



CPI - INTERVIEW WITH FTC COMMISSIONER TERRELL MCSWEENY



Aitor Ortiz: Hello, Commissioner McSweeney. Thank you for inviting CPI to your house for this short interview. I want to ask a few questions about the latest FTC policies on enforcement and international cooperation. I would like to start with one - might be a bit tough, but perhaps you can give us a good answer.

There are allegations that the US agencies are not taking a lot of action in the unilateral conduct section investigations. How does that happen, or what can you tell us about that?

T.McSweeney - First of all I want to thank you very much for taking the time today to come over to the FTC to have a chat. As you say, I don't mind answering hard questions, I think they're important ones to ask.

I would push back a little bit on those allegations. I was actually looking at this and I think the FTC has brought Section 2 cases at least once a year for the last few years prior to my time here at the Commission and also more recently. So I think Section 2 enforcement is in fact alive and well in the U.S. Thinking about our *McWane* case, which was a case in which access to distributors was essential for entry into the iron pipe fitting market; our *Bit-tracks* case, which was announced last month and which involved again, medical device customers not being able to take advantage of lower prices because they were locked into long-term exclusive contracts with Bit-tracks; and also *Cardinal Health*, which was a case that was settled a couple of years ago in which we alleged that Cardinal had illegally monopolized the market for the sale and distribution of radiopharmaceuticals. So I think that actually the FTC has a good track record of using its



authority to bring cases when it sees anticompetitive unilateral conduct.

AO - Definitely there were more than I thought originally, but I'm sure people will be waiting in some markets to see if the FTC and other agencies will keep moving forward in this section, but that is for a different interview.

Now for something more political, but I think very interesting. At the time of this interview there are only three commissioners of the FTC - all of them women, which actually speaks very well about the FTC when compared to other agencies. How has this affected the decision-making and day-to-day work? I seem to recall - and please correct me if I'm wrong - three years ago there was a Microsoft case that was deadlocked 2-2 because there weren't enough commissioners to make a decision. How has this affected you?

TM: I think it's a great question and I'm glad you put it out that the FTC is run by women right now. It actually has been really for the past year. Before my colleague Julie Brill left we were four women, and all of our bureau directors - Economics, Competition and Consumer Protection - are all women. So it's really an agency in which we have a lot of leadership by women, which is unique I think, and very interesting. Although I suppose it's less unique now, because we have Commissioner Vestager at DG Comp, we have Renata Hesse now as the acting Attorney General for the Antitrust Division at the DOJ and of course Chairwoman Ramirez running the FTC, so we're starting to see quite a lot of women enforcers in competition, which I think is very exciting.

In terms of what it means to have 3 commissioners: I think the only real difference is that it does sometimes make communication between us a little bit more challenging. I cannot talk to my individual colleagues, even in a one-on-one conversation, about a decision we are going to make without noticing a meeting, because of our Sunshine Laws. So one of the procedural changes I think people who follow the agency have observed is that we are noticing a lot more meetings. Those are very often meetings we're noticing just so we can individually talk to each other about a case and a proceeding. That makes it a bit more clunky sometimes, to try to understand each other's views and make a resolution. But we've been managing it quite well, and I can't even think of a case since Commissioner Brill departed in April where we have actually not been able to reach a consensus. So the FTC continues to be a very consensus-oriented decision making entity.

AO: I would like to ask you about the Sunshine laws, which I think is something that will be surprising for our non-American listeners. So this is a law that doesn't allow you to talk to the other commissioners?

TM: The way that a Sunshine law works - and it's a very important law, because it's meant to promote transparency in decision-making - is that we're expected to be transparent about when we're meeting to make a decision about cases. The reason, when there are only three of us, that we have to start noticing far more meetings is that when a majority -which would be two- meet,



we have to notice it as an actual meeting. When there's a quorum present that could make a decision for the FTC we have to notice that under Sunshine laws. When there are four or five commissioners we can individually meet with each other and talk about our views. Again, when you get to the point where there is a quorum present for a decision, that would be a meeting as well. But it continues to be the case that the FTC continues to be a very consensus-oriented commission. And I was trying to think of any cases where we haven't been able to reach consensus in the last four months, and I can't think of any off the top of my head. I think that's a really important quality to this institution. That we really do try to come together and understand each other's points of view, and reach compromise in our decision-making. Even though there are just 3 of us it continues to be a very important principle.

