

THE DIGITAL BROADBAND MIGRATION
AND THE FEDERAL TRADE COMMISSION:
BUILDING THE COMPETITION AND
CONSUMER PROTECTION AGENCY OF THE
FUTURE

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awareness that the application of a wide range of tools often affords the best way to achieve good policy results. The search for the optimal mix of techniques continues each day, and a commitment to a process of experimentation, assessment, and refinement will help ensure that the FTC makes wise choices in the face of dramatic technological and organizational change associated with electronic commerce.

The second unifying characteristic is institutional multiplicity. For competition policy, consumer protection, and privacy, the FTC shares authority with a host of other public bodies. These include other federal agencies, state and local governments, and authorities located in other countries. The fact of multiplicity creates a special urgency for the FTC and its government counterparts to establish means of cooperation to address phenomena whose effective treatment requires concerted efforts across jurisdictional boundaries. Especially in the international arena, there is a need to engage other jurisdictions in discussions about the appropriate content of policy, the identification of superior processes for implementation, and the attainment of interoperability across nations with dissimilar laws and institutional frameworks.

In dealing with institutional multiplicity, one initially might assume that, because the actors are public institutions, they would recognize their common cause and tend naturally to work well together to achieve good policy results in areas of shared interests. Since leaving the academic tower of ivory in 2001 to see theory meet practice at the FTC, one of the greatest elements of my continuing education has been to see that cooperation across public institutions with overlapping authority rarely comes easily. As I discuss in more detail below, in the field of Internet commerce and other areas of policy, it will be useful for the United States to consider how existing institutional arrangements might be reconfigured.

II. ACHIEVING SUPERIOR INSTITUTIONAL DESIGN: THE IMPORTANCE OF LONG-TERM INVESTMENTS IN CAPABILITY

A central foundation for my views about future FTC policymaking for the Internet is a self-assessment exercise that the agency carried out in the second half of 2008.³ A major motivation to undertake a self-study is a global pattern of exceptional institutional innovation and upheaval among agencies that do competition policy and consumer protection work. Called *The FTC at 100*, the FTC self-study had three dimensions. We conducted internal assessments, we held roundtables with a variety

3. BILL KOVACIC, *THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY* (Jan. 2009), *available at* <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf>.

of observers in the United States, and we had extensive public consultations abroad. The exercise benchmarked the Commission with many of its foreign counterparts. With respect to various questions of agency organization and governance, it had become evident to me that many jurisdictions were looking more energetically than the FTC was at fundamental questions of how best to configure the mechanisms for carrying out regulatory responsibilities for the Internet and other areas of commerce. One of the most interesting sources of institutional innovation and reform consists of jurisdictions with a recent past of centralized economic control and whose competition and consumer protection systems are relatively new. Many of these jurisdictions started the process of building new competition policy and consumer protection frameworks without the path dependency and preconceptions that tend to beset older systems and limit their capacity to embrace innovations. The newer regimes ask important, basic questions about regulatory design and governance that older regimes might view as asked and answered.

As regulatory frameworks grow older, it can require a significant
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surrender the power and electoral benefits that come from overseeing specific regulatory agencies. Few committees will give up oversight responsibilities without getting something equivalent in trade. The financial crisis could upset assumptions about the durability of the status

States is that incumbent political leaders in regulatory agencies have too few incentives to invest in the engineering of institution building and implementation, which are the agencies' equivalent of durable infrastructure. There is strong incentive to engage in consumption and too little motivation to invest. In regulatory policymaking, consumption consists of engaging in activities that generate readily observable events for which one can claim credit. This can imbue policymaking with a highly short-term perspective. By contrast, investments in creating a strong institutional infrastructure generate returns that tend to extend mainly beyond the period of leadership of an individual political appointee, of which I am one. Given the choice between consumption and investment, the interior voice that urges incumbent leaders to consume easily can drown out the voice that calls for investment. Where there are long term policy needs and short term political appointees, it is a major challenge to create incentives that press the agency to examine its institutional arrangements regularly and pursue measures to improve them.

