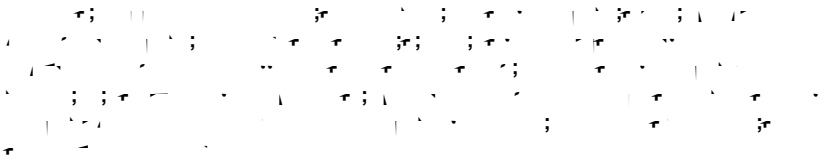
Concurrences
Revue des droits de la concurrence

William KOVACIC: A new Chairman for the US FTC

Interview | *Concurrences* N° 3-2008 – *pp. 5-9*

William KOVACIC
wkovacic@ftc.gov
Chairman, US Federal Trade Commission



William KOVACIC: The modern transformation of the FTC is one of the great success stories of public administration in the United States and, I think, around the world. The FTC in 1979 had considerable strengths, but the FTC of 2008 is much improved by comparison in several ways. First, the FTC today has a stronger, more systematic approach to setting priorities and selecting competition and consumer protection initiatives that are most likely to benefit consumers. At the Commission level and within individual operating bureaus, the agency has enhanced techniques for defining goals, setting criteria for choosing projects, ensuring that the agency's commitments are well matched to its resources and capabilities, and assessing the results of specific interventions.

A second important change is increased reliance on the full collection of policy instruments that the U.S. Congress entrusted to the FTC in 1914. These instruments include the litigation of cases, especially through the FTC's own administrative adjudication process; the publication of reports using information obtained by use of, among other methods, the agency's data collection powers; the convening of seminars and conferences to learn about current commercial trends; appearances before other government bodies to act as an advocate for pro-consumer and pro-competition policies; providing guidance to the business community; and conducting programs to educate consumers. By engaging all of its capabilities and seeking to apply the best tool or combination of tools, the FTC has made great progress toward achieving policy results that surpass what the agency could achieve by relying entirely or predominantly on the prosecution of cases. A one-dimensional competition or consumer protection agency is not likely to be equal to the challenges that lie ahead. By using all of its capabilities, the FTC has taken major steps toward realizing the destiny that Congress foresaw at the Commission's creation.

"The modern transformation of the FTC is one of the great success stories of

A fourth significant change has taken the form of greater efforts to achieve more integration of the agency's competition policy and consumer protection capabilities. There is a growing realization that in a number of sectors, such as health care and financial services, the FTC can achieve superior outcomes by joining up knowledge that comes from the study of both supply side (the competition policy emphasis) and demand side (the consumer protection policy emphasis) perspectives.

A fifth adjustment has been a dramatic increase in resources devoted to cooperation with competition and consumer protection authorities outside the United States. When I was a junior case handler in 1979, international liaison activities were handled by a single FTC employee. Today we have an Office of International Affairs with over 15 professionals, including members of foreign competition and consumer protection agencies who are spending time with us under our International Fellows program. In 1979, nobody envisioned that competition policy would be a concern beyond a relatively small number of countries with well-established market economies. Few foresaw the day when these jurisdictions would provide advice to socialist states about the development and implementation of competition laws. Those improbable events have come to pass. Today the FTC conducts a substantial technical assistance program literally around the world.

"In 1979, nobody envisioned that competition policy would be a concern beyond a relatively small number of countries with well-established market economies."

A sixth change has been a major upgrading of the FTC's technological infrastructure that permits us to collect and analyze data relevant to our consumer protection programs. When I first joined the FTC, consumer complaints were recorded and filed by hand. In the 1990s, the agency invested heavily in technology and created electronic data bases, such as Consumer Sentinal, and other computer-based information gathering mechanisms. These and subsequent investments in this decade have sharply reduced the time between the first identification of a problem and the day the FTC is in court seeking an injunction to stop an offensive practice.

A final noteworthy improvement has been a progressive enhancement of the FTC's human capital. Compared to the agency of 1979, the FTC's team of administrative professionals, attorneys, and economists is considerably stronger in terms of their skills and experience. An agency goes only as far as its people can carry it, and the FTC's greater success over time in recruiting and retaining a first-rate staff has been indispensable to its success.

