ICLE tl;dr

The Uncertain Scope of FTC UMC Authority

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Background: U.S. law grants both the Federal Trade Commission (FTC) and the U.S. Justice Department (DOJ) authority to enforce both the Sherman Antitrust Act and the Clayton Antitrust Act. The FTC also enforces the Federal Trade Commission Act. Indeed, the agency's antitrust authority is grounded in Section 5 of that act, which prohibits "unfair methods of competition" (UMC).

But... There's been ongoing controversy about the meaning of these laws and particularly about Section 5. Both the Sherman Act and the FTC Act are written in very broad terms. Section 1 of the Sherman Act prohibits "Every contract, combination... or conspiracy, in restraint of trade." But which contracts or combinations are illegal restraints of trade? Similarly, which methods of competition are "unfair," as prohibited under Section 5? Most importantly, what, if anything, does UMC cover that isn't covered by the Sherman Act?

KEY TAKEAWAYS

A PURPOSEFUL LACK OF SPECIFICS

In writing these antitrust statutes, Congress set down general goals, an institutional structure, and enforcement powers, but left it to the agencies and the courts to develop the details. That provided for flexibility as the economy and our understanding of market competition evolved.

For more than 100 years, that's roughly how things proceeded. Both agencies brought cases; the FTC also generated research and reports; and the courts weighed in, too. Congress exercised its voice through both amendments and appropriations. The FTC monitored and contributed to economic learning in ways ultimately reflected in legal standards.

An understanding emerged that the FTC's UMC authority reached somewhat beyond the Sherman Act, but was still tethered to the central antitrust concepts of the consumer welfare standard and the "rule of reason," both of which offer courts a means to evaluate the legality of market behavior in terms of its likely harms and benefits.

WHAT ELSE, IF ANYTHING, DOES UMC COVER?

While the various antitrust laws use somewhat different language, there is considerable overlap among them. In 1941, the Supreme Court ruled (and has affirmed many times since) that UMC includes conduct prohibited under the Sherman and Clayton Acts. But UMC also includes some amount of "extra" coverage beyond the other antitrust laws—known as "standalone Section 5 authority." While there's been considerable agreement that Section 5 goes beyond the letter of the Sherman Act, there's much less agreement about what lies beyond.

For one thing, the FTC Act doesn't say. Also, relatively few decisions are based on standalone Section 5. The FTC has tended to bring cases alleging simultaneous violations of both Section 5 and the Sherman Act, and the DOJ doesn't enforce the FTC Act. The relevant court decisions are old and likely out of date. Complicating the issue is that many of the cases recognizing standalone authority are ones the government lost, so the decisions suggest that Section 5 reaches something beyond the Sherman Act, but fail to indicate what that might be.

KEY CONSTRAINTS IMPOSED BY CONGRESS AND THE COURTS

In 1972's *FTC v. Sperry & Hutchinson*, the U.S. Supreme Court famously found that there may be Section 5 violations that have "anticompetitive impact" but do not violate the other antitrust laws. But the FTC lost that case, partially because the agency did not appeal the lower court's decision that there was no Sherman Act violation and because it failed to establish a Section 5 violation on any other grounds. The Court's ruling didn't tell us what would constitute a standalone violation of Section 5, except that consideration of "public values beyond… those enshrined… in the… antitrust laws" was permitted.

Yet in the wake of *Sperry & Hutchinson*, as well as a dust-up between the FTC and Congress over Section 5's prohibition of "unfair or deceptive acts or practices" (UDAP), Congress amended Section 5 to make clear that "public policy considerations may not serve as a primary basis" for liability.

More recent decisions have reinforced the importance of an integrated approach to the antitrust laws, as well as of both the rule of reason and the consumer welfare standard. This prompted former FTC Chairman Bill Kovacic to write that the FTC "should not… rely on the assertion… that the Commission could use its UMC authority to reach practices outside both the letter and spirit of the antitrust laws. We think the early history is now problematic, and we view the relevant language… with skepticism."

A GENERAL CONSENSUS

Most experts recognize that Section 5 operates as a measured extension of the Sherman Act, with the two laws serving a common goal. Thus there is agreement that Section 5 applies to "invitations to collude." If two or more competing firms agree to fix prices, that's an illegal agreement that violates the Sherman Act. But if one firm attempts unsuccessfully to collude—inviting a competitor to join in a price fixing scheme only to be rebuffed—there's no *agreement* at all, much less an actual restraint. But because it's an attempt to violate the Sherman Act that presents a risk of harm to competition and consumers but serves no legitimate business purpose, most everyone agrees it would properly be within the scope of Section 5.

For more on ongoing controversies regarding Section 5, see the ICLE explainer Issues with FTC UMC Enforcement.

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