The need to focus on institutional arrangements and effectiveness assumes still greater importance for agencies, such as the FTC, that operate in highly dynamic environments characterized by rapid change in technology, business organization, and patterns of commerce at home and abroad. These forms of dynamism demand routine upgrades and experiments in the regulatory framework. The upgrades in the regulatory policy framework must take place on a recurring basis. A central characteristic of good regulatory design and performance involving the Internet is a norm that emphasizes continuous improvement. This includes identifying relevant commercial phenomena on a regular basis, upgrading the knowledge base of the agency on a routine basis, and always asking questions about what the appropriate institutional design should be. On the scorecard by which we measure the quality of regulatory agency decision making, if we ask what constitutes good agency leadership, a vital criterion is the demonstrated capacity of the regulatory authority to account for new commercial, political, and social phenomena and to adapt the agency to address them.

A positive modern trend among the world's competition and consumer protection authorities is a growing recognition that skill in implementation and the quality of institutional arrangements shape policy results. Instead of conferences that dwell exclusively upon the big issues of substance—what is the right standard for abusive dominance, what does net neutrality mean, and how might its specific operational

questions about how to set priorities, how to structure operations, how to recruit and retain a capable professional staff, and how to measure effectiveness. This is producing a better balance between deliberations about questions of normative principles of policy on the one hand and matters of institutional infrastructure and management on the other.

Greater appreciation for the importance of institutional design and policy implementation may have the useful effect of spurring a redefinition of what constitutes a “good” regulatory agency. In scholarly

A. Clear Statement of Goals

One necessary foundation for effective agency performance is a clear definition of the agency's aims. Everything an agency does flows from the development of a clear statement of what the agency is about and what it means to do. It is a great challenge for any new set of leaders to state their aims clearly and to persuade the agency's staff that the stated aims are worth pursuing. The agency's administrative and professional staff have heard a sequence of political appointees offer their vision for the future. They are familiar with a wide array of slogans, clichés, and motivational techniques. The staff has heard them all. With each new group of political appointees, the staff seeks to learn the new vocabulary and re-flag existing projects to please the new regime. It is no small matter to overcome fears that each collection of new leaders takes some comfort from knowing they will not fully internalize the effects of choices taken during their tenure. It requires considerable effort to make a credible commitment to build durable norms and to identify goals that serve the public and the institution well over time.

The formulation and statement of goals have two elements. One is internal discussion, and the other is external consu13 Tc.07teu13 ,dmifnsu19(ve -5(i9(l)-4.9(ece.0022 Tc(

instruments. One element is to assist executive branch prosecutors to bring criminal suits to imprison wrongdoers. A second ingredient is to develop education programs that encourage consumers to take stronger precautions against Internet-based fraud. A third method is to use the Commission's data collection and other research tools to gain a better understanding of how criminal actors formulate and implement illegal schemes involving the Internet.

For other issues that deeply involve the Internet, self-regulation can be a further useful supplement to the prosecution of cases and the development of research and public education programs. The FTC has prepared a further iteration of its Self-Regulation Guidelines for Behavioral Marketing.⁶ The FTC did not issue these Guidelines as a comprehensive resolution of issues surrounding the use of online behavioral marketing. Instead, the Guidelines are one part of a dialogue about behavioral marketing and the latest step in an ongoing conversation about how self-regulation might facilitate the achievement of sound policy.

To recognize the value of a problem-solving, rather than a case-centric, policymaking approach is to see something about what will constitute the successful competition or consumer protection agency of the future. The successful agency will possess a broad, flexible portfolio of tools. The FTC ought to be a central participant in forming policy for the Internet and for a wide range of other challenging competition and consumer protection issues precisely because Congress has given the agency an unusually broad range of policy instruments.

In a number of key respects, the FTC's policy tools have no equivalent in the United States or abroad. For example, the Commission's Bureau of Economics has over eighty industrial organization economists with doctorates. Among other accomplishments, this team has done truly superior empirical research on many pressing issues of public policy, including recent pathbreaking work on mortgage disclosures.⁷ The Commission also has the distinctive capacity to compel firms to provide information for the preparation of studies unrelated to the prosecution of individual cases. The application of this capacity has enabled the FTC to make significant contributions to public understanding of matters such as the food advertising directed

6. FTC STAFF R

toward children⁸⁸

current thinking in business strategy, economics, law, and public administration. The commercial environment that the agencies oversee and the intellectual disciplines on which they rely feature high levels of dynamism and increasing complexity. A recurring criticism of public policy making that involves the Internet and other dynamic commercial developments is that the knowledge base of the government agencies is the equivalent of a bicycle and the rate of change in the industry resembles a Porsche. From this perspective, the agency cyclists struggle in vain to catch up. On a good day, they feebly get their arms around developments that took place five years ago. Policy is set on the basis of stale knowledge, new developments rush onward, and the agency never achieves the capacity to address current problems effectively.

