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The FTC's New Unfair Methods of Competition Policy Statement: To What Extent Will the Approach Survive in Court?

*By Koren W. Wong-Ervin & Sam Sherman**

On November 10, 2022, the Federal Trade Commission (FTC) issued a new policy statement regarding the scope of unfair methods of competition (UMC) under Section 5 of the FTC Act.[1] The Statement was voted out along party lines with Commissioner Christine Wilson dissenting;[2] it replaces the Obama Administration's bipartisan 2015 Statement that tethered the analysis of UMC to the rule of reason standard. A key question is to what extent the Statement's approach is likely to survive in court. While Section 5 clearly reaches beyond the Sherman and Clayton Acts, the issue is how far.

The Statement sets forth "two key criteria" for determining whether conduct is a UMC. First, "[t]he conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature."[3] Second, "[t]he conduct must tend to negatively affect competitive conditions" by "affecting consumers, workers or other market participants."[4] The two principles are weighed according to a sliding scale. Where the indicia of unfairness are clear, less evidence may be necessary to show a tendency to negatively affect competitive conditions. The "tend[s] to negatively affect" criteria can be met not only by considering the "cumulative effect of a variety of different practices" by the defendant, but also when taken together with "the conduct of others engaging in the same or similar conduct."[5]

Analysis of caselaw suggests that many of the theories set out in the Statement—namely, those that go beyond actual or threatened harm to competition—are unlikely to survive in court. The main alleged support for the Commission's new approach are cases decided near the very end of the period of extremely aggressive enforcement approaches (1937–1973), which was characterized by *per se* rules. "At the point of 'peak *per se*' in 1972, the Supreme Court openly mocked the use of economic analysis."[6] Since then, the Supreme Court has issued a number of landmark decisions aimed at bringing antitrust law in line with modern economic learnings. While those decisions were decided under the antitrust laws and did not explicitly address the FTC Act, appellate court decisions on the reach of UMC, the makeup of the current Supreme Court, and modern economics support a more limited reach for UMC.

One pending case before the Supreme Court, *Axon Enterprise, Inc. v. Federal Trade Commission*, may set limits on the FTC's discretionary powers. The issue is whether federal courts have jurisdiction to hear constitutional challenges to the Federal Trade Commission's structure, procedure, and existence, or such challenges must be raised

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[1] Policy Statement of the Federal Trade Commission Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [hereinafter "Policy Statement"].

[2] Dissenting Statement of FTC Commissioner Christine S. Wilson, Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf [hereinafter "Wilson Dissent"].

[3] Policy Statement, *supra* note 1, at 9.

[4] *Id.*

[5] *Id.* at 10.

[6] Abbott B. Lipsky, Jr., *Ohio v. American Express: The Supreme Court Still Passes the Test*, CPI ANTITRUST CHRONICLE, June 2019, at 3, https://www.competitionpolicyinternational.com/wp-content/uploads/2019/06/CPI-Lipsky.pdf (citing *United States v. Topco Assocs.*, 405 U.S. 596, 609 n.10 (1972)).

first in the administrative proceeding.[7] While this case does not present the issue of the reach of the UMC provision, depending upon the outcome, it may still be important to the consideration of the reach of the Commission's powers.

Given these considerations, some have questioned whether the Statement is purely a political one and not indicative of the types of enforcement actions the Commission will actually bring. Another possibility is that the Commission will bring cases designed to push the caselaw to a more expansive approach in line with the majority's interpretation of the text, structure, purpose, and legislative history of Section 5. And, given the "culture of consents" the Commission may be relying upon its ability to extract commitments from parties well beyond what it could obtain in court, even when those commitments "may impair rather than improve competition and thereby harm consumers."[8]

While there is some comfort in the courts as a check, litigation takes significant time and the FTC's new approach is likely to chill procompetitive conduct and serve as a tax on transactions in the meantime. As Commissioner Wilson warns, the new approach is likely to result in harm to consumers, including through higher prices and reduced innovation.[9] One of the primary benefits of the consumer welfare standard is that it tethers competition law to the methodological rigors of economics by having theories of harm with testable implications. Did quality-adjusted prices go up, output go down, or was innovation harmed? A standard that results in different outcomes from the consumer welfare standard necessarily harms consumers.[10] For example, applying alternative standards to protect less-efficient competitors or workers despite lower prices, increased output, and/or increased innovation sacrifices those benefits to consumers.[11]

The remainder of this article is organized as follows: Section I summarizes the Policy Statement, Section II analyzes the caselaw interpreting the scope of UMC, and Section III identifies some theories of harm that are unlikely to survive in court.

