



into action requires wrestling with some of the same challenges that surround cost-benefit analysis.

TACD's articulated version of the precautionary principle states that it "is about taking preventative policy measures when there is a reasonable suspicion of harm, even if scientific evidence is lacking."<sup>2</sup> Applying this principle in practice would require policymakers and others

As part of its broad based policy-making framework, the OECD highlighted the importance of using a cost-benefit analysis that takes into account both quantifiable factors and qualitative issues such as community standards and ethical considerations.<sup>10</sup> It also recommends looking at the effects that the options under evaluation could have on competition and other policy areas such as the environment and health and safety. The OECD also recognized that not every action by government requires a detailed analysis: for example, an immediate product ban following a death or serious injury to consumers would not necessarily require a cost-benefit analysis.

Of course, as the OECD also recognized, the success of any policy making approach in promoting and protecting consumer interests depends “critically on the interpretation, implementation and enforcement of those policies by enforcement authorities.”<sup>11</sup>

### **Costs, Benefits, and Values in Consumer Protection Rulemaking**

So let me begin with the FTC’s outlook on consumer protection rulemaking. The FTC is first and foremost an enforcement agency – indeed, we are the leading consumer protection and competition enforcement agency in the U.S. However, Congress has given us specific authority to promulgate rules in discrete areas of critical importance to consumers. As an independent agency, the FTC is not bound by the requirements of cost-benefit analysis that apply to agencies that are part of the president’s administration.<sup>12</sup> But the FTC conducts its rulemakings with the same level of attention to costs and benefits that is required of other agencies. We build extensive records from public workshops and formal written comments from the public to inform these assessments. And we review all regulations at least every ten years to determine whether any changes are warranted or whether they are still needed at all.

Some of our most important privacy regulations involve harms that are qualitative in nature. Let me give you a couple of examples. The Children’s Online Privacy Protection Act (COPPA) creates strong protections for information collected online from children under the age of 13.<sup>13</sup> These protections are based on a recognition that children are less capable than adults of understanding the terms of data collection and use, making stronger protections on data collection and use as well as data security appropriate to keep children safe and secure online. In the most recent review of the COPPA Rule – which the FTC conducted five years ahead of

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<sup>10</sup> See *id.* § II.6.v.

<sup>11</sup> See OECD, Consumer Policy Toolkit 101 (July 2010), available at <http://www.oecd.org/sti/consumer/consumer-policy-toolkit-9789264079663-en.htm>.

<sup>12</sup> See Statement of the Federal Trade Commission on the FTC’s Regulatory Reform Program: Twenty Years of Systematic Retrospective Rule Reviews & New Prospective Initiatives To Increase Public Participation and Reduce Burdens On Business Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, U.S. House of Representatives, at 1 (July 7, 2011), available at <https://www.ftc.gov/public-statements/2011/07/prepared-statement-federal-trade-commission-ftcs-regulatory-reform-program> (Through Executive Order 13563, the President recently directed all Executive Branch agencies to engage in a regulatory review process. While the FTC, as an independent agency, is not bound by this Order, it fully supports the Order’s goals.”).

<sup>13</sup> See 15 U.S.C. §§ 6501-6506.



course, one could estimate the cost to consumers in terms of the time they spent dealing with these calls instead of doing something else, like working or eating dinner with their families. But those estimates account for a small fraction of the frustration, inconvenience, and overall sense of invasion that consumers suffer as a result of unwanted calls.<sup>24</sup>

### **Costs, Benefits, and Values in Consumer Protection Enforcement**

The FTC combines our broad mandate to protect consumers with a rigorous, empirical approach to enforcement matters and a need to meet exacting legal standards. Section 5 of the FTC Act – the fountainhead of our enforcement authority – prohibits “unfair or deceptive acts or practices in or affecting commerce.”<sup>25</sup> In our cases brought under our deception authority, we address the broad, public harm to consumers and the marketplace that arises when companies misrepresent or make false statements about their goods and services, or fail to disclose material facts about them. Truthful information is so fundamental to consumer markets that we can bring deception cases based on a company’s representations in an advertisement, for example, without alleging that any consumers even saw the ad in question.

In our enforcement actions to stop “unfair” practices, we must prove that a practice is likely to result in consumers suffering “substantial injury.”<sup>26</sup> Such harm very well may be qualitative, as many of the FTC’s privacy and data security cases illustrate.

We must also prove that the consumer harm from the practice we believe is “unfair” is “not avoidable by consumers” and is “not outweighed by countervailing benefits to consumers or competition.”<sup>27</sup> In other words, a form of cost-benefit balancing test is written into the basic unfairness statute that we enforce. This test does not require the FTC to consider only quantifiable harms, though in many cases we can make a good estimate of the amount of consumer harm in terms of dollars and cents. In other cases, however, the harm to consumers – and the lack of benefits – is both qualitative and extremely clear.

A few examples from the dozens of privacy and data security cases that the FTC has brought will illustrate this point. Consider our case against Facebook. One of the practices that caused the FTC to take action was that Facebook overrode users’ privacy settings and exposed consumers’ information to a broader audience than they intended when they provided it to Facebook.<sup>28</sup> The FTC alleged that these disclosures could lead to substantial harm, namely “threats to [consumers’] health and safety” and “unauthorized revelation of their affiliations.”<sup>29</sup> Consumers did not have a chance to opt in to this change, nor did they enjoy a clear benefit from having information that they intended to keep private or share with one audience suddenly be shared more broadly.<sup>30</sup>

The FTC has also taken action against companies for unfairly *collecting* information. For example, the FTC brought an action against a firm that developed software for rent to own companies to install on computers they offered to consumers, to disable the computer if the consumer failed to make timely payments, or the computer was stolen.<sup>31</sup> An add-on feature for the software, called “Detective Mode”, allowed the rent-to-own companies to log keystrokes and capture screenshots of confidential and personal information such as user names and passwords, social media interactions and transactions with financial institutions.<sup>32</sup> It also allowed the rent to own companies to take pictures of anyone within view of the computer’s webcam, all without even alerting consumers to the existence of the software.<sup>33</sup> We believed that collecting this deeply personal information was harmful to c

and data security cases that we have brought against companies large and small. It shows in the 39 Safe Harbor cases that we brought before the *Schrems* decision. It shows in the hundreds of other cases we have brought to enforce consumers' rights and dignity under other laws, like the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Children's Online Privacy Protection Act. And it shows in our commitment to cooperate with enforcement agencies in Europe and other regions. These are unsettled times in transatlantic privacy, but the FTC is committed to building on the progress that we have made on our own and in cooperation with others.

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Consumer protection in one country, with its own legal framework and traditions, is a vast undertaking, particularly when technologies and business models are rapidly changing. Providing effective consumer protections in a world of global services and personal data flows is even more challenging – but also essential to this system of commerce. I believe the FTC sets a standard for combining strong, effective enforcement with a relentless effort to examine markets and understand the effects of its actions. I hope and expect that our record will be part of the foundation of consumer protections in the transatlantic economy as TTIP and the many other issues brewing at the moment reach their resolutions.

Thank you.