

## Enforcer To Regulator? FTC Dems Eye Antitrust Rulemaking

By **Bryan Koenig**

*Law360 (May 7, 2021, 2:43 PM EDT)* -- Is the Federal Trade Commission a competition regulator? For years agency officials have answered no, saying the commission is an enforcer that lays down antitrust do's and don'ts primarily by going after mergers and conduct that harm competition, setting adjudicated precedent for companies to follow rather than agency-created rules.

For instance, in August, then-FTC Bureau of Competition chief Ian Conner emphasized that the commission "is a law enforcement agency and not a regulator," with a focus on preventing anti-competitive conduct by enforcing antitrust laws.

"In order [to] reach any conclusions about a particular company or industry sector, an antitrust enforcer has to go through a fact-intensive analysis that is unique to each case," Conner, now a Latham & Watkins LLP partner, told Competition Policy International.

However, if current and incoming Democrats on the commission have their way, that may be about to change. But their dream of pursuing ramped-up antitrust enforcement by spelling out prohibited competitive behaviors more extensively could be difficult to make into reality. That's partly because antitrust enforcers have long relied on combating anti-competitive conduct one enforcement action at a time.

"It would be a sea change from the past several decades of enforcement viewpoint," said Eric Grannon of White & Case LLP.

Constantine Cannon LLP partner Henry C. Su voiced a similar sentiment, noting that not only has the FTC traditionally behaved like a competition enforcer, but that's what Congress and the business community have understood it to be. A regulatory approach also "presupposes that there is a well-settled vision of what competition looks like," Su said, yet like markets, competition is constantly fluctuating, which is why the general U.S. philosophy on antitrust policy has been to step in only when there's a problem.

"To me it's just totally contrary to our experience," said Su, who worked on American Bar Association antitrust law section comments that, in weighing in on FTC consideration of employment contract noncompete clauses, were highly critical of the prospect of FTC competition-focused rulemaking.

An FTC competition rulemaking initiative under acting Chairwoman Rebecca Kelly Slaughter is in its

earliest stages, and exactly what any such rules might look like remains unknown. Antitrust practitioners note that specific regulations could take years to write, debate and implement.

"The devil will be in the details," said Philip Bartz of Bryan Cave Leighton Paisner LLP.

Slaughter's office did not respond to a request for comment.

### **'Express Authority'**

Feeding into the prospects of the FTC dusting off its rulemaking authority is Lina Khan, the big tech critic currently up for a spot on the commission in the clearest sign so far that President Biden seeks an aggressive antitrust enforcement agenda. Khan has argued that the FTC's legal authority to issue rules aimed at "unfair methods of competition" offers untapped potential to produce "a predictable, efficient, or participatory antitrust regime."

Khan, a Columbia Law School professor, said during an April 21 Senate confirmation hearing that she doesn't have "a philosophical view" on whether the FTC should avoid rulemaking in areas where it hasn't been expressly authorized by Congress. However, in her view, the FTC's power to expand competition regulation is clear.

"In the context of the FTC, I think that question is obviated by the fact that there is express authority in the statute," Khan said at the time.

Those remarks were the continuation of an idea Khan pushed when she served as a legal fellow for FTC Commissioner Rohit Chopra. Together, Khan and Chopra last year penned "The Case for 'Unfair Methods of Competition' Rulemaking," published in the University of Chicago Law Review.

"Antitrust litigation and enforcement are protracted and expensive, requiring extensive discovery and costly expert analysis. In theory, this approach facilitates nuanced and fact-specific analysis of liability and well-tailored remedies," they wrote. "But in practice, the exclusive reliance on case-by-case adjudication has yielded a system of enforcement that generates ambiguity, drains resources, privileges incumbents, and deprives individuals and firms of any real opportunity to participate in the process of creating substantive antitrust rules."

That article now may serve as part of the intellectual foundation for a new, centralized FTC rulemaking group launched at the end of March by Slaughter, who at the time pushed back on the "bad reputation" she said the commission's rulemaking authority has developed as being difficult to use.

"Longstanding FTC [consumer protection] rules, such as the Funeral Rule and the Eyeglass Rule, have provided significant benefits to consumers," Slaughter said in a statement at the time. "It is also time for the commission to activate its unfair methods of competition rulemaking authority in our increasingly concentrated economy, and I am excited for this new rulemaking group to explore all the possibilities."

Slaughter, Khan and Chopra have all been intensely critical of recent years of U.S. antitrust enforcement. They say that enforcement hasn't sufficiently punished anti-competitive practices and has been too permissive of potentially anti-competitive mergers, in the tech space and beyond.