A competition policy or consumer protection agency resembles a high technology company whose well-being depends upon the quality of its research and development programs. Imagine a conversation between the executives of a pharmaceutical company and investment analysts. Suppose the analysts ask the chief executive to describe the firm's R&D program. What conclusions would the analysts form if the CEO said the firm has fired its scientists, shuttered its laboratories, abandoned plans to develop new drugs, and chosen to focus solely on turning out its existing products as fast as it can? That is a formula for going out of business.

To cope with change and complexity, the agency must obtain regular, substantial additions to its base of knowledge. Without routine upgrades, an agency is prone to misdiagnose problems, select harmless or perverse cures, or find itself trapped in analytical models that once represented the state of the art but have become threadbare. The successful agency of the future is one that invests heavily in building knowledge and in refreshing its intellectual capital. These investments are the public administration equivalent of research and development.¹² These outlays do not occur spontaneously or by accident. Good agency practice requires a conscious process of building R&D outlays into every budget cycle. Regulators should be pressed to explain what part of their budgets are being spent on making their agencies smarter.

R&D for competition policy and consumer protection can take several forms. One method is to convene public consultations in the form of hearings or workshops. In these proceedings, an agency asks

agency's work. These proceedings do not necessarily seek to identify definitive policy making paths. In many instances, they serve to teach the agency what it must know to apply its authority wisely.

Since the early 1990s, the FTC has made external consultations a more central element of its portfolio of activities.¹³ This reflects the Commission's recognition that the only way for the agency to stay current is to use its policy instruments to improve its understanding of the commercial and intellectual environment in which it operates. This highlights another respect in which case-centric measures of agency effectiveness give false signals about what an agency should do. In a case-centric world, the incentive to make substantial R&D investments goes down the drain. In any period, an agency faces the question of how much to consume (i.e., bring new cases or issue new rules) and how much to invest (e.g., undertaking projects that improve the agency's base of knowledge or its administrative infrastructure and thus increase its capacity to select the optimal mix of policy measures). If it embraces case-centrism as the measure of its worth, an agency will emphasize current consumption and slight investments in capability.

Another approach to building knowledge is to engage the skills of institutions outside the agency. The FTC cannot accumulate the capability it needs with its own resources alone. One promising way for the FTC to augment its own efforts is to form partnerships with academic research centers. In 2008 the agency initiated a prototype with Northwestern University, which has a superb complex of researchers in business, economics, and law who specialize in topics closely related to the FTC's responsibilities. The FTC program with Northwestern could become a platform that the agency can duplicate elsewhere in the United States and abroad. One can look forward to a day when the FTC has links with institutions such as the Department of Economics at the University of Toulouse, the Centre for Competition Policy at the University of East Anglia, the faculties of economics and law at Oxford University, the London School of Economics, the National University of Singapore, and any number of other leading research centers. Through partnerships with academic research centers, the FTC can learn about state of the art developments in theory and empirical research and, by reviewing current Commission initiatives, can seek to encourage researchers to study topics related to the agency's work. To this end, the FTC might make greater efforts to make agency data accessible to researchers who have an interest in doing applied work related to competition law and consumer protection. Without these kinds of

13. *More Than Law Enforcement: the FTC's Many Tools—A Conversation with Tim Muris & Bob Pitofsky*, 72 ANTITRUST L.J. 773, 774–80 (2005) (discussing FTC's expanded use of public consultations).

collaborations, the FTC and its counterpart agencies overseas are unlikely to keep up with the demands that developments in commerce and in the intellectual framework of competition and consumer protection place upon government authorities to strengthen their pool of knowledge.

F. Recruiting and Retaining Human Capital

As suggested above, increased cooperation with external institutions can help the FTC expand its capabilities and improve its effectiveness. Even with these and other forms of collaboration, the public agencies can prosper only if they succeed in recruiting and retaining a high quality staff. At some point, the United States will have to confront the political and social hypocrisy by which its citizens and elected officials demand Mercedes-like performance from public institutions and insist on paying nothing more than Chevrolet prices to get it. In no area of our experience as consumers do we expect there to be no general link between the quality of what we are willing to pay and what we get. On what basis might one reasonably expect that this relationship is largely or completely irrelevant in the field of public administration?