My background brings three useful perspectives to my latest appointment to the FTC. The first is that I have come to understand the agency's culture and habits as only an insider can – in my case, as a junior member of the professional staff, as an advisor to a commissioner, as the General Counsel, and as a commissioner. Second, as an academic, the opportunity to do research and write about the FTC has given me a feel for its history and the forces that have shaped its performance over time. Third, my work in jurisdictions outside the United States has provided many valuable points of comparison and many insights into what makes a competition policy system operate successfully.

All of these experiences prepared the path to my current position. No single experience has been more important than my friendship and professional relationship with Timothy Muris, the FTC Chairman who brought me to the Commission to be the General Counsel in 2001. I first worked with Tim on projects at the FTC in the early 1980s, and I was his colleague on the faculty at the George Mason University School of Law for ten years. Much of what I know about the FTC and the art of public administration I learned from Tim.

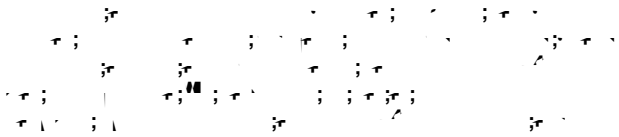
I have three priorities relating to the FTC's antitrust law and economics programs. The first is to sustain and enhance the agency's litigation and non-litigation initiatives in sectors of the greatest importance to consumers and to economic performance generally. Key areas for our attention include energy, health care, pharmaceuticals, real estate, and standard setting. In addition to important FTC merger and nonmerger litigation matters in these areas, we will be devoting substantial resources to a rulemaking proceeding involving market manipulation in the petroleum products sector and various forms of competition policy R&D, including the completion of a study of authorized generic pharmaceutical products. Among other events, this Fall we are convening what we hope to be the first of what we hope to be an annual conference on developments in industrial organization economics.

The second is to undertake an extensive self-assessment of the agency with an eye toward identifying how best to improve the FTC's operations and organization. This project, called *The FTC at 100: Into Our Second Century*, will use internal deliberations and public consultations to assess what the FTC must do to fulfill the ambitions our Congress set for it early in the 20th Century. We will use our centennial year (2014) as a focal point, and we will use internal deliberations and external consultations to identify means to strengthen the institution. Our external consultations will include workshops and seminars outside the United States to gain insights from the competition policy community abroad. The aim of this exercise is to illuminate the path for the FTC to strengthen its institutional foundation and to establish a norm of routine, periodic self-assessment.

"I have three priorities relating to the FTC's antitrust law and economics programs."

The third priority is to pursue innovations in intergovernmental cooperation relating to competition policy inside the United States and with our counterpart agencies abroad. I see many opportunities to improve the effectiveness of law enforcement and policy making through collective efforts to identify superior analytical techniques and operational methods and to cooperate in law enforcement and research matters of shared interest. Achieving higher degrees of interoperability and cooperation assumes ever greater importance in an environment that features tremendous fragmentation of authority inside and across individual jurisdictions.

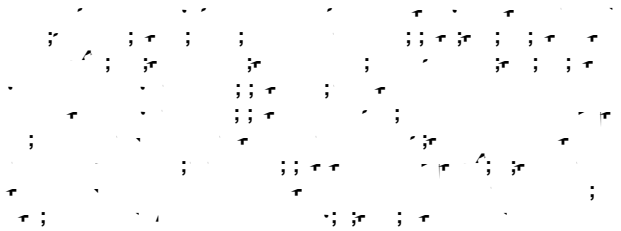
New presidential administrations have tended to make at least some adjustments in the existing mix of activities of the FTC. Notwithstanding these adjustments, I anticipate that continuity will be the dominant theme for the FTC. When they study the current programs of the FTC and assess its activities in this decade, I expect that the appointees of the new president will understand three things clearly. First, they will see the large extent to which path to success for the FTC has taken the form of incremental, progressive enhancements of existing programs. They will come to appreciate how the many successful litigation and non-litigation programs of the FTC in this decade – for example, the FTC's report on the patent system and competition policy, *T omote Innovation* — have built creatively and wisely upon foundations established in the 1980s and 1990s. Second, they will how the diversified, ambitious portfolio of existing FTC initiatives supplies a superior foundation for the agency's future work. Third, they will see how massively the FTC in this decade has invested in improving the institutional infrastructure of competition policy within the Commission, inside the United States, and throughout the global competition community, and they will view this as a practice worth continuing.



