Unfair Methods and the Competitive Process:
Enforcement Principles for the Federal Trade Commission's Next Century
Keynote Address by FTC Chairwoman Edith Ramirez
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I want to thank the George Mason Law & Economics Center and Law Review for hosting this event to commemorate the Federal Trade Commission's 100th anniversary. It is a pleasure to be here with friends and colleagues, who, like me, care deeply about the agency's mission and future.

The FTC was born one hundred years ago to protect consumers from unfair methods of competition. That mandate is as important to consumers in the information age as it was to their predecessors who lived in the era of the great railroad and steel trusts. The Commission's challenge is the same too – to use its expertise to guarantee that consumers enjoy the benefits of a dynamic and competitive marketplace.

In light of the occasion, I want to take this time to share my thoughts on those few words that gave us our marching orders a century ago: "unfair methods of competition in commerce are hereby declared unlawful."[1]

I want to speak in particular about two distinct though related issues. The first is the substantive scope of our Section 5 enforcement authority, which is grounded in the origins of the FTC. The second is the approach we should use in developing our Section 5 enforcement principles as we enter our next century. I will take each issue in turn.

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[1] Federal Trade Commission Act, Ch. 311, 38 Stat. 717 (1914). In 1938, Congress expanded the class of prohibited conduct to include "unfair or deceptive acts or practices." Wheeler-Lea Act, 75 Pub. L. 447, 52 Stat. 11 (Mar. 21, 1938). My remarks today relate solely to the prohibition on "unfair methods of competition."

I. The Substantive Scope of the FTC's Section 5 Authority

In 1914, Congress created an independent expert agency to pursue pro-competition objectives outside the limits of the Sherman Act. In the early decades that followed, no one doubted that the agency's "unfair methods" authority extended well beyond the Sherman Act. In fact, the only question at that time was whether Section 5 even applied to conduct prohibited by the Sherman Act. As late as 1948, some parties argued that, whatever else it might mean, "the term 'unfair methods of competition' should not be construed as embracing *any* conduct within the ambit of the Sherman Act."[2] The Supreme Court disagreed and concluded that Section 5 fully incorporates but is not limited to conduct that also falls within the scope of the Sherman Act.[3]

What remained was to define the Commission's additional authority to pursue conduct that is not barred by the Sherman Act – what we now call our "standalone" Section 5 authority.[4] As a purely legal matter, the Supreme Court has repeatedly stressed that our Section 5 authority extends very broadly. In the early decades of the Commission's institutional life, the Commission applied that authority to ban a great many business practices that would never cross an antitrust lawyer's desk today. These included practices that did not threaten competition but were deemed immoral or otherwise objectionable, such as lotteries and commercial bribery.[5] In 1972, the Supreme Court endorsed this expansive view of our "unfair methods" authority,

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[2] *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 692 (1948) (emphasis added).

[3] *Id.*

[4] Because the interplay between Section 5 and the Sherman Act is the main focus of inquiry, I will use the term "Sherman Act" to denote both the Sherman Act and the Clayton Act.

[5] *See* William Kovacic and Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 945 (2010).

holding unanimously that the Commission may “consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”[6]

In recent decades, however, the Commission has tied its standalone Section 5 authority to objectives grounded in at least the spirit of the antitrust laws. Administrative agencies derive their authority and credibility from their institutional expertise. By long tradition, our expertise has centered on preserving consumer welfare. And in the area of competition, we protect consumer welfare best when we focus our enforcement activities on conduct that threatens the competitive process.[7] Of course, that enforcement objective animates the Sherman Act as well.

At the same time, Congress directed us to prohibit some types of conduct that generalist courts would not deem violations of the Sherman Act, a point that the Supreme Court reaffirmed in 1986.[8] Congress gave us that broad authority in 1914 because it believed the Sherman Act was too rigid to encompass all forms of anticompetitive conduct that should be subject to antitrust enforcement.

That rationale still applies today, even though, to some extent, the Sherman Act is more flexible and effective than Congress predicted it would be. But, while the Sherman Act has been applied more broadly than many expected in 1914, courts have limited its scope in recent decades. To be sure, in many cases where courts have narrowed the scope of Sherman Act liability, they have done so because it needed to be narrowed. We have a more sophisticated understanding of antitrust economics now than we did in the early-to-mid twentieth century, and we are therefore more careful about the type of conduct we prohibit. But in some areas, courts

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[6] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

[7] *See, e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (“The antitrust laws … were enacted for the protection of competition not competitors.”) (internal quotations omitted).

