

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

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INTRODUCTION

I am grateful to Phil Weiser and the Silicon Flatirons Center for the opportunity to discuss the role of the Federal Trade Commission (FTC) in the formulation of public policy for the Internet. I approach the topic in a somewhat awkward position. At the time of this conference, my

* Commissioner, U.S. Federal Trade Commission, and Professor, George Washington University Law School (on leave). From March 2008 to March 2009, the author served as Chairman of the FTC. The views expressed here are the author's alone.

tenure as the FTC's chairman is the equivalent of an hour-to-hour lease, terminable at will. My wife and I recently visited a bank to purchase a certificate of deposit. To perform a required background check, the bank's representative asked, "Where do you work?" I said I was with the Federal Trade Commission. The next question was, "What is your position there?" The first answer that came to my mind was "precarious."

The imminent close of my time as FTC chairman means that I am less able to speak confidently about what the agency will do in the months and years ahead. Compared to other Commission members, the FTC chairman has relatively greater ability to guide the agency toward specific ends. Rather than focus upon specific policy initiatives, I will talk more about what I see to be institutional predicates for the FTC to formulate sound competition and consumer protection policies for the Internet.

I. THE FTC'S POLICY PORTFOLIO AND THE INTERNET

The FTC has a fairly extraordinary portfolio of policymaking responsibilities that affect the development of the Internet. Three areas stand out. First, the Commission is a competition policy agency. As such, it addresses a wide range of competition issues, including abuse of dominance, mergers, distribution practices, and agreements among rivals. It is the Commission's view, in light of *Brand X*,¹ that the agency has jurisdiction to address broadband-related matters, notwithstanding the common carrier exception to the Federal Trade Commission Act.² The second element of the FTC's policy portfolio is consumer protection. Over the past decade, the Commission had addressed a wide range of issues associated with advertising, marketing, and other activities that affect Internet-based commerce. A third area closely related to consumer protection is the field of privacy and data protection.

Two common characteristics link all three dimensions of the FTC's Internet portfolio. The first is the Commission's method of policymaking. To build a program, the FTC has used the complete portfolio of policymaking instruments entrusted to it. These include the prosecution of cases, the preparation of studies, the education of consumers and business organizations, the issuance of guidelines, and advocacy with other public institutions. This strategy reflects the agency's

1. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005). See also *Reconsidering Our Communications Laws: Ensuring Competition and Innovation: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 202 (2006) (prepared statement of the Federal Trade Comm'n) [hereinafter *Communications Competition Hearing*] (discussing FTC jurisdiction over broadband services), available at <http://www.ftc.gov/os/2006/06/P052103CommissionTestimonyReBroadbandInternetAccessServices06142006Senate.pdf>.

2. 15 U.S.C. § 45(a)(2) (1994).

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 exogenous shock to stimulate change. The financial crisis may have provided the shock that stimulates a rethink of the existing distribution of financial services regulatory authority.⁴ Numerous public bodies at the state and federal level—including the Federal Reserve Board, the Department of the Treasury, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and the FTC—share responsibility for regulating the financial services sector. The FTC has seen firsthand the costs of the existing fragmentation of regulatory power and has spent an unfortunately large amount of its effort to determine the shape of existing jurisdictional boundaries.

The reassessment of financial services regulation eventually could lead legislators and other policymakers to ask questions about the wisdom of other regulatory frameworks that feature considerable fragmentation and shared authority. One question of keen interest to the FTC is whether the country should sustain two federal competition agencies, or have numerous public bodies at the federal and state levels share responsibility for evaluating the likely competitive effects of mergers involving firms in sectors such as energy and telecommunications. It is easy to assume that the existing distribution of authority is immutable, because congressional committees are unlikely to

4. One element of these reforms is a proposal to divest the FTC of its consumer protection duties in the field of financial services and create a new Consumer Financial Protection Agency. This measure is examined in William E. Kovacic, *The Consumer Financial Protection Agency and the Hazards of Regulatory Restructuring*, LOMBARD STREET, Sept. 14, 2009, <http://www.ftc.gov/speeches/kovacic/090914hazzrdsrestructuring.pdf>.

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 quo and raise basic questions about what the optimal regulatory framework for other areas of government policy—such as antitrust enforcement—might be.

