

CPI's North America Column Presents:

# FTC Hearings #11: The FTC's Role in a Changing World

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The FTC conducted its 11<sup>th</sup> hearing in its Hearings initiative on Competition and Consumer Protection in the 21<sup>st</sup> Century with a two-day hearing at the FTC headquarters in Washington, D.C. on March 25-26. The hearing centered on the FTC's role in international antitrust, consumer protection, and privacy enforcement, evaluating the FTC's successes and failures, and discussing potential future shifts in the FTC's approach to international engagement.

The panelists were from around the world and represented universities, corporations, law firms, and numerous government agencies. This diverse set of panelists engaged in lively discussion and often emphasized different roles, tools, and priorities for the FTC going forward.

FTC Chairman Joseph Simons opened the hearing by remarking that significant changes to the global economy and the proliferation of competition agencies around the world have necessitated the FTC's global engagement, in large part to assist less mature agencies in developing the enforcement tools and techniques necessary to benefit consumers. Chairman Simons' sentiments were underscored by William Kovacic, Global Competition professor at George Washington University Law School. Professor Kovacic discussed how other countries have restructured consumer protection, competition, and privacy regulation in light of the changing global economy and increasing international enforcement, which has created natural experiments for jurisdictions to evaluate when considering similar problems.

As stressed by Chairman Simons, Professor Kovacic, and numerous other panelists, the SAFE WEB Act is crucial to the FTC's successful global engagement. Numerous panelists called for SAFE WEB's permanent renewal throughout both days of the Hearings.

### **Building Enforcement Cooperation for the 21st Century**

Matthew Boswell, Commissioner of the Canadian Competition Bureau, opened the first panel by discussing the inevitability of change in the global New Economy. He noted by 2020 over 2 billion people will purchase goods or services digitally. How agencies respond to these changes is vital, with cooperation among agencies becoming more important than ever. The "human glue" binding agencies is particularly important in enabling the necessary collaboration for international engagement and effective enforcement.

Tom Barnett, a partner at Covington & Burling and former AAG for the Antitrust Division, built upon Commissioner Boswell's statements by discussing two forms of international engagement: formal mechanisms to facilitate information sharing and enforcement, and informal cooperative measures that build agency familiarity. Mr. Barnett stressed how informal engagements allow agencies to build both personal and institutional trust for more effective cooperation through formal channels.

The panelists largely agreed on the importance of informal engagements such as technical assistance programs and the effectiveness of soft law organizations. Chiluyfa Sampa, the Executive Director of the Zambian Competition and Consumer Protection Commission, noted

that those tools could be employed within multinational trading blocks, particularly those with nascent or maturing competition agencies, to increase their effectiveness and reach. And while the panelists generally agreed that new tools for facilitating cooperation were not yet needed, they shared admiration for the International Organization of Securities Commissions (IOSCO) information sharing requirements described by Jean-François Fortin, the Executive Director of Autorité des Marchés Financiers.

James Dipple-Johnstone, the Deputy Commissioner of the UK's Information Commissioner's Office, subsequently noted that the ICO must pick and choose between formal and informal tools to employ when partner countries are grappling with similar consumer protection and privacy issues. James Sullivan, the Deputy Assistant Secretary of the Commerce Department's International Trade Administration, explained these tools are not without limits, however, particularly those related to privacy, privilege, and confidentiality.

Marie-Paule Benassi, the Acting Director for Consumer Affairs Directorate-General Justice and Consumers at the European Commission (EC), highlighted how the EC must facilitate cooperation and enforcement through bilateral cooperation because it lacks direct enforcement capability. By contrast, one reason for the success of IOSCO, as noted by Kurt Gresenz, the SEC's Senior Assistant Director in the Office of International Affairs, is that members are required to provide international assistance to the extent permitted by law. Jeff Thomson, a Senior Intelligence Analyst in the Royal Canadian Mounted Police, agreed, and also identified instances where formal and informal agreements allowed for integrated policing of international fraudulent activities.

On the competition side, Fiona Schaeffer, a partner at Milbank, described how different legal traditions and enforcement systems often make uniform competition solutions worldwide infeasible. Nicholas Banasevic, the EC's Head of Unit Directorate-General Competition, concurred, noting that convergence may not be necessary so long as the countries explore the reasoning behind divergent outcomes to better understand the motivations that led to such result.

In discussing the limitation various privacy laws play on international engagement, Jeanne Pratt, a Senior Deputy Commissioner with the Competition Bureau Canada, highlighted that the benefit from international cooperation is generally not establishing facts about the case, but in exploring the legal theories being tested as a means to coalesce around consistent global enforcement. However, Marcus Bezzi, the ACCC's Executive General Manager, suggested that the ACCC focuses on matters with a local nexus, an approach which best employs scarce resources on areas of immediate local impact and minimizes the number of challenges posed by privacy laws.

### **International Engagement and Emerging Technologies: Artificial Intelligence Case Study**

Former FTC Commissioner Julie Brill opened the next discussion by highlighting both the transformative potential of artificial intelligence, as well as how some companies were

approaching AI and big data from a privacy and consumer protection perspective. Professor Chinmayi Arun with Harvard University and National Law University Delhi discussed the role of big data, AI, and privacy laws in India, and specifically the struggle in using machine learning and big data to improve individual lives while respecting individual privacy. James Dipple-Johnstone emphasized the need for public trust related to AI, as well as the need to have transparency and timely engagement with big data companies.