AO: When I talk to other agencies they always say that, to have only 3 commissioners would be very interesting - and they wish they were only three, because having to reach an agreement with five or seven people is more complicated, so some would say that 3 commissioners would be the perfect number.

TM: I would defer to our staff on whether it is a bit more efficient. Certainly there are fewer points of view they have to take into account and for parties coming in, fewer meetings. We don't have five meetings, only three meetings. So maybe it is helpful for people.

AO: Can we expect any appointments before the election?

TM: I really don't have any information about appointments. It's a decision that'll be made by the White House and by the Senate. So I'll spare you any predictions that would be based on pure speculation.

AO: Now I would like to jump to one of the topics that is on the table in practically every agency in the world - the Sharing economy. It seems that the EU is taking the lead in regulating this market - perhaps some of them wrongly. Not even at a EU level, but at a national level - some agencies are very active on that. We heard that the FTC is conducting a new study on this topic. Could you tell us more about this study?

TM: Absolutely. Last year we hosted a workshop on the sharing economy, looking especially at the competitive aspects of it and the innovation that's occurring in the space. There are obviously also consumer protection issues associated with it, and our focus has been more on the competitive dynamic. So we're in the process of assessing all the comments that were made in the course of that workshop and pulling them together, and I hope to see something on that soon.

It is a hot topic, and one of the things the FTC has been very proactive about in this space is



advocating on behalf of new entrants. Companies that are coming in with new business models, whether they're ride-sharing platforms or in our country Tesla coming with a direct-sales model for automobiles, can be providing some very good competition and some good consumer benefits and innovation. So one of the things that we have been very active in doing is expressing in comments to either state lawmakers or local regulators, that as they're thinking of how to draw the appropriate consumer protection rules or laws around these businesses that they be careful not to overcorrect. So that they don't take a step to simply ban entry of a new business simply because they may or may not have incumbent interests at stake or may or may not be thinking about the narrowest, pro-innovation way of writing rules and regulation. So the FTC has been quite an active advocate on behalf of competitive entry for really the last 10 to 12 years, so we continue to be very active in that space.

AO: You mention a couple of things, like wanting to promote entry, avoid any kind of ban restrictions to entry, but also to protect consumers. So there's a question surrounding these markets - normally market entry requires less intervention, consumer protection requires more intervention - to make sure their rights are protected. What is your opinion on the dichotomy between ex-ante and ex-post regulation in all of this?

TM: I think this is a really important area. I think there are advantages to both - in some situations having clear ex-ante rules that are properly narrowly tailored to the harms that they're trying to protect consumers from. And I think ex-post enforcement can be incredibly important as well, you generally need both these things working together.

So when it comes to issues in the Sharing economy of course we strongly support consumer protection enforcement, to protect consumers if there are harms, and narrowly-tailored regulations that are appropriate to the kinds of concerns a local authority might have around public safety for example, or public health. But at the same time we don't want to overly-chill innovation and new businesses from entering simply by prohibiting them altogether. So I think that striking the right balance can be very challenging, and we've been talking a little bit about the sharing economy models - the Airbnb's, the Ubers, the Lyfts of the world, I mentioned Tesla which is really just a new business model, and I think we see this experimentation as having a lot of benefits for consumers, because they get the benefit of the innovation and the competition from a new entrant. Of course there is broader debate about some even trickier policy issues -and by tricky I mean multi-dimensional - and those would be the issues around privacy and data security as well.

AO: I think no one has found the right balance between these two views, so let's see who is the first to actually tackle all these problems.