I expect that all areas of US antitrust law and policy will feature continuing evolution. This has been the US experience since 1890. It stems from the decision of the Congress, in designing the Sherman Act, to adopt a consciously evolutionary scheme through which courts over time would interpret and reinterpret the broad, relatively open ended terms of the statute to account for developments in learning about economics and the law.

Tw Tel6roblemomwh*J-327fue dwciomp,(ty upoi T*(wsen0 FTC fue d)TjTiJ-327same ag25(w masTf Tw8 Tw 9 0 1.9129(w the)1ince)]T5 ..010

If the conceptual benefits of a dual function agency are to be realized, the agency must take a number of organizational and operational steps to integrate these perspectives, to ensure that alternative views are brought to bear on problems. This does not happen automatically. I would say that the FTC has made substantial progress in this direction in areas such as health care and data protection. This is a work in progress, and there is more to be done to realize the potential gains from our dual-function configuration.



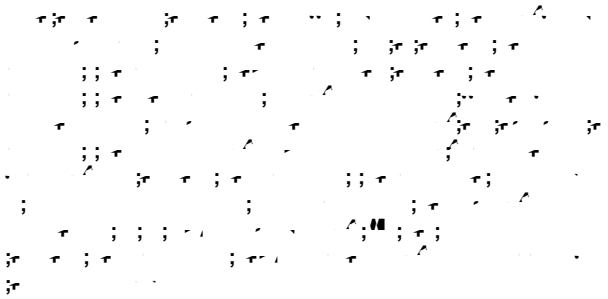
Under the federal antitrust statutes, our States have authority to bring their own lawsuits and do not require the consent of the federal antitrust agencies to do so. In their selection of cases and choice of theories, they are constrained essentially by the same force that constrains the federal agencies – namely, the decisions of the Supreme Court and the other federal courts. Even so, within the boundaries set by the jurisprudence established by the federal courts, the federal agencies and the State agencies enjoy discretion to decide how to act.

A domestic competition network (DCN) would serve several aims. It would seek, by a process of consensus building, to attain agreement on what analytical tests and enforcement norms the federal and State authorities might collectively embrace. Where there are differences in preferences, a DCN would provide a forum for regular discussion and debate with an eye toward achieving better understanding of the basis for

equilibrium in the US is the product of a successful hijacking of doctrine and policy by ideologues associated with the Chicago School. In my former role as an academic who marks student examinations, I would give either interpretation no better than a “C+.”

Where do we find “A+” answers? One place to look is at how the antipathy of US courts toward the current system of private rights of action has led judges to impose ever more demanding standards for establishing the fact of an infringement. I believe US abuse of dominance law would look much more like EU law if the courts had not concluded, rightly or wrongly, that the existing system of private rights creates excessive risks of overdeterrence. Another place is to study how differences in assumptions about the operation of the economic systems in the EU and the US, respectively, affect the definition of liability standards. The US preference for permissive rules reflects that view that looser controls are appropriate due to the adaptability of rivals, customers, and suppliers. This adaptability inheres in strong capital markets, relatively few limits on the establishment and operation of new businesses, an absence of social stigma for operating a failed enterprise, relatively few rigidities in the market for labor, and a fluid mechanism for injecting the assets of bankrupt firms back into the economy. EU courts and enforcement officials may perceive economic conditions differently in the Community. The choice of assumptions can deeply influence how you set and apply abuse of dominance rules.

There are a number of ways to achieve greater understanding and, perhaps, more consensus: deeper collaboration on individual abuse cases, fuller contacts at the case handling and management levels on unilateral conduct issues, pursuit of common research agendas to study specific sectors, and fuller exploration of the assumptions that guide current policy. The EU and US agencies do some of this now and ought to do more in the future. This process will require considerable future effort and patience. The success achieved regarding cartels and mergers shows the positive results from a common commitment to work constructively together over the long run.



International cooperation initiatives undertaken under the auspices of networks such as the International Competition Network (ICN) and the Competition Committee of the Organization for Economic Cooperation and Development (OECD) have made great progress of four types: increasing interoperability across different national systems, fostering understanding about experience in individual jurisdictions, building a consensus about superior norms regarding substantive analysis and procedural methods, and transferring knowhow. A major challenge for the members of these organizations is to make a commitment to continue and today?
?