The financial crisis had not emerged fully when I became FTC Chairman in late March 2008. Looking at the months ahead, I asked myself what I could do during a tenure that was likely to be relatively short. Having studied the experience of appointments to the FTC,⁵ I knew one thing with great clarity: new presidents, whatever their party affiliation, tend to pick their own person to chair the Commission. With one exception since 1950 at the FTC, all new presidents with a vacancy on the Commission have brought in a new person from the outside. I understood that my expiry date would probably be about the 20th of January, 2009 and that my best-if-used-by date would be November 4, 2008. For me the question was, “What can you do in a year or less?” As a creature of habit from academia, I thought the FTC could do what universities do to prepare for review by an accrediting body: conduct a self-study. For a number of years I have believed that the FTC urgently needed a self-assessment to face the host of challenges coming the Commission’s way. This belief drew force from watching one jurisdiction after another overseas ask basic questions about institutional design and effectiveness.

Careful attention to institutional considerations is long overdue. The overwhelming focus of discussion about regulation is the substance of policy rather than the means by which policy is developed and implemented. The physics of substantive policy routinely eclipses the engineering of implementation. The physics of regulation consists of intriguing questions of doctrine and its supporting conceptual framework. The papers deemed most publishable in academic journals dwell principally upon matters of theory. To affect policy, theory cannot be suspended in air. If theory is not grounded in the engineering of effective institutions, it will not work in practice. The engineering of policy making involves basic questions of implementation. It is one thing for the policymaking aerodynamicist to conceive a new variety of aircraft. It is another for the policy engineer to design and build it.

To have elegant physics without excellent engineering is a formula for policy failure. A problem with public administration in the United

5. On the history of appointments to the FTC from 1914 through the mid-1990s, see William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915 (1997).

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 criteria be designed—there is more discussion about the proper design of regulatory frameworks and how regulatory agencies can make things work effectively in practice. There is a very healthy inclination to elevate

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 papers and in casual conversation, students of regulation often discuss how well agencies are doing. There is no readily observable index by which one can see how the shares of the Federal Trade Commission or other regulatory bodies are trading. What do we mean when we say that a regulatory body is performing well, adequately, or deficiently? On my report card, a good agency consciously devotes effort to improving its institutional infrastructure. This requires capital investments in institutional capacity, a commitment that collides with the short-term orientation of much policymaking. An aphorism urged upon Washington officials is “to pick the low hanging fruit.” This summons up images of fruit gatherers roaming about the Mall with baskets in search of easily reached tree limbs. Washington does not have a good aphorism that says it is the duty of agency leaders to plant trees. The trees of good policy can take years to grow, and the maturation process easily can outrun the tenure of the political appointee who will serve two, three, or four years. A policymaking culture that emphasizes short-term credit-claiming regards one who would plant trees as a fool. The consequence is an underinvestment in the kinds of capital improvements that improve agency performance over time.

One cannot readily design binding commands that compel leaders to make capital investments in agency capacity. A sustained commitment to institution-building arises instead from the establishment of norms (inside and outside the agency) that treat enhancements to institutional infrastructure and agency capacity as an essential duty of leadership. Such a norm presses regulators to describe in each budget cycle what steps the agency is taking today to make it a better institution five and ten years into the future.

III. THE FTC AT 100: CHARACTERISTICS OF GOOD AGENCY PRACTICE

The FTC self-study shed light upon a number of approaches that the Commission should take to strengthen the agency’s institutional foundation and to improve its capacity to deliver good policy results. Sketched below are techniques that characterize good agency practice.

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 consultation with academics, consumers, business officials, and other public officials. The statement of goals is not a one-shot endeavor. The agency's aims required reexamination and reformulation as conditions change. The clear statement and restatement of aims have a number of important advantages. They provide valuable guidance to the agency's staff, and they help affected firms organize their affairs to satisfy their obligations under the law. They facilitate debate over what the agency ought to be trying to achieve, and they set a baseline for measuring the results of the agency's activities. Maybe most importantly, the exercise of preparing a clear statement of aims forces the agency to define its purpose and to decide, among all of the choices available to it, what goals most warrant its attention.

