information collection on rivals, and coercion, threats, and intimidation. What Commissioner Bedoya and the Commission majority do not provide is a method for assessing when such conduct runs afoul of Section 5, or a policy rationale for condemning conduct without a showing of actual or likely harm to competition or consumers.

Finally, the policy statement also reiterates that the current FTC believes it has the power to create binding, substantive UMC rules. The combination of an assertion of overly broad and loosely defined substantive coverage of conduct, together with an assertion of broad remedial and legislative powers, previews an aggressive agency with heavy-handed enforcement and rulemaking to come.

²¹ *Statement of Commissioner Alvaro M. Bedoya*, Federal Trade Commission (Nov. 10, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStmntBedoyaStmnt.pdf.