The current recession has raised the FTC's personnel retention rates and made public service a more attractive career option for many individuals. No agency can count on national economic distress to preserve and enhance its human capital indefinitely. As economic conditions improve, the economic enticements of the private sector again will hammer at the fragile structure of civil service compensation schemes. Even amid conditions of economic crisis, there are many skills necessary to agency effectiveness that cannot be had on the cheap. For example, good information technology specialists remain in high demand. The k7(e)9d and its foreign counterparts depend ever more heavily on their communications infrastructure and electronic data sets to conduct routine operations and improve productivity. An agency can suffer grievously if it does not sustain and enhance its information technology systems. How long will a superb information technology officer remain with the Commission if the civil service salary ceiling remains at about \$150,000—or perhaps \$20,000 more with a Senior Executive Service bonus?

Public agencies are no different from any number of other institutions whose quality of performance is a function of their human

early 1980s¹⁵ to a position in the front ranks of the world's public agencies is that the overall quality of its personnel improved dramatically. One major enhancement was the development of a larger number of highly skilled teams to prepare and litigate the agency's cases. Despite these improvements, the FTC and many other public agencies lack the depth of skills that private sector institutions such as law firms can assemble. The Commission resembles a sports team with an excellent first team and a substantial number of skilled players on the bench. But the roster is thinner than one would like in several areas, and the departure of certain valued performers could cause a drop off in performance.

The FTC's position is not unique among competition and consumer protection authorities. If one makes the safe assumption that salaries for civil servants are not about to rise significantly, agencies will have to find novel ways to attract and keep the human talent they need to perform effectively. Several strategies come to mind. One way is to give agency employees a better experience by devoting extensive attention to individual professional development. Another is to cooperate more extensively with the academic community to establish internships for students, to recruit promising graduates, and to encourage faculty members to spend time in the agencies as visiting scholars. If substantial turnover is to be an inevitable, chronic condition, the agencies must build methods to retain institutional memory and other forms of important knowhow when people leave. Agencies can develop an electronic repository of research memoranda, checklists used to perform interviews and conduct investigations, and other practical tools that can be used by others and need not be reconstructed from scratch. Staff can establish and maintain data sets that track activity and permit managers and case handlers to obtain a clear, accurate profile of what the agency has done and to identify the nature and status of existing matters. Many of these endeavors require the agency to make regular capital outlays for information systems.

G. Constructing and Improving Networks with Other Institutions

The FTC self-study underscored a point that many agencies have come to realize in the course of working in legal environments where many public agencies share responsibility for specific functions. Individual initiative will not enable competition and consumer protection agencies to carry out their mandates successfully. The performance of

of FTC issued by Ralph Nader's consumer organization and by a blue ribbon commission of the American Bar Association).

15. *Id.* at 664-71 (describing congressional proposals from late 1970s and early 1980s to curtail FTC authority).

national competition policy and consumer protection systems will degrade over time if agencies do not improve their capacity to cooperate effectively with other institutions that have the same or similar mandates.

A number of foreign jurisdictions are realizing that it can be a tremendous source of national economic advantage to improve the design of regulatory institutions, either by reordering the assignment of regulatory responsibility or by strengthening cooperation among existing

involving telecommunications services providers, but the common carrier exception precludes this.

If the answer to all of these queries is to leave the status quo in place, then it is incumbent upon the public agencies with competition or consumer protection duties to spend more effort than they do today to achieve a greater convergence of approaches and to see how collaboration can permit them to achieve results that exceed the grasp of single agencies acting alone. One place to start is to create a domestic competition network and a domestic consumer protection network to engage the public authorities in the kind of discussions and cooperation that U.S. agencies pursue with their foreign counterparts.¹⁷ There is no forum in which the U.S. public institutions assemble regularly to discuss what they do and consider, as a group, how the complex framework of federal, state, and local commands might operate more effectively. At best, the U.S. public authorities perform these network building functions in piecemeal fashion at bar association conferences and other

As suggested above, government agencies in the United States would do well to emulate the European experience and create domestic networks for competition policy and consumer protection, respectively. A domestic competition network could begin with a memorandum of understanding adopted by the public agencies with competition policy duties, including the two federal antitrust agencies, sectoral regulators such as the Federal Communications Commission (FCC) and the antitrust units of the state attorneys general. The agreement might commit the participants to participate in regular discussions about matters such as the coordination of inquiries involving the same transaction or conduct, the development of common analytical standards, information sharing about specific cases, staff exchanges, and the identification of superior investigative techniques. Cooperation could progress toward the pursuit of joint research projects and the preparation of a common strategy to address various commercial phenomena. The network would be a platform for replicating activities that have become core elements of the ECN, such as interagency sharing of practical know-how and sector-specific experience, the development of common training exercises, and benchmarking of procedures across agencies.