I. The Policy Statement

The Statement defines unfair methods of competition as "conduct that goes beyond competition on the merits. Competition on the merits may include, for example, superior products or services, superior business acumen, truthful marketing and advertising practices."[12] There are "two key criteria to consider when evaluating whether conduct goes beyond competition on the merits," which are "weighed according to a sliding scale."

1. "The conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature."
2. The conduct "tend[s] to negatively affect competitive conditions," by "affecting consumers, workers or other market participants." "These consequences may arise when the conduct is examined in the aggregate along with the conduct of others engaging in the same or similar conduct, or when the conduct is examined as part of the cumulative effect of a variety of different practices by the respondent."[13]

While caselaw on the reach of the UMC provision lists coercive, collusive, deceptive,

[7] *See* Petition for Writ of Certiorari, Axon Enterprise, Inc. v. Fed. Trade Comm'n, Jul. 20, 2021 (No. 21-86).

[8] Judge Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, *in* WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE – LIBER AMICORUM (VOL. I) (Nicolas Charbit et al. eds., 2013).

[9] *See* Wilson Dissent, *supra* note 2, at 8–9.

[10] *See, e.g.*, Mark Israel, Jonathan Orszag & Jeremy A. Sandford, *New Merger Guidelines Should Keep the Consumer Welfare Standard*, CPI ANTITRUST CHRONICLE, Nov. 2022, at 7–8, https://www.compasslexecon.com/wp-content/uploads/2022/11/New-merger-guidelines-should-keep-the-consumer-welfare-standard_CPI-Antitrust-Chronicle_Mark-Israel_Jonathan-Orszag_Jeremy-Sandford.pdf (arguing in the merger review context that, "if a new standard condemned mergers that harmed workers only if consumers were also harmed, it would be equivalent to the [consumer welfare standard].").

[11] *See* Wilson Dissent, *supra* note 2, at 8.

[12] Policy Statement, *supra* note 1, at 8–9.

[13] *Id.* at 9.

predatory, or exclusionary conduct,[14] the new Policy Statement expands the list to include conduct that is "exploitative" or "abusive" without defining those terms. Looking to foreign jurisdictions such as the European Union for guidance, exploitative abuses of dominance include conduct such as excessive pricing—conduct that the U.S. Supreme Court has long held does not violate the other U.S. antitrust laws.[15]

In her dissent, Commissioner Christine Wilson points out that, "[w]hen conduct is labeled 'facially unfair' pursuant to the first criterion, the second criterion is rendered essentially irrelevant."[16] While the Statement says, "[w]here the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions," Commissioner Wilson reasons that, because the criteria are weighed on a sliding scale, if the first criteria is weighed 100 percent, then the second criteria requires zero percent. She also notes that the Statement's examples seem to rely upon the adjectives listed in the first criteria.

Under the Statement, the FTC may consider procompetitive benefits, although the burden is asymmetric, allowing the Commission to make a case based upon a showing that proscribed conduct meets the "tend[s] to negatively affect" standard—a lower standard than under the other antitrust laws—while requiring parties to establish that cognizable, procompetitive benefits actually "outweigh the harm." In cases involving conduct in its incipiency, it is difficult to imagine how a party could show such actual net benefits. That said, it may be possible to make such a showing when there is evidence of what happened in the market in terms of factors like price, output, quality, or innovation. However, even if parties can show benefits outweigh harm, the analysis would "not be a net efficiencies test or a numerical cost-benefit analysis," but rather would need to take into account non-specified "non-quantifiable harms."[17]