B. Process to Set a Strategy

Good agencies have a conscious plan to set strategy. No responsibility of agency leadership is more important. When the FTC conducted interviews with other regulators for its self-study, it was striking to see how the tyranny of the daily routine tends to discourage planning and the forward-looking establishment of priorities. One head of a foreign competition agency said, "I'm so busy that I have no time to think, much less to plan." Many agencies operate with what might be called a fire department model of prioritization. The fire bell rings. The agency takes out the trucks, puts out the fire, returns to the station, and

waits for the bell to ring again. In this model, nobody has time to think about fire prevention—to determine what causes fires and to figure out how best to stop them from happening in the first place.

A good process of setting strategy forces the agency to consider which outlays of resources yield the best returns. The United Kingdom's Office of Fair Trading (OFT) has one of the best management approaches for measuring proposed projects according to their likely economic effects or their contribution to the development of doctrine. The OFT planning process compares anticipated returns of a project to its likely cost in staff and time. Project teams also are asked to provide practical tests by which the agency can tell whether expected gains are being realized in practice. OFT clearly communicates its planning framework to its staff and requires staff to relate proposed projects to the framework.

OFT takes individual projects and considers them as elements of an agency-wide portfolio. Individual matters are classified according to their likely risks and returns. Some matters pose relatively low risks and promise relatively small returns. Some present modest risks and offer modest returns. Others entail high risks but, if successful, are likely to generate substantial returns. By examining projects as parts of a portfolio, OFT is able to assess whether its program is balanced in two respects. It helps the agency assess whether its commitments are well matched to its capabilities to perform successfully, and it supplies a useful means of seeing whether the agency is taking acceptable political risks. In selecting projects, an agency can envision itself as either accumulating political capital or spending it. An agency can afford to incur deficits in political capital temporarily, but not chronically. If an agency runs deficits in political capital consistently over time, it will melt down and fail. Proposed projects must be measured by their impact upon the political capital account.

Strategic planning assumes special importance in the current context. The financial crisis has created enormous pressure to reduce public expenditures and to make wise choices among possible application of agency funds. The FTC is responsible for enforcing approximately fifty-five statutes. To do this the agency receives an annual appropriation of roughly \$255 million, which supports the work of 1100 employees. The imperative to select good projects increases with the possibility that federal regulators in the years ahead will do well to protect existing budgets or, perhaps, obtain small increases. There is no surplus of capacity to cope with improvident program decisions that entail commitments which outrun our capabilities to deliver good results. Now more than ever a competition agency cannot rely on path dependence—a simple repetition of past patterns of behavior—to decide what it will do.

C. *From Case-Centrism to Effective Problem Solving*

The FTC self-study revealed a healthy movement on the part of many competition authorities from a case-centric approach to resource allocation toward a philosophy that emphasizes problem solving. The traditional focus of project selection has responded to the way in which many regulators bodies are evaluated. To a large degree, the popular measure of a competition agency is the number of cases it prosecutes: you are whom you sue. The commencement of a case is a readily measurable event, and cases often serve as a proxy for the more meaningful and difficult exercise of determining whether the agency's programs are improving economic performance. In a case-centric measurement scheme, there often is extra credit for the big case that gets prominent media coverage.

There are serious problems with a norm that treats the number of prosecutorial events as the chief index of an agency's worth. The agency can become the equivalent of an airline that measures effectiveness by its number of takeoffs. At the agency's airport, an observer would see a large display board labeled "Departures." If the observer asked, "Where is the board for arrivals?," the agency would reply, "We do not track arrivals. Instead, look at our impressive number of departures." For purposes of good public policy, one needs to monitor arrivals carefully. Are projects arriving on time? Are projects taking the agency where it is supposed to be going? Did the agency set out on a case with a clear idea of where it was going—the difference between departing Washington, D.C. and saying "Fly to Los Angeles" versus saying "Fly to the West Coast?"

An indifference to how projects come to earth—smooth touchdowns, hard landings, or smash-ups?—can afflict leaders with relatively short-term appointments if the agency is graded by the number of cases it initiates. If the policymaking world and the community of academics, consumer groups, and practitioners measure the agency and its leaders by the number of cases launched, agency leaders may be induced to give them what they want. This is a terribly short-sighted structure of incentives.