[8] *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (1986).

apply the Sherman Act more narrowly than sound competition policy dictates, mainly because they question their own institutional ability to understand market dynamics and fashion remedies that promote consumer welfare. Recent antitrust decisions routinely express these concerns about the institutional limitations of generalist courts and the economic consequences of false positives when courts intervene too aggressively.[9] Courts are also plainly concerned about the over-deterrent effects of treble damages liability under the Sherman Act.[10]

When courts express these institutional concerns, they often compare themselves unfavorably to specialist sector agencies such as the Federal Communications Commission.[11] As these courts observe, such agencies have built up years of expertise in studying particular industries and are sometimes better positioned to resolve complex competitive issues on behalf of consumers.

As an institution, the FTC falls somewhere on the continuum of expertise between a generalist court and an industry-specific authority. Like federal courts, we have general authority over most industries, and we focus more on law enforcement than on prescriptive

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[9] *See, e.g.*, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 452 (2009) (basing holding in part on "[i]nstitutional concerns" about the role of courts); *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 281-82 (2007) (noting that, in light of "the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible" in antitrust matters, it is difficult for courts across the country to reach consistent results); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (stating that the "cost of false positives counsels against an undue expansion of § 2 liability."). *See also* Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683 (2011).

[10] *See, e.g., NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998) (expressing concern that a per se treble damages rule "would discourage firms from changing suppliers – even where the competitive process itself does not suffer harm"); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984) (emphasizing that it is important to distinguish between lawful conduct and price-fixing agreements because "the latter are subject to per se treatment and treble damages"); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984) (rejecting intra-enterprise conspiracy as a basis for Sherman Act liability and noting doing so "eliminate[s] treble damages from private state tort suits masquerading as antitrust actions").

[11] *See, e.g., Trinko*, 540 U.S. at 414 (noting that "[e]ven if the problem of false positives did not exist, conduct consisting of anticompetitive violations of [regulatory obligations] may be … beyond the practical ability of a judicial tribunal to control") (internal quotations omitted).

regulation. But like sector regulators, we have developed considerable expertise over markets and competition policy. Hundreds of lawyers and economists throughout the Commission have devoted their careers to analyzing the proper role of antitrust enforcement in promoting consumer welfare. Our workshops and staff reports are peerless in their analysis of specific competition challenges. And Congress gave us special powers to conduct investigations and research studies precisely because it recognized our institutional expertise and wished to deepen it.[12]

Moreover, when we use our standalone Section 5 authority, we do so with a far lighter touch than a generalist court. Typically, we impose only a cease-and-desist order, and our enforcement actions create more limited risk for follow-on private damages claims under federal law. In contrast, enforcement actions under Sherman Act standards often give rise to follow-on suits for treble damages.

Given these key differences in expertise and remedies, it should not surprise anyone that we draw the lines of acceptable conduct differently than generalist courts would when applying the Sherman Act to the same conduct. Indeed, there has been some bipartisan consensus that we *should* sometimes draw those lines differently, precisely because we are not a generalist court. Former Chairman Bill Kovacic has suggested that our "institutional comparative advantage" and more limited remedies "could be presented front and center as a basis for applying Section 5" more broadly than the Sherman and Clayton Acts.[13] Professor Herbert Hovenkamp has likewise noted that the Commission enjoys "structural and procedural advantages over a traditional

[12] *See* Section 6(b) of the FTC Act, 15 U.S.C. § 46(b).

[13] Kovacic & Winerman, *supra* note 5, at 947.

federal court" that support FTC enforcement outside the bounds of the Sherman and Clayton Acts.[14]

All this said, I do not want to overstate the role of standalone Section 5 enforcement. In most of the antitrust cases that we bring, the Sherman and Clayton Acts are more than sufficient to achieve our competition objectives. Accordingly, our day-to-day enforcement efforts will remain largely focused – as they have been for many decades – on enforcement under the standards established by courts for the Sherman Act. But where our expertise allows us to identify likely competitive harm, we should use the authority that Congress gave us 100 years ago to prohibit anticompetitive conduct that falls outside the scope of the Sherman Act.