Finally, the Statement specifies that "Section 5 does not require a separate showing of market power or market definition when the evidence indicates that such conduct tends to negatively affect competitive conditions."[18]

II. Judicial Precedent on the Reach of UMCs

There are five key decisions on the reach of Section 5's UMC provision: two Supreme Court cases from the mid-1960s to early 1970s—*Fed. Trade Comm'n v. Texaco, Inc.* (1968)[19] and *Fed. Trade Comm'n v. Sperry & Hutchinson Co.* (1972)[20]—and three appellate court cases from the 1980s—the Ninth Circuit's decision in *Boise Cascade Corp. v. Fed. Trade Comm'n* (1980)[21] and the Second Circuit's decisions in *Official Airline Guides Inc. v. Fed. Trade Comm'n* (1980)[22] and *E.I. du Pont de Nemours & Co. v. Fed. Trade Comm'n ("Ethyl")* (1984).[23]

While the older Supreme Court decisions could be read as support for at least some of the expansive approaches articulated in the new Policy Statement, the subsequent cases from appellate courts in the 1980s impose important

[14] *See infra* section II.

[15] *See, e.g., Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135–37 (1998) (explaining that the evasion of a pricing constraint may hurt consumers without harming "the competitive process, *i.e.* . . . competition itself," and distinguishing the mere breach of a pricing commitment from the unlawful acquisition or exercise of monopoly power by pointing out that, with the former, the "consumer injury flowed . . . from the exercise of market power that is *lawfully* in the hands of a monopolist"); *see also Rambus, Inc. v. FTC*, 522 F.3d 456, 464 (D.C. Cir. 2008) ("Even if deception raises the price secured by a seller, but does so without harming competition, it is beyond the antitrust laws' reach.").

[16] Wilson Dissent, *supra* note 2, at 4.

[17] Policy Statement, *supra* note 1, at 11.

[18] *Id.* at 10.

[19] 393 U.S. 223 (1968).

[20] 405 U.S. 233 (1972).

[21] 637 F.2d 573 (9th Cir. 1980).

[22] 630 F.2d 920 (2d Cir. 1980).

[23] 729 F.2d 128 (2d Cir. 1984).

limiting principles. Of significance is that the Supreme Court cases were decided prior to landmark decisions from the Court adopting a rule of reason or effects-based approach and otherwise imposing stricter burdens on plaintiffs in antitrust cases. These decisions also express greater concern and caution regarding Type I (false positive) over Type II (false negative) errors. The subsequent cases, together with the ideology of the current Supreme Court, suggest that courts today are unlikely to adopt the Commission's new expansive approach.

Taken together, the appellate court decisions make clear that the FTC must articulate standards for what constitutes a UMC, and those standards must allow stakeholders to determine what they can lawfully do rather than be left in a state of unpredictability. Prior inconsistent positions and statements from the Commission may be used to support a holding that a given action is arbitrary and capricious for lack of predictability. In the absence of a predictable standard from the FTC, appellate courts have required at least evidence of an agreement, anticompetitive effects, anticompetitive intent, or the absence of a legitimate business justification. To demonstrate anticompetitive effects, the appellate courts have required or relied upon proof of more traditional antitrust harms such as actual effects on price or foreclosure.

Turning to the five decisions in detail, the most recent decision from the Supreme Court on the reach of the UMC provision is the Court's 1972 decision in *Sperry & Hutchinson*,[24] which could be read as leaving open the door for the FTC to develop a UMC standard based upon harm to consumers without harm to the competitive process. Specifically, the Court held that a UMC can go beyond conduct that infringes the letter or the spirit of the antitrust laws, and may reach conduct that "affects consumers," "regardless of their nature or quality as competitive practices or their effect on competition."[25] The Court said the FTC, "like a court of equity, considers public values beyond . . . those enshrined" in the letter or spirit of the antitrust laws.[26] The Court did not specify what values may be considered, yet made this statement in the context of what it viewed as the FTC's authority to consider harm to consumers even in the absence of harm to competition. The Court referred to values "enshrined" in traditional antitrust laws like the Sherman Act as "public" values.