The FTC self-study identified an emerging, superior view about how agencies should approach the application of their authority. The appropriate measure of an agency's value is how well it solves competition policy problems, not merely how many cases it prosecutes. A problem-solving orientation asks two basic questions about each problem the agency faces. The first is to ask what is the best policymaking tool or collection of tools to address the problem. The best problem-solving approach may often involve a mix of techniques. In the case of serious fraud involving electronic commerce, it has become increasingly evident that the FTC's approach must draw upon several of its policy

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 REPORT: SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING (Feb. 2009), *available at* <http://www.ftc.gov/os/2009/02/p085400behavadreport.pdf>.

7. JAMES M. LACKO & JANIS K. PAPPALARDO, BUREAU OF ECON., FEDERAL TRADE COMM'N, IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE DISCLOSURE FORMS (June 2007), *available at* <http://www.ftc.gov/os/2007/06/p025505mortgagedisclosurereport.pdf>.

toward children⁸ and the interaction between producers of branded pharmaceuticals and manufacturers of generic equivalents.⁹

A further distinctive FTC capability is the joining up of the competition and consumer protection perspectives that are inherent in the Commission's mandate. For a number of matters involving the operation of the Internet, it can be valuable to bring both substantive disciplines to bear in deciding when and how policymakers should intervene. For example, in addressing subjects relating to privacy, the FTC's Bureau of Consumer Protection's experience in bringing cases, designing regulations, and conducting education programs has generated useful insights about the design of privacy protections. The agency's experience as a competition policy authority makes the agency sensitive to possibilities for rivalry among firms to elicit private initiative to satisfy consumer tastes concerning privacy, and it highlights the need to ensure that privacy related rules are not set in a way that endangers practices that bring significant benefits to consumers. The mix of competition and consumer protection duties creates a healthy dynamic tension inside the agency and increases our capacity to see all major dimensions of a problem and devise appropriate solutions.

The FTC has an excellent collection of capabilities to apply a sophisticated problem solving approach to difficult issues involving Internet commerce. This does not mean that the Commission or the larger community of competition policy and consumer protection specialists can assume that the agency has achieved an optimal regulatory design or that the distribution of regulatory authority in these areas across federal, state, and local institutions is ideal. There are many questions about the U.S. institutional framework for economic regulation that would benefit from debate.

Developments overseas suggest that one question worth considering is whether the results of collective decision making by a multi-member commission are superior to those achieved from a regulatory body headed by one individual. Many foreign counterparts to the FTC are governed by a single official or a team consisting of a chief executive and a chief operating officer. That is the configuration of the UK's Office of Fair Trading. The OFT's leaders are advised by an external board consisting of academics, practitioners, consumer representatives, and government officials drawn from the United Kingdom and abroad. A potential

8. FEDERAL TRADE COMM'N, *MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY EXPENDITURES, ACTIVITIES, AND SELF-REGULATION* (July 2008), available at <http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf>.

9. FEDERAL TRADE COMM'N, *GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY* (July 2002), available at <http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf>.

benefit of having a unitary governance mechanism is an increase of accountability. The head of an institution with a unitary governance framework may be more likely to internalize the costs and benefits of decisions taken during the official's tenure. The unitary framework also eliminates the circumstance in which one member of a governing board acts in a manner that diminishes the value of the partnership but advances the individual's interests.

Comparative experience also raises serious questions about procedural conventions governing the operation of the federal multi-member commissions. The Government in the Sunshine Act,¹⁰ for example, severely reduces the opportunities for collective discussion and consultation that are assumed to be the strengths of decision making by a college rather than by a single executive. For a broad range of matters, the Sunshine Act forbids a quorum of commission members (for a five member body, the quorum is three) from discussing agency business without the prior issuance of a public notice that such conversations will take place and, in many instances, without making the conversation open to the public.

It is difficult to imagine a measure that is better calculated to diminish agency effectiveness than forbidding spontaneous conversations among a plurality of members of the board. At the FTC, conversations about FTC cases or broader policy issues are permitted if only two commissioners participate. For instance, if a third member of the commission appears in the cafeteria and joins two colleagues who are discussing FTC business over lunch, the conversation about Commission work immediately ceases and discourse turns to topics of culture, sport, or holiday plans. Consequently, discussions about agency matters take place in bilateral conversations between commissioners, with the inevitable misinterpretation and loss of meaning that takes place as information is relayed in a chain of seriatim encounters, two-by-two, among the five. Another accepted circumvention of the Sunshine Act is to have the advisors of the commissioners meet as a group to discuss what the board's collective preferences might be. Rather than encourage private face-to-face discussions among the five board members, the multi-member federal commissions rely heavily on the insane alternative of having their staffs collectively and privately perform key functions of debate and consensus building.