Concurrences est une revue trimestrielle couvrant l'ensemble des questions de droits communautaire et interne de la concurrence. Les analyses de fond sont effectuées sous forme d'articles doctrinaux, de notes de synthèse ou de tableaux jurisprudentiels. L'actualité jurisprudentielle et législative est couverte par neuf chroniques thématiques.

Concurrences

Editorial

Jean-Bernard Blaise, Nicolas Charbit,
Laurent Cohen-Tanugi, Claus-Dieter Ehlermann,
Laurence Idot, Hubert Legal,
Claude Lucas de Leyssac, Denis Waelbroeck...

Interview

Sir Christopher Bellamy, Dr. Ulf Böge,
Nadine Calvino, Frédéric Jenny, Neelie Kroes,
Mario Monti, Mustafa Parlak, Dominique Voillemot...

Tendances

Jean-François Bellis, Guillaume Cerutti,
John Davies, Céline Gauer, Damien Géradin,
Pierre Kirch, Christophe Lemaire, Irène Luc,
Jorge Padilla, Emil Paulis, Richard Whish...

Doctrines

Guy Canivet, Emmanuel Combe, Serge Durande,
Luc Gyselen, Daniel Fasquelle, Barry Hawk,
Laurence Idot, Bruno Lasserre, Stanislas Martin,
Caroline Montalcino, Catherine Prieto,
François Souty...

Pratiques

Tableaux jurisprudentiels : Bilan de la pratique des engagements, Données publiques et concurrence, Droit pénal et concurrence...

Horizons

Allemagne, Belgique, Canada, Japon,
Luxembourg, Suisse, USA...

Droit et économie

Penelope Papandropoulos, David Spector

Chroniques

Ententes
Emmanuelle Claudel
Michel Debroux
Cyril Sarrazin

Pratiques unilatérales
Laurent Flochel
Catherine Prieto
Anne Wachsmann

Pratiques restrictives et concurrence déloyale
Daniel Fasquelle
Jean-Patrice de la Laurencie
Marie-Claude Mitchell

Concentrations
Jean-Mathieu Cot
Jérôme Philippe
Stanislas Martin

Aides d'État
Jean-Yves Chérot
Jacques Derenne
Christophe Giolito

Procédures
Valérie Michel-Amsellem
Chantal Momège
Fabien Zivy

Régulations
Denis Lescop
Jean-Paul Tran Thiet
Thierry Tuot

Secteur public
Bertrand du Marais
Stéphane Rodrigues
Jean-Philippe Kovar

Politique internationale
Frédérique Daudret-John
François Souty
Stéphanie Yon

Revue des revues

Christelle Adjémian
Umberto Berkani
Alain Ronzano

Bibliographie

Centre de Recherches sur l'Union Européenne
(Université Paris I – Panthéon-Sorbonne)

Tarifs 2008

❏ Abonnement annuel - 4 n° (version papier) *1 year subscription (4 issues) (print version)*	398 €	406,36 €
❏ Abonnement annuel - 4 n° (version électronique + accès libre aux e-archives) *1 year subscription (4 issues) (electronic version + free access to e-archives)*	490 €	598,34 €
❏ Abonnement annuel - 4 n° (versions papier & électronique accès libre aux e-archives) *1 year subscription (4 issues) (print & electronic versions + free access to e-archives)*	580 €	693,68 €
❏ 1 numéro (version papier) *1 issue (print version)*	100 €	102,10 €
❏ Crédit de 5 articles (version électronique sur concurrences.com) *Pack of 5 articles (electronic version on concurrences.com)*	110 €	131,56 €
❏ 1 article (version électronique sur concurrences.com) *1 article (electronic version on concurrences.com)*	30 €	35,88 €

Bulletin électronique e-Competitions | *e-bulletin e-Competitions*

❏ Abonnement annuel multi-postes + accès libre aux e-archives *1 year subscription with multi PC access + free access to e-archives*	498 €	595,68 €
❏ Crédit de 5 articles *Pack of 5 articles*	90 €	107,64 €
❏ 1 article *1 article*	20 €	23,92 €

Revue *Concurrences* 10€,64 € € €