Just returning to the last thing you mentioned regarding privacy issues: One of the questions we wanted to raise, and I think you are a strong advocate for this, is



about Big Data and privacy. We saw some countries, like France and Germany, recently release a joint report on Big Data. These countries are concerned that dominant companies such as Facebook or Google are collecting too much data, and that the way they handle it could raise some privacy issues and anticompetitive effects. So the question would be, even including that Germany recently opened an investigation on Facebook on privacy grounds (and apparently with some links to competition issues, but we'll learn more about that soon). How does the FTC promote a competitive environment including competition and privacy standards?

TM: The FTC is a uniquely-situated agency when it comes to how we're trying to undertake our mission to both protect competition and innovation and also protect consumers, because we're on the one hand an antitrust enforcer and on the other hand a broader consumer protection and data protection enforcer as well.

So one of the things that we've been trying to do is to make sure that we're understanding the competitive dimensions of privacy and data, and that tends to be a very fact-specific inquiry, based on the cases or issues that are presented by either a certain transaction or a certain set of facts in a conduct case.

Against the broader privacy and data use policy debate -which is in my view far broader than a simply competition policy debate. It involves notice, choice, consent, use of data - which is really a very complicated set of policy choices. On the one hand, data is the lifeline for innovation in a lot of these new digital economy markets and you want to facilitate the use of it. We also see a lot of benefits coming from open data initiatives in the US government for example, data being used to provide precision medicine and better health outcomes. So we see a lot of benefits to the use of data and we don't want to foreclose the development and innovation of all that. But at the same time, as a privacy and data protection enforcer we understand that there can be harms to consumers as well, and the consumers need to have clear notice, choice, transparency and control over their individual data as well. So the FTC has actually brought over 100 data security and privacy cases over the last decade involving, usually, deception or unfair practices around the handling and collection of consumer data. We are very vigorous and forceful on the consumer protection side.

In a way I think it can be a bit trickier to try to combine these things. We tend here at the FTC to think of antitrust enforcement and antitrust rules as Competition tools, and then think about privacy policy, data security policy and consumer protection in that area by using our consumer protection tools, or advocating for legislative or regulatory changes to provide greater protection to consumers. Obviously sometimes these areas can intersect, and certainly as a competition enforcer if we saw companies competing on security or privacy I would assess that as a form of innovation for quality competition, and you can assess an effect there I think. But I think it can be very difficult to try to use the antitrust enforcement rules -especially in the US - to try to force a privacy policy that is broader than competition. What I mean by that is to say, that making the right choices around appropriately protecting consumer privacy and data is just a broader set of policy considerations than the Antitrust policy considerations.



AO: I think it will be interesting to see the way these markets evolve in different parts of the world. I have the impression that Europe is going to evolve in one way, the US is going to evolve a different way, although the decisions taken in one part of the world could affect - we are seeing that recently, with the case of the Austrian Law student, thought this is a different topic - But that also brings me to the last question, which is also a little about international relations but on how they may evolve in some markets.

Something that everybody is talking about now, not so much concerning antitrust but it has its effects on antitrust, is Brexit - The UK Brexit is having impact all over the world. How do you think Brexit will affect the relationship between the two countries in the Atlantic, in terms of cooperation and investigations?

TM: I think it's very early to really know what effect it will have, and obviously we're watching that process play out very carefully. I would just emphasize that we have a long history of working with the UK's CMA and its predecessor agencies on policy matters, and increasingly we've been having a lot of cooperation with them on cases as well. Like the FTC, the CMA is now also a dual competition and consumer protection authority, so we do have parallel investigations, we have had staff secondments and other ways of cooperating.

So I would note, to the extent that the CMA enforcement mandate becomes separate from the Commission in a post-Brexit world, I would expect us to continue to have a lot of opportunities to cooperate with them and continue to have a close working relationship. But again, I'm watching as a spectator like the rest of the world, and we'll have to see what's negotiated.

AO: And I'm sure the collaboration will continue. That was all from us. On behalf of CPI I would like to thank you once again for this interview. I hope in the future we may take these questions up again and see if there are new answers or comments about them. Thank you for sharing your views with us.