ANTITRUST AND COMPETITION NEWS

Antitrust Law's Unwritten Rules of Unfair Competition

BY SANDEEP VAHEESAN *November 17, 2021*

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Does the Sherman Act actually "protect competition, not competitors"? An examination of the case law reveals a more nuanced picture, in which the courts do not indiscriminately protect competition, but rather restrict certain forms of competition they deem unfair. The FTC should codify and strengthen these implicit norms.

Is competition always good? According to many antitrust enforcers, judges, and scholars, the answer is yes. When debating the purpose of the Sherman Act and its antimonopoly provision (Section 2) in particular, they declare that Congress enacted the law for "the protection of competition, not competitors." They describe desirable business conduct that the law should bless as "procompetitive" and undesirable conduct that the law should restrict as "anticompetitive." Even some in the progressive reform camp treat competition as an unalloyed good and contend that "the protection of the competitive process" is the correct aim of antitrust law.

Yet, a careful examination of the case law reveals a more nuanced picture, in which the courts do not indiscriminately protect competition. In interpreting Section 2, the Supreme Court and federal courts of appeals have for more than a century restricted *certain* forms of competition as unfair. Rather than protect all methods of business rivalry, as I explain in a forthcoming law review essay, the courts hold that certain forms of competition are illegal. What normative principles inform the legal restrictions on particular competitive practices? Judicial interpretations of antitrust law limit firms' ability to obtain or maintain a monopoly using their market dominance, advantageous access to finance, or practices generally prohibited by other laws. These underlying norms of unfairness are, however, rarely acknowledged openly in antitrust complaints and decisions. Without an honest acknowledgement of this morality, we can only discuss *what* practices the Sherman Act should proscribe, not *why* the law should proscribe them. The Federal Trade Commission (FTC) can provide philosophical clarity and a practical way forward. To make the current antitrust morals of the marketplace explicit and strengthen their legal force, the FTC should codify the Sherman Act's implicit norms of unfair competition.

In interpreting Section 2 of the Sherman Act, the Supreme Court has held that monopoly power alone is not sufficient to violate the law. In a seminal 1966 decision called *United States v. Grinnell Corp.*, the Court ruled that "[t]he offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." The Court was clear that monopoly itself, as well as certain forms of acquiring or preserving a monopoly, were legal under Section 2. For example, a firm that produces and markets more efficient rooftop solar panels and captures the entire market as a result is not guilty of monopolization.

When does a firm face liability for monopolization? In articulating the meaning of "willful acquisition or maintenance" of monopoly (in the language of the *Grinnell* decision), the courts have identified a range of practices. Four are worth highlighting. First, a vertically integrated firm that has a monopoly in Market 1, under certain circumstances, cannot refuse to deal with a non-integrated, dependent firm in Market 2 as a means of acquiring or maintaining a monopoly in Market 2. Second, a monopolist cannot coerce or induce trading partners, such as distributors and suppliers, into not dealing with the monopolist's competitors and thereby restrict their market access. Third, a monopolist—or an aspiring monopolist—cannot deliberately run losses as a means of eliminating competitors to acquire or preserve a monopoly. Fourth, a firm cannot acquire or maintain a monopoly using generally prohibited practices, such as deception and property destruction.

In limiting or prohibiting these four practices, the courts have not described why they are improper or unfair. Judges label these practices as "anticompetitive" or "harmful to competition," but generally have not offered a normative rationale for restricting them. A lawyer or law student who wants to know *why* the Sherman Act regulates exclusive dealing and below-cost pricing will find that the antitrust case law sheds little light.

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A critical read of the legal precedent reveals an implicit moral conception of unfair competition. First, in restricting refusals to deal and exclusive dealing, the courts limit firms' ability to use their dominance to acquire a competitive advantage to maintain a monopoly or to obtain a new monopoly. In other words, monopolists are not free to coerce dependent rivals or trading partners as a method of competition. A 1948 Supreme Court decision recognized this anti-coercion norm, stating that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

Second, by limiting below-cost pricing, the courts restrict firms from using their financial advantages to obtain or maintain monopolies. For example, a venture capital-backed enterprise cannot run losses in a price war against rivals, if this strategy carries a "dangerous probability of actual monopolization." Similarly, a national firm with monopoly power in many local markets cannot run losses in other markets in an effort to eliminate rivals and acquire or restore its dominance. In contrast, firms are free to cut prices on account of a "lower cost structure" arising from more efficient operations.