II. **The Path Ahead for Developing Section 5 Doctrine**

This brings me to the second topic I would like to address today: the process the Commission uses to develop Section 5 doctrine. I favor the common law approach, which has been a mainstay of American antitrust policy since the turn of the twentieth century. The Sherman Act is of course a case in point. To paraphrase, the familiar language of the Act prohibits contracts in "restraint of trade" and practices that "monopolize." Well over a century of antitrust law in the United States has rested mostly on judicial interpretation of the brief and broad language of that statute.

Congress deliberately kept the language broad because it understood that markets, commercial practices, and economic analysis are in constant flux and that courts would therefore need to refine antitrust principles over time on a case-by-case basis. The value of that common law approach is virtually undisputed today, even in complex doctrinal areas involving the rule of reason, where antitrust risks can be difficult for private actors to predict in advance with

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[14] Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 876-77 (2010).

complete accuracy. And we accept that common law approach even though the remedies for a Sherman Act violation can be far more severe than any remedy the FTC could impose under Section 5.

Just as Congress wrote the Sherman Act in broad terms to permit judicial flexibility, it also wrote Section 5 in broad terms to permit administrative flexibility. It understood that it would be difficult, if not impossible, to describe in advance all of the conduct that may raise valid competitive concerns anywhere in the economy.

While there is some tension between flexibility and certainty, there are costs to placing excessive weight on certainty, and effective antitrust enforcement must be at least as concerned with protecting competition. And if we think a little more deeply, we see that erring on the side of rigidity produces certainty only for some commercial actors, not necessarily for the marketplace as a whole. For example, an enforcement policy that favors under-enforcement on unilateral conduct might provide greater certainty for the monopolist, but it generates a great deal of uncertainty for upstarts considering whether to undertake major investments to challenge the monopolist's dominant paradigm.

A common law approach is well-suited to finding the right balance as we evaluate industries and cases over the course of many years. For that reason, I have expressed concern about recent proposals to formulate guidance that seek to codify our "unfair methods" principles for the first time in the Commission's 100-year history. While I do not object to guidance in theory, I am less interested in *prescribing* our future enforcement actions than in *describing* the broad enforcement principles revealed in our recent precedent.

As every American law student knows, common law is best understood by reading and analyzing the leading case decisions, each of which is firmly grounded in particularized facts.

Of course, it is useful to compile a Restatement. And it is helpful to have good law review articles and treatises. But the real guidance rests with the primary sources. At the FTC, that means the decisions, complaints, statements, and analyses associated with our enforcement actions.

In keeping with a common law approach, any effort to create new standalone Section 5 precedent can provoke debate at first, but it often results in well-established norms of business conduct. For example, when the FTC first invoked Section 5 to stop invitations to collude between competitors, it sparked a healthy debate about the use of Section 5 in the absence of market power. That initiative also elicited considered discussions on how to fashion an appropriate remedy for unaccepted solicitations, one that would prevent efforts to collude but not chill procompetitive business communications. But it is now widely accepted that the FTC appropriately uses its Section 5 authority when it enforces a prohibition on invitations to collude.

Our most recent Section 5 cases show that the Commission will condemn conduct only where, as with invitations to collude, the likely competitive harm outweighs the cognizable efficiencies. This is the same standard we apply every day in our investigations. For example, in our recent action charging Google with breach of its FRAND commitments, we alleged that Google's conduct lacked a "legitimate efficiency justification" to outweigh the "likely anticompetitive effects."[15] Similarly, in our action last year against Bosley and Aderans for the improper exchange of competitively sensitive information, we alleged that the exchange "endangered competition" and "served no legitimate purpose."[16]

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[15] *In re Motorola Mobility LLC,* No. C-4410 (F.T.C. July 23, 2013) (complaint), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolacmpt.pdf.

[16] *In re Bosley, Inc.*, No. C-4404 (F.T.C. May 30, 2013) (complaint), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/06/130605aderansregiscmpt.pdf.

Of course, reasonable people may disagree about how to measure and account for the harms and efficiencies of particular conduct. But reasonable people have disagreed for many years about those very issues under the Sherman Act. Each time we confront a potential violation of standalone Section 5, we engage in reasoned debate about how to exercise our authority in the best interest of American consumers. And each time we consider whether precedents established in earlier cases should be followed, distinguished, or modified to reflect the continuous, case-oriented refinement of competition doctrine. That is the essence of the common law method. Our analysis is richer because of it and so are consumers.

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Let me conclude by saying that I am excited and optimistic about the agency's future and our positive agenda on behalf of consumers. I welcome the opportunity for continued dialogue on the challenges we will confront as we enter our second century, including those I have discussed this morning.

Thank you.