

American Precautionary Antitrust: Unrestrained FTC Rulemaking Authority

AURELIEN PORTUESE | JANUARY 2022

EXECUTIVE SUMMARY

The Issue

Led by Neo-Brandeisians, the FTC’s regulatory agenda for 2022 reveals a plan to enhance its rulemaking authority to prohibit so-called “unfair methods of competition” (UMC). Annoyed with time-consuming antitrust enforcement actions, which allegedly provide excessive scope for efficiency considerations, Neo-Brandeisians now want to replace ex post antitrust enforcement actions with ex ante regulatory rules to preemptively prohibit a wide range of market actors’ behaviors. This shift illustrates the rise of the precautionary logic toward pro-innovative conduct. In other words, the Neo-Brandeisian FTC illustrates a “precautionary antitrust” already at play in Europe through the Digital Markets Act (DMA).

But the FTC’s rulemaking authority regarding UMC not only imports Europe’s precautionary approach to disruptive behaviors that are beneficial to consumers and is thus likely to harm American innovation, but it also raises two fundamental questions. First, it is unclear whether the FTC has a valid legal basis for embarking on such UMC’s rulemakings. Second, it is clear that preemptive prohibitions of innovative conduct without consideration for the rule of reason, which enables efficiency considerations in the antitrust analysis, would lead to false positives with considerable unintended consequences. In other words, courts and agencies have historically rejected, for obvious economic reasons, per se rules of illegality regarding the way firms compete. But should per se rules of illegality be reinstated through dubious precautionary antitrust, the detrimental effects to consumers and, less perceptibly, to the incentives to innovate, would worsen at the expense of American competitiveness and innovation.

This report investigates these two fundamental questions. It finds that the FTC’s precautionary antitrust is likely to be unlawful given the statutory language, the case law, and a congressional analysis. It also finds that the efficiency costs (to consumers and to innovation) to be generated by the FTC’s adoption of a precautionary approach to innovative conduct are prohibitively high, since per se rules of illegality will inevitably thwart disruption, albeit an inherent component of the innovation process.

ITIF’s Analysis and Findings

The FTC’s intent to engage in UMC rulemakings is void of a valid legal basis, and is detrimental to consumers and innovation.

American Precautionary Antitrust Is Likely Illegal

The FTC intends to justify UMC rulemaking based on Section 6(g) of the FTC Act of 1914 (FTCA). Following the adoption in 1975 of the Magnusson-Moss Act, Congress authorized but

conscripted the FTC's rulemaking authority for consumer protection. Congress has not authorized the FTC to enact substantive rules on UMC, except for procedural and interpretive purposes. The Supreme Court has seminally expressed in the case of *Gratz* in 1920 that "it is for the courts, not the commission, ultimately to determine as a matter of law what [UMC] include."

Consequently, absent congressional mandate and in line with settled case law, the FTC lacks a valid legal basis for UMC rulemakings. Therefore, the Neo-Brandeisians' regulatory agenda to ignore the FTC's institutional constraints amounts to engaging in unlawful UMC rulemaking activity likely to generate congressional and judicial consternation.

American Precautionary Antitrust Is Likely Harmful

The rule of reason is essential to antitrust analysis since it allows courts to balance anticompetitive and pro-competitive effects of any given conduct, so that efficiency and innovation considerations receive due care. To replace the courts' rule of reason with FTC's per se rules of illegality is to ignore efficiency (i.e., pro-competitive and pro-innovative) effects of scrutinized conduct. Consequently, consumer harm and innovation deterrence necessarily will fall prey to false positives. Because the focus shifts from consumer welfare to "competitors' welfare," the FTC will inevitably preserve the current market structure and companies against disruptive practices, however beneficial they may be for consumers and innovation.

The shift from ex post antitrust enforcement to ex ante regulatory rules of competition with blanket prohibitions already is at play in Europe with the Digital Markets Act (DMA). American precautionary antitrust follow in the same path via the FTC's unrestrained UMC rulemakings. Rather than pushing back against the European precautionary logic applied to innovative companies and disruptive conduct, the FTC embraces and further expands this logic domestically at the detriment of market dynamism, American innovation, and consumers.

Policy Recommendations

The FTC must refrain from engaging in UMC rulemakings, which are neither legally acceptable nor economically beneficial. Rather, it should endorse principles of dynamic antitrust, which rely on ex post enforcement of antitrust laws.

Dynamic antitrust opposes precautionary antitrust, because it relies on dynamic enforcement of antitrust laws rather than on preemptive rules of illegality. Also, dynamic antitrust focuses on fostering dynamic competition as a source of innovation rather than protecting static competition as a way to fossilize market structure.

Read the Full Report

Aurelien Portuese, "American Precautionary Antitrust: Unrestrained FTC Rulemaking Authority" (ITIF, February 2022), itif.org/american-precautionary-antitrust.

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