While the Court in *Sperry & Hutchinson* affirmed the lower court's ruling against the FTC, it did so on the grounds that the FTC's decision was premised on a classic antitrust rationale of injury to competition. The Court stated that the FTC's opinion did not provide "any standards" for a UMC premised upon considerations of consumer interest independent of possible or actual effects on competition.[27] The Court ordered the decision be remanded to the FTC to allow the Commission to analyze the case under this more expansive theory. The Court did not provide guidance as to the scope of this expansive theory, stating that the FTC alone has the authority to define UMCs, and courts "can only affirm or vacate" the Commission's determination.[28]

In its 1968 decision in *Texaco*,[29] the Supreme Court adopted an expansive interpretation of the reach of UMC, affirming an FTC order based upon a theory of "economic power in one market to curtail competition in another."[30] The Court did not require evidence of either monopoly power in the first market or overt coercion to induce the stocking and sale of certain products in the second market to affirm the FTC's decision.

The conduct held to be a UMC was a sales-commission arrangement under which Goodrich would pay Texaco a ten percent commission on all purchases by Texaco retail service station dealers of Goodrich tires, batteries, and accessories. In return, Texaco agreed to

[24] 405 U.S. at 242.
[25] *See id.* at 239.
[26] *Id.* at 244.
[27] *Id*. at 248.
[28] *Id.* at 249.
[29] 393 U.S. at 262.
[30] *Id.* at 230.

promote the sale of Goodrich products to Texaco dealers. There was no evidence of overt coercion. Rather, the evidence was that Texaco carried out its agreement to promote Goodrich products through "constantly reminding its dealers of Texaco's desire that they stock and sell the sponsored Goodrich products."[31] The Court held that the sales-commission marketing system was "inherently coercive" because a service station dealer "whose very livelihood depends upon the continued good favor" of Texaco "is constantly aware" of Texaco's "desire that he stock and sell the recommended brand" of products.[32]

The Court concluded that Texaco held "dominant economic power" over its dealers based upon the fact that nearly forty percent of Texaco dealers leased their stations from Texaco and typically held a one-year lease on those stations—leases that Texaco could terminate essentially at will.[33] Similarly, the contract under which Texaco dealers received their "vital supply" of gasoline and other petroleum products ran from year to year and was terminable on 30 days' notice under Texaco's standard form contract.[34]

With respect to harm to competition, the Court said that to "the extent that dealers [were] induced to select the sponsored brands in order to maintain the good favor" of Texaco, "the operation of the competitive market is adversely affected."[35] The Court reasoned that "[t]he nonsponsored brands do not compete on the even terms of price and quality competition; they must [also] overcome . . . the influence of the dominant oil company."[36] With respect to the incipiency standard, the Court held that, despite the lack of evidence of actual foreclosure, the "anticompetitive tendencies" of the arrangement were "clear" and the "Commission was properly fulfilling the task that Congress assigned it in halting this practice in its incipiency."[37]

In the Ninth Circuit's 1980 decision in *Boise Cascade*,[38] the court declined to enforce an FTC order that was based upon parallel conduct, relying in part on prior, inconsistent FTC practices and statements that contributed to the lack of predictability for stakeholders as to whether conscious parallelism alone could constitute a UMC. The court held that the "weight of the caselaw, as well as [these prior] practices and statements of the Commission,"[39] established a rule that, in the absence of evidence of overt agreement to utilize a pricing system to avoid price competition, the Commission must demonstrate that the challenged pricing system has actually had the effect of fixing or stabilizing prices.

The court went on to conclude that:

> In this setting at least, where the parties agree that the practice was a natural and competitive development in the emergence of the southern plywood industry, and where there is a complete absence of evidence implying overt conspiracy, to allow a finding of a section 5 violation on the theory that the mere widespread use of the practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior.[40]

The court found that there was not substantial evidence to support a finding of anticompetitive effect given the Commission provided the court "with little more than a theory of the likely effect of the challenged pricing practices."[41] The court found "a complete absence of meaningful evidence in the record that price levels . . .