The same approach could be applied to consumer protection. Shared concurrent authority is common for a variety of consumer protection matters involving the Internet and other aspects of commerce. For the Internet, the consumer protection portfolio is shared by, among others, the FCC, the FTC, state attorneys general, and state consumer protection offices. Focal points for collaboration within a domestic consumer protection network would include the development of common analytical techniques, coordination of investigations, and the preparation of common research projects.

H. Communication with External Constituencies

Effective internal and external communications are key ingredients of good agency performance. One dimension of effective communications is to communicate the agency's aims and intentions clearly to its own staff and to external audiences. Another element is education directed to consumers and to businesses. Consumer and business education programs can encourage precaution taking that reduces exposure to Internet fraud and spurs greater reporting of episodes of apparent misconduct.

Education programs can build upon what the FTC learns through the application of its research and data collection tools. As noted above, FTC researchers have done excellent work to examine how individuals absorb information and understand disclosures associated with various products and services. The work of the FTC's Bureau of Economics has

identified a number of ways in which disclosures involving mortgage transactions might be improved to enable consumers to make better

analysis.

The third approach is to conduct periodic reviews of the institutional framework through which the agency develops and applies competition and consumer protection policy. An important element of good administrative practice is to embrace a norm that treats periodic assessment as an essential foundation for agency improvement. A culture that regards routine assessment and refinement has to be built from within and not imposed by outsiders.

One focal point for this type of assessment is the U.S. framework for privacy. A review could consider whether the country should take the disparate elements of privacy oversight and create a uniform data protection regime. Or should the country leave existing industry specific and activity specific privacy commands in place and construct a new, overarching statute that would cover conduct not subject to existing oversight? A third possibility is to rely mainly on the application of Section 5 of the FTC Act to fill in the interstices in the system. Whatever path is taken, the process of reform should be the result of a well-considered deliberative assessment and not merely a quick response to crisis.

CONCLUSION: A REPORT CARD ON GOOD ADMINISTRATIVE PRACTICE

What do we mean when we speak of a competition or consumer protection authority as being a "good" agency? By what standards should we measure whether the Federal Trade Commission is performing its responsibilities properly with respect to Internet-related issues or other matters subject to its oversight?

One valuable way to measure the FTC or any other public regulatory authority is to assess the quality of its institutional infrastructure. Good agency performance does not take shape in a vacuum. Policy travels across an infrastructure of institutions, and the strength of the institutional framework and operational methods determines whether agencies can deliver superior policy results.

The FTC's self-study identified a number of institutional characteristics for successful competition policy and consumer protection agencies. Good competition and consumer protection agencies (1) clearly and coherently specify their goals, (2) devise and apply a conscious, thoughtful mechanism for selecting strategies to attain their aims, (3) measure themselves not by the number of cases they prosecute but by their capacity to solve problems by recourse to a broad, flexible portfolio of policy tools, (4) develop rigorous internal quality control systems, (5) invest heavily in building knowledge, increasing human capital, and enhancing the infrastructure of information systems, and (6) routinely

engage in ex post evaluation exercises to determine how specific initiatives turned out and to identify the need for refinements of the agency's analytical approach, statutory powers, and institutional design.

Doing these things well requires incumbent agency leadership to make capital investments whose benefits may come to pass mainly during the tenure of future appointees. A telling sign of a good leader is the intensity of commitment to take actions today that generate positive externalities for one's successors. For an agency, the aim is to create a norm that discourages individual credit-claiming in the short term and emphasizes contributions to the long-term success of the institution.

One person whose ideas helped inform the FTC's self-study is Fred Hilmer, who played a formative role in the modern development of Australia's competition and consumer protection system and now serves as the Chancellor of the University of New South Wales. Among other duties, Chancellor Hilmer teaches executive MBA classes. He tells his students that the success their companies are experiencing today probably are rooted in long-term investments that their predecessors made five or ten years ago. He advises them, upon returning to their offices, to pose the following question to themselves every day: "What have I done to make the lives of leaders who follow me better off five or ten years from now?" That is good advice for public officials, as well.