When the strictures of the Sunshine Act are explained to the FTC's foreign counterparts, there is an evident disbelief that a nation nominally would choose to avail itself of the benefits from collective decision making and then proceed to disable, or severely encumber, the process of

10. 5 U.S.C. § 552b (1994).

collective discussion that for most tribunals is an essential means by which the benefits of governance by college are realized. A rethink of this debilitating limitation is an appropriate part of a larger assessment about how the FTC and other federal regulatory commissions might improve effectiveness. If existing limits on spontaneous private discussions involving a plurality of commission members are not relaxed, there is considerable merit to abandoning the collective governance model and replacing it with a unitary executive.

D. Effective System of Internal Quality Control

The FTC self-study underscored the importance of strong quality control as an element of good agency practice. Foreign agencies with competition and consumer protection responsibilities are using a variety of means to test the legal theory and factual support for proposed cases and administrative regulations. Some have designated staff to participate on “scrutiny panels” or to serve as “devil’s advocates” to test the work of the case handling teams. A key focus of these measures is to avoid a tendency to underestimate the quality of conceptual arguments and facts that an opponent will raise in litigation.

Beyond attaining an accurate view of an opponent’s likely litigation positions, the effort to build robust, internally driven quality control techniques is to set policy and process in the right place—to do the right things and to do things the right way. The enhancement of internal quality control mechanisms reflects an awareness that an agency will not achieve good policy results consistently if it relies principally on outsiders to come in from time to time and exhort the agency to do this, that, or the other thing. External assessments can help guide the design of an internal quality control and usefully supplement the agency’s own internal measures.¹¹ Yet the urgency to test theories, facts, programs, and processes must come foremost from within.

E. Investments in Building Knowledge

The most important input to what competition and consumer protection agencies do is knowledge. Agencies rise or fall according to how well they understand commercial developments and stay attuned to

11. An excellent example of this form of external assessment is the framework that Paul Malyon and Bernard J. Phillips have developed in recent years under the auspices of a project sponsored by the Competition Committee of the Organization for Economic Cooperation and Development. Malyon and Phillips have constructed an evaluation tool that assists competition authorities to examine their management processes and, based on the results of extensive interviews with agency officials and employees and outside observers, to construct an action plan for improvements. The competition authorities of Hungary, Mexico, and Portugal have participated in this exercise.

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 knowledgeable outsiders to share their views about important developments in commerce and in academic disciplines central to the

12. During his tenure as FTC Chairman from 2001–2004, Timothy Muris underscored the need for the FTC and similar institutions to invest in “competition policy research and development” and to make these expenditures a routine element of the agency's budget process. Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of Competition Policy*, 2003 COLUM. BUS. L. REV. 359.

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 FTC 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 capital. A major reason for the FTC's progression from near death in 1969¹⁴ and from a severe legislative pummeling in the late 1970s and

14. William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L. REV. 587, 592–602 (1982) (discussing critical assessments

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 institutions. This advantage consists of achieving the existing level of regulatory performance at a lower cost or improving regulatory results at the same cost. If the United States complacently regards the existing configuration of competition policy and consumer protection regulatory authority as immutable and fails to engage existing institutions in more substantial collaborative programs, the nation will fall behind other jurisdictions that are experimenting actively with institutional reforms to achieve superior policy solutions.

The present configuration of competition policy authority is a striking example of the problem. In recent years, three jurisdictions—France, Portugal, and Spain—have consolidated their two national competition agencies into a single entity. Brazil's legislature is poised to adopt legislation that will consolidate most functions performed by the three national bodies with competition policy authority into a single institution. These developments ought to be a stimulus for Americans to ask whether the existing distribution of policy making and prosecutorial power is sensible. What benefits does the country gain from having two federal antitrust agencies? Is it sensible for sectoral regulators at the national and state levels to conduct reviews of mergers and impose conditions that go beyond remedies attained by the federal antitrust authorities? Should state governments have competence to enforce the national competition laws and conduct proceedings parallel to those undertaken by the Department of Justice and the FTC? Is the existing form of private rights of action well conceived?