[31] *Id.* at 227.
[32] *Id.* at 229.
[33] *Id.* at 226.
[34] *Id.* at 227.
[35] *Id.* at 229–230.
[36] *Id.* at 230.
[37] *Id.*
[38] 637 F.2d 573.
[39] *Id.* at 582.
[40] *Id.*
[41] *Id.* at 578.

reflect an anticompetitive effect"[42] and data on costs and profits were not informative because they were "largely a deduction from the Commission's reasoning about the tendencies of the challenged practice."[43] 0

The FTC's new Policy Statement adopts a narrow reading of *Boise Cascade*, stating that its "applicability to cases outside the realm of delivered pricing is limited" given that "the court's decision was driven by the Commission's inconsistent position on delivered pricing practices in prior statements, its shifting litigation strategy, and the Commission's failure to meet its own standard."[44] Given the text and reasoning of the decision, which focuses on conscious parallelism, it is unlikely that courts today would interpret *Boise Cascade* as limited to delivered pricing. And the FTC majority's own recognition that prior inconsistent positions played a significant role in the court's conclusion is helpful in challenging enforcement actions in which the FTC has not disavowed prior inconsistent positions when articulating a new standard. The types of conduct that may fall into this category are discussed in Section III.

The Second Circuit's 1980 decision in *Official Airline Guides*[45] is an important case with limiting principles on refusals to deal. The court held that, notwithstanding the fact that evidence supported the Commission's finding that the conduct had a substantial effect on competition, there was no antitrust duty to deal absent coercive conduct or a purpose to restrain competition or enhance or expand its monopoly. The court found no anticompetitive purpose given that the alleged harm in a market the defendant did not operate in, i.e., the discriminatory dealing, was not against a rival.[46]

With respect to what constitutes harm, the Second Circuit found that "substantial evidence supports the Commission's findings of significant competition between certificated and commuter carriers, and of injury to that competition, as well as the finding that [the defendant] 'arbitrarily' refused to publish the connecting flight schedules of commuter carriers."[47]

The Second Circuit's 1984 decision in *Ethyl*[48] involved non-collusive, parallel conduct by several companies, including the use of most favored nation clauses. The court seemed to adopt a more lenient, intent-based standard for analyzing parallel conduct than the Ninth Circuit's actual effects standard from its earlier decision in *Boise Cascade*. That said, the standard in *Ethyl* could possibly be read as limited to oligopolistic industries. Specifically, the court said that "in an oligopolistic industry, . . . a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct."[49]

The court explained that the "Commission owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[50] The court further explained that "[a] line must . . . be drawn between conduct that is anticompetitive and legitimate conduct that has an impact on competition" [or consumers] . . . Section 5 is aimed at conduct, not at the result of such conduct, even though the latter is usually a relevant factor in

[42] *Id.* at 579.

[43] *Id.* at 580.

[44] Policy Statement, *supra* note 1, at 7 n.43.

[45] 630 F.2d 920.

[46] Specifically, the issue was whether a monopolist-publisher of flight schedules, not itself an air carrier, had some duty not to discriminate unjustifiably between certificated air carriers and commuter airlines so as to place the latter at a significant competitive disadvantage. *See Official Airline Guides*, 630 F.2d at 921.

[47] *Id.* at 924.

[48] 729 F.2d at 139.

[49] *Id.*

[50] *Id.*

determining whether the challenged conduct is 'unfair.'"[51]

III. Theories of Harm Unlikely to Survive in Court

The appellate court decisions and makeup of the current Supreme Court suggest that many of the theories set forth in the Policy Statement are unlikely to survive in court, in particular those that go beyond actual or threatened harm to competition. In addition, theories based upon a refusal to deal that does not harm the competitive process are unlikely to survive given, among other things, the Commission's prior positions requiring harm to competition. The following are examples of theories that are unlikely to survive.