Third, the courts have incorporated public policy into monopolization doctrine. Firms are not at liberty to use practices that are prohibited by other federal statutes or the common law, such as deception and sabotage, to obtain or perpetuate a monopoly.

Instead of promoting competition indiscriminately, the antitrust laws restrict certain forms of competition. Parties injured by these proscribed competitive methods have the right to treble damages and broad injunctive relief under the Clayton Act. Customers can recover monopolistic overcharges, and suppliers can recoup monopsonistic underpayments. In addition to purchasers and sellers, competitors injured by practices such as exclusive dealing and predatory pricing can obtain lost profits from the offending monopolists. Contrary to the cliché that the Sherman Act "protects competition, not competitors," the law restricts certain forms of competition and protects rivals injured by them. Indeed, if applied literally, the "protect competition, not competitors" bromide would mean that a monopolist could bomb the factory of an upstart rival to eliminate it as a competitive threat and not face any consequences under the antitrust laws.

Looking ahead, the FTC should codify and strengthen the Sherman Act's implicit notions of unfair competition. Responding to the judicial narrowing of the Sherman Act and the adoption of the rule of reason in *Standard Oil Co. v. United States*, Congress created the FTC in 1914 and gave it the authority to prohibit "unfair methods of competition"—a phrase that plainly recognizes that not all forms of competition are welcome and worthy of legal protection. Critically, the Congress that passed the FTC Act wanted the new Commission to strike at trade restraints in their "incipiency" well before firms obtained monopolistic positions. Given the statutory text and legislative history of the FTC Act, the Supreme Court held that the FTC could function "like a court of equity" and prohibit "not only practices that violate the Sherman Act and the other antitrust laws, but also [those] that the Commission determines are against public policy for other reasons."

The current FTC under Chair Lina Khan has signaled it will use its unfair methods of competition authority much more ambitiously than recent Democratic and Republican commissions have.

What should the FTC do? Here are three possibilities for FTC rulemakings or policy statements that would draw on and expand the Sherman Act's existing norms regarding unfair competition: First, the FTC should prohibit exclusive dealing and other exclusionary contracting by dominant firms. (A public interest coalition led by the Open Markets Institute, where I work, petitioned the FTC for such a rule in July 2020.) Second, the FTC should ban below-cost pricing by near-dominant firms and prevent well-heeled corporations from deploying their financial firepower as a competitive weapon. Third, the FTC should deem violations of other laws, such as environmental and labor laws, as an unfair method of competition. By way of example, a firm can gain a critical competitive edge through a union-busting campaign that violates the National Labor Relations Act (NLRA). It can keep wage bills low and gain an important cost advantage over high-road rivals which comply with the NLRA and respect their workers' right to unionize.

These three actions would restrict firms from using market dominance, superior financial resources, and generally prohibited practices as a method of competition. The proposed FTC policymaking program would not be purely negative and proscriptive in effect. It holds the promise of directing business strategy toward more socially beneficial ends. By restricting certain competitive methods as "unfair," the FTC would channel business strategy in other directions. Instead of trying to use dominance, financial privileges, or general lawbreaking as a competitive method, more firms would seek to compete by treating customers, workers, and suppliers fairly, developing new goods and services, pursuing operational efficiencies, and expanding production capacity. The result could be a political economy with more affordable goods and services, higher wages, more jobs, and greater investment. The merits of an aggressive FTC competition policymaking agenda in general and its particulars can and will be debated, but this prospect reveals a basic truth: Lawmakers, regulators, and the public need to ask not whether the law promotes competition, but what types of competition it promotes.

Disclosure: The Open Markets Institute, where the author is employed, led a coalition that petitioned the FTC to prohibit exclusive dealing and other exclusionary contracting by dominant firms in July 2020.

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