The rulemaking group could end up as part of an overall push to rectify those perceived shortcomings, depending on the ultimate makeup of the Biden-era FTC's Democratic majority — Khan must still be

confirmed and Chopra has been nominated to head the Consumer Financial Protection Bureau. The Senate Banking Committee deadlocked on his CFPB confirmation in March.

Slaughter expounded on her vision for the rulemaking group in a speech May 4 to the Consumer Federation of America's Virtual Consumer Assembly. In her prepared remarks that focused primarily on consumer protection rules rather than ones targeting anticompetitive conduct, Slaughter noted that "rulemaking is not a panacea for all the problems consumers face" and that rulemakings can be time-consuming and difficult, and could still be upended by court challenges.

Those concerns, Slaughter said, are "reasonable," but "the world continues to change."

"Dark patterns haunt the internet, robbing consumers of their privacy, time, and money. Algorithms are supercharging deceptive and unfair practices. Corporate concentration climbs," Slaughter said. "To my mind, these new challenges must be met by new rules, which we can adopt, ironically, through a return to the text Congress passed long before the internet entered our lives."

### **Essentially Unused**

If the FTC does try to set out rules governing unfair methods of competition, it will have only a single past regulation for guiding precedent, a "Tailored Clothing Rule" established in 1967 and repealed in 1994 without ever having been used in an enforcement action.

"It's somewhat untested power," said Maureen K. Ohlhausen, a Baker Botts LLP partner who served as acting FTC chair in the beginning of the Trump administration.

One reason for the essentially unused state of the FTC's competition rulemaking authority, antitrust professionals say, is the fact-intensive nature of most antitrust enforcement.

"It's always going to be pretty hard to come up with a grand, general rule for everything," said Eugene "Gene" M. Paige of Kecker Van Nest & Peters LLP.

Professionals further note that most of the FTC's rulemaking via its consumer protection rather than antitrust banner is under express Congressional authorization, with lawmakers specifically requiring the commission to lay down regulations for particular industries.

"At least on the consumer protection side it's pretty clear they're a regulator," said Lisa Kimmel of Crowell & Moring.

The FTC's rulemaking powers against unfair methods of competition are far more vague.

"It's very skeletal guidance from Congress," Ohlhausen said.

Even Khan acknowledged in her Senate testimony that the "precise contours" of those powers have been debated at the FTC for years.

"There are a series of cases from the '80s where the FTC adjudicated and courts came up with a few standards relating to coercion or oppressiveness. In practice, though, I think adjudication has not been very successful as a mechanism for defining the contours," Khan said at the time.

The prospects for any legal challenges to such rules would depend heavily on what the rules are. In the face of fears of heavily prescriptive and overbearing rules, Kimmel noted, however, that there's no guarantee the FTC will issue bright-line rules that would mark out specific, automatic violations.

"There's no reason that when they write a rule they can't allow some flexibility," Kimmel said.

## **Complications**

Antitrust professionals point to a number of potential hurdles to using unfair methods of competition rulemaking to curtail the kind of abusive behavior Slaughter and Chopra have called out in FTC dissents and Khan has assailed in her academic writings, most notably in her Yale Law Journal article, "Amazon's Antitrust Paradox."

Paige of Keker Van Nest pointed to Slaughter's own stated reasoning for why a rulemaking group is important: fears that a U.S. Supreme Court ruling would hobble the agency's ability to go to court, instead of through its arduous in-house process, to seek financial penalties via restitution. That power is used primarily against consumer protection violations but sometimes also employed against anti-competitive conduct.

Those fears came to pass April 22 in a unanimous decision that the FTC is now asking lawmakers to reverse with legislation. Before the justices ruled, the announcement from Slaughter's office said the risk of such a decision made rulemaking "a critical part of the FTC's toolbox." But it's also possible for the rulemaking group to be seen as the FTC trying to find a way around a high court prohibition.

Rulemaking, according to Grannon, is also particularly vulnerable to the whims of whoever currently runs the FTC.

"Even outside of competition, the first thing to come and go when the White House changes parties are the latest agency regulations, which are viewed as partisan," said Grannon, who noted that rules are fairly easy to replace and revoke compared to binding precedent set down in court.

Even within an administration, professionals say, competition rules set by the FTC could create complications for U.S. antitrust enforcement. That's because U.S. enforcement is in fact split between the commission and the U.S. Department of Justice, which has no antitrust rulemaking powers. The agencies generally split merger enforcement along lines of expertise and experience.

"It is ripe for confusion," Grannon said.

Commission rulemaking could also create tension directly with the DOJ Antitrust Division, according to practitioners.

"It certainly does change the balance, or would change the balance," Ohlhausen said.

--Editing by Marygrace Murphy.