The first example is enforcement actions based upon the Statement's standard of "tend[s] . . . to negatively affect competitive conditions—whether by affecting consumers, workers, or other [unspecified] market participants." Theories not based upon harm to the competitive process are unlikely to survive under existing caselaw. As Commissioner Wilson says in her dissent, the Statement condemns conduct based upon considerations of non-competition factors such as harms to workers. And it does so without explaining how the Commission could possibly weigh and balance economic harms against equitable ones. If conduct results in lower prices, increased output, or higher innovation, yet harms workers, which value would trump?

A second example is the Statement's approach of considering the "cumulative effect" of not only the defendant's conduct, but also including in the broth "the conduct of others engaging in the same or similar conduct." Setting aside possible due process issues, the Statement provides no guidance on how such an analysis would be conducted.

Third is "exploitative" conduct, which is included in the Statement's list of objectionable conduct. While the Commission does not define the term or explicitly mention particular conduct that would be considered exploitative, the term suggests that excessive pricing may fall within this category. Any enforcement action based upon "exploitative" conduct such as this that does not harm the competitive process is highly unlikely to survive under existing caselaw. This is also an area in which the Ninth Circuit's decision in *Boise Cascade* on the use of prior inconsistent FTC positions could be useful. Relying upon Supreme Court precedent, the FTC and the Department of Justice have long explained the dangers of condemning the mere extraction of monopoly profits as opposed to the extension of monopoly power through exclusionary or predatory conduct.[52]

Fourth is the Policy Statement's inclusion of "the use of economic power" in its list of objectionable conduct without defining the term. While the Statement cites the Supreme Court's decision in *Texaco*, it does not limit a theory based upon "the use of economic power" to conduct that harms competition. In addition, while the Statement does not explicitly mention abuse of superior bargaining position, this is also a theory that is unlikely to survive in court, including given that the FTC has long advocated against the use of the theory by foreign jurisdictions such as Korea.[53]

A final example is unilateral refusals to deal, which is another area in which the FTC's prior, inconsistent positions could be useful. The Policy Statement mentions only discriminatory refusals to deal; it does not explicitly address unilateral refusals to deal, much less state that the Commission is departing from its prior positions that "refusals to deal are actionable only when done by a firm creating or maintaining a monopoly power, and the refusal must harm,

[51] *Id.* at 138.

[52] *See, e.g.*, OECD, Excessive Pricing in Pharmaceutical Markets - Note by the United States (2018), https://one.oecd.org/document/DAF/COMP/WD(2018)111/en/pdf; OECD, Excessive Prices - Note by the United States 299–308 (2011), https://www.oecd.org/daf/competition/49604207.pdf.

[53] *See* Int'l Competition Network, Report on Abuse of Superior Bargaining Position 17 (2008), https://centrocedec.files.wordpress.com/2015/07/abuse-of-superior-bargaining-position-2008.pdf (highlighting criticism by the United States that ASBP rules are harmful to efficient bargaining).

not only the targeted firm, but also the competitive process."[54]

Concluding Thoughts

Limiting principles from caselaw, combined with the makeup of the current Supreme Court, suggest that many of the theories set forth in the Policy Statement are unlikely to survive in court. Unfortunately, the problem is that court challenges take significant time and the Commission's new approach is highly likely to chill procompetitive conduct in the meantime.

Replacing the consumer welfare standard with unpredictable standards that attempt to consider competing values is likely to harm consumers and also the agency itself. Not only will the FTC's new standards undermine its credibility, but they will also provide additional support for Congressional efforts to eliminate the agency (or at least its competition mandate). As Edith Ramirez explained during her tenure as FTC Chairwoman, while non-competition factors such as employment "may be appropriate policy objectives and worthy goals overall," they have no place in competition analysis.[55] Standards that attempt to weigh and balance efficiency concerns against equity concerns are not only not administrable, but outside the FTC's expertise, making the Commission "ill-equipped" to evaluate such considerations.[56]

[54] OECD, Roundtable on Refusals to Deal - Note by the United States 2 (2007), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/usrefdeal.pdf.

[55] Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Core Competition Agency Principles: Lessons Learned at the FTC - Keynote Address 7 (May 22, 2014), https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf.

[56] *See id.* at 8.