A closely related question of institutional design is the wisdom of maintaining jurisdictional boundaries that were set in the first half of the 20th century. The FTC has advocated the abandonment of the common carrier exception to its jurisdiction to account for the transformation of the telecommunications sector in the past forty years.¹⁶ The Commission has developed substantial expertise in dealing with false advertising and the litigation of claims involving unfair or deceptive acts or practices. This expertise usefully could be brought to bear upon a range of matters

16. See *Federal Trade Commission Reauthorization: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 110th Cong. (2008) (prepared statement of the Federal Trade Comm'n), available at <http://www.ftc.gov/os/testimony/p034101reauth.pdf>; *Communications Competition Hearing*, *supra* note 1.

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 professional gatherings. There also are bilateral discussions involving some public bodies.¹⁸ These measures are useful, but they are not good substitutes for the establishment of a more comprehensive framework of interagency regulatory cooperation. The U.S. competition agencies spend more time seeking to develop effective mechanisms for cooperation with foreign authorities than they devote to the integration of policymaking across federal and state agencies domestically.

Good examples of how to achieve greater levels of cooperation exist abroad. In the middle of this decade, the European Union (EU) created the European Competition Network (ECN) to coordinate the work of the national competition authorities of the EU member states and the European Commission's Competition Directorate (DG COMP). The ECN meets regularly to discuss matters of common concern and to promote information sharing and other forms of cooperation. The network has achieved considerable success in avoiding conflicts that might have arisen from the EU's decision to devolve greater levels of responsibility to the member states as part of a modernization of the EU's competition policy framework.

17. See William E. Kovacic, *Toward a Domestic Competition Network*, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 316 (Richard A. Epstein & Michael S. Greve eds., 2004) (describing value of establishing a domestic competition network).

18. These initiatives facilitate discussion about current law enforcement matters and the examination of larger policy issues. Since 2006, the FTC and many of the state attorneys general have convened an annual workshop to address topics of common interest. The workshops have addressed competition and consumer protection issues in the petroleum industry, the pharmaceutical industry, and the retailing sector. This recently developed custom will continue in the Fall of 2009, when the FTC, DOJ, and the states convene a workshop on energy issues.

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 choices among product alternatives. These efforts supplement the agency's litigation program, which challenges instances of misrepresentation and related misconduct involving the sale of financial services products. The mix of initiatives—research, consumer education, and litigation—is another illustration of the application of a multidimensional problem solving approach to address problems the FTC has encountered.

I. *Ex Post Evaluation*

A necessary element of the policy life cycle is a conscious process to assess whether specific agency initiatives achieved their intended aims. There is a great temptation to treat ex post evaluation as a luxury to be dispensed with in order to handle the press of new business. It is easier to issue a press release that gives assurances about the efficacy of a chosen course of action than it is to attempt to measure actual effects. Too often public agencies behave like a hospital that performs surgeries, discharges its patient, and declines to provide post-operative monitoring. Upon discharge, the patient asks the surgeon, "When do I come back to see you?" The surgeon replies, "Never. We have a press release that says we removed every malignant cell, we left every bit of healthy tissue in place, and you are in great shape." No responsible hospital practices medicine in that manner, and the same should go for competition or consumer protection agencies. The measurement of outcomes can be difficult, but difficulty does not excuse a failure to try.

An ex post evaluation program ought to have three basic elements.¹⁹ The first is to test the results of the agency's substantive initiatives—to assess the impact of cases, rules, education programs, and advocacy. Agencies can avail themselves of a growing body of experience concerning the design of evaluation techniques. Means to this end include reviews conducted by agency insiders, consultations with outside experts, and peer review exercises performed by representatives from other competition authorities.

The second is to evaluate the agency's procedures and management methods. For example, by measuring the time required for matters to progress through the agency's investigation and decision making processes, it may be possible to identify ways to accelerate the disposition of individual matters without diminishing the quality of the agency's

19. For a more comprehensive discussion, see William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503 (2006).

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.