

FTC Pay-To-Block Challenge May Foretell Antitrust Crackdown

By **Bruce McCulloch, Angela Landry and Morgan Marmaro** (October 17, 2022, 6:42 PM EDT)

The [Federal Trade Commission](#)'s recent lawsuit challenging alleged pay-to-block schemes on the part of pesticide manufacturers [Syngenta Crop Protection AG](#) and [Corteva Inc.](#) is among latest efforts by the U.S. antitrust agencies to ramp up antitrust enforcement under the Biden Administration.

In the press release announcing the Sept. 29 Federal Trade Commission v. Syngenta Crop Protection **complaint**, filed in the U.S. District Court for the Middle District of North Carolina, FTC Chair Lina Khan described the companies' loyalty programs as efforts to "[pay] off distributors to block generic producers from the market."

The lawsuit arises from a broader political context that has almost explicitly set the stage for the FTC to investigate and challenge certain distribution arrangements, such as loyalty programs, exclusivity arrangements and tying.

Antitrust Agencies Primed For Distributor-Arrangements Challenge

President Joe Biden has made competition a priority, calling upon the FTC and the [U.S. Department of Justice](#) to vigorously enforce the antitrust laws to promote competition. The FTC and DOJ have heeded the call, making clear that they intend to ramp up enforcement.

In many instances, the agencies are reinvigorating analytical standards and claims that in recent decades have generally been treated, whether rightly or not, as too difficult to administer and insufficient to achieve antitrust laws' goals.

For example, in an April speech at the University of Chicago Stigler Center's Antitrust and Competition Conference, Assistant Attorney General Jonathan Kanter, the head of the DOJ's Antitrust Division, advocated for less reliance on a mathematical exercise undertaken by economic experts to measure welfare tradeoffs in favor of

promot[ing] material progress, quality, and innovation, "at the same time" that it supports our democracy and preserves a society of choice and opportunity.

More recently, Khan announced a forthcoming reactivation of the FTC's authority under standalone Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition, to target a broader range of conduct than already prohibited by the traditional antitrust laws such as the Sherman Act, and she suggested that this will include the use of the FTC's expertise to distinguish between what is fair and unfair.

FTC Commissioner Alvaro Bedoya agrees, having advocated for a return to a fairness



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standard over an efficiency standard. In support of his proposal, he called out examples of distribution arrangements that led to unfair outcomes, and he recommended reviving enforcement of certain antitrust laws that he said have a fairness mandate, such as the Robinson-Patman Act, which targets price discrimination.

Additionally, the FTC both issued a policy statement and launched an industry study in June 2022 indicating its intent to closely scrutinize drug manufacturers' distribution arrangements with pharmacy benefit managers that seek to exclude lower-cost versions of the drugs through the use of rebates and fees paid to pharmacy benefit managers and other pharmaceutical supply chain intermediaries.

The policy statement identified the legal authorities it has available to challenge these practices, including statutes it has not relied upon in decades, such as the Robinson-Patman Act and Section 3 of the Clayton Act, which prohibits certain distribution arrangements where a sale is conditioned on the purchaser agreeing to limit its purchase of competing products from other sellers.

Both the FTC and DOJ have made clear that they will utilize all tools available to them to challenge agreements that they consider anti-competitive. This would be a change from recent practice where it was largely private litigants who led the charge in challenging distribution agreements.

Loyalty Programs: FTC v. Syngenta and Corteva

Against this backdrop, it is not surprising that the FTC has brought a lawsuit reviving agency enforcement to challenge certain distribution arrangements.

The complaint against Syngenta and Corteva alleges that the companies use their loyalty programs to pay distributors to exclude competitors' generic crop-protection products — e.g., herbicides, fungicides, and insecticides — from their inventories.

A group of farmers followed suit this week with a follow-on complaint of their own against the companies. According to both complaints, the companies' loyalty programs effectively require distributors to limit the crop-protection products they purchase from generic manufacturers, depriving those generic manufacturers of the ability to compete effectively, and in turn allowing Syngenta and Corteva to maintain supracompetitive prices for their products.

The FTC alleges that, as a result of the loyalty programs, farmers pay more for the crop-protection products at issue, and generic manufacturers have decided to exit, or to never enter, the markets for these products.

Additionally, the FTC alleges that, for the same reason, the loyalty programs have deterred generic manufacturers from innovating to improve their crop-protection products.

A Reinvigorated Approach to Distribution Arrangements

Although the case is in early stages, the outcome will be important for distribution-based businesses. One thing is already evident: The agencies are scrutinizing distribution arrangements — particularly those that have the potential to exclude competitors — more so than in the last few decades.

Although private litigants have challenged distribution arrangements in the past, the FTC's

challenge to Syngenta's and Corteva's loyalty programs portends heightened enforcement in this area.

The FTC's prior practice has been to exercise significant restraint in challenges to distribution arrangements, focusing on Sherman Act violations and bringing challenges under other authority only rarely. For example, the FTC has brought claims under its standalone FTC Act Section 5 authority, which prohibits unfair methods of competition that the other antitrust laws do not.

In some cases, the FTC has gone out of its way to make clear that standalone Section 5 claims cannot be brought by private litigants in follow-on actions. But agency leadership under the Biden administration has been making moves toward more aggressive enforcement relating to distribution arrangements.

The case against Syngenta and Corteva is among the first enforcement actions the FTC has brought in this pursuit. Notably, the FTC has brought a claim in this case under Section 3 of the Clayton Act — among other, more traditional federal antitrust statutes — a first for either the FTC or DOJ in decades.

In reviving agency enforcement of Section 3, the FTC has made clear that it has its eye on distribution arrangements and will use all available tools to challenge the ones it deems problematic.

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