Francis Kariuki, Kenya's Competition Authority Director General, discussed how transparency and informational asymmetries can create externalities that are not yet fully understood, which make policy analysis difficult. Omer Tene, the Vice President of International Association of Privacy Professionals, highlighted a more foundational challenge when those driving innovation in AI themselves cannot fully explain the systems to regulators.

Marcela Mattiuzzo, a partner at VMCA Advogados, and Isabelle de Silva, President of France's Autorité de la Concurrence, both discussed how international convergence on big data and AI is challenging, in part because AI touches on competition, consumer protection, and privacy concerns. In particular, they stated how algorithms may be capable of helping the competitive process but may also implicate privacy concerns in doing so.

### **Implications of Different Legal Traditions and Regimes for International Cooperation**

The second day of hearings focused on how diverse legal traditions around the world created the potential for divergent antitrust and consumer protection outcomes. Commissioner Noah Phillips set the stage with many of the international enforcement challenges the FTC currently faces. Roger Alford primed the panel by pointing out that, while divergent outcomes receive the most spilt ink, common principles undergird most legal traditions, with the implication that divergent outcomes much less rarely occur relative to what one might otherwise expect. However, the differences between political, historical, and societal landscapes in various jurisdictions are real and affect enforcement outcomes.

Professor Christopher Yoo of the University of Pennsylvania addressed the significant differences between approaches in common law and civil jurisdictions relating to who determines the merits and the level of deference to enforcement agencies. Similarly, Professor Francesca Bignami from George Washington University Law School, discussed the differing approaches between adversarial systems, such as in the U.S. with its focus on litigation, and an informal regulatory style, such as those in Europe with a focus on future compliance incentives.

Professor Phillip Marsden of the College of Europe, contrasted jurisdictions where populist sentiments call for significant changes in goals and enforcement priorities with jurisdictions and agencies resisting *any* form of change or modernization, concluding both trends were likely flawed. Building on these themes, Professor Angela Zhang of the University of Hong Kong and King's College London Law School explored how differing political landscapes can

necessitate divergent enforcement, and contrasted the deference given to EC determinations by European courts with the regulatory consensus building of antitrust agencies in China.

### **Promoting Sound Policies for the Next Decade**

Commissioner Christine Wilson opened the next panels by identifying the changes in international enforcement over her legal career, and in particular noted how antitrust was at an inflection point on several important issues. These include the proper standard for evaluating antitrust harm and agency success. The U.S.'s policy decisions on these questions, she emphasized, could have important international ramifications.

During the subsequent panel, Teresa Moreira, Head of the Competition and Consumer Protection Branch at the United Nations Conference on Trade and Development, discussed the European success in adopting broad, multi-national consumer protection and competition policies despite significant member-nation diversity. Conversely, Tad Lipsky, professor at the George Mason University's Antonin Scalia Law School, focused on the success of bilateral relationships in setting enforcement norms and elevating international standards.

John Pecman, a Senior Business Advisor with Fasken, identified several ways that the U.S. is already promoting its policies internationally, including multilateral engagements, international trade agreements, bilateral agreements between agencies, MLATs, technical assistance programs, and others. Soft law organizations are increasingly ways to respond to the increased pace of change, according to Justin Macmullan, Co-Director General of Consumers International. Pablo Trevisán, Commissioner of Argentina's National Commission for the Defense of Competition, discussed the benefits of such soft law organizations using Argentina's recent reforms as an example.

Chris Warner, Legal Director of the UK's Competition and Markets Authority, noted how CMA worked with the International Consumer Protection and Enforcement Network (ICPEN) to shift the agency towards outcome driven initiatives. Babatunde Irukera, Director General of Nigeria's Consumer Protection Council, noted the importance of soft law organizations like ICPEN in light of the Nigerian CPC's statutory mandate to cooperate with foreign nations for the protection of its consumers.

Paula Farani de Azevedo Silveira, Commissioner of Brazil's Administrative Council for Economic Defense, noted CADE's experience was similar to the Nigerian experience, emphasizing the value of international cooperation in the agency reaching maturity. Han Li Toh, Chief Executive and Commissioner, Competition and Consumer Commission of Singapore, also mentioned how Singapore has enforced competition law for approximately 20 years, but only recently added a consumer protection mandate. As a result, the agency is utilizing soft law to gain experience on the consumer protection matters and catch up to its competition capabilities. Amidst this discussion of cooperation, Stephen Wong, Hong Kong's Privacy Commissioner, emphasized the continued importance of agency independence.

Finally, Rainer Wessely, Delegation of the European Union to the United States, discussed how domestic priorities influence international outreach, cooperation, and enforcement, and that while features of the ECN may not be transferable to other nation blocks, they can inspire other regional blocks and help shape an effective enforcement agenda in those regions.

### **The FTC's Role in a Changing World**

James Rill, former DOJ AAG for the Antitrust Division and current Senior Counsel at Baker Botts, opened the final panel with a discussion of the history of the FTC's and DOJ's international contributions, and outlined a set of specific suggestions for the FTC in the future. Specifically, he discussed the FTC's role in promoting the consumer welfare standard internationally, continuing the technical assistance programs with the DOJ, and converting international guidance documents into best practice guidance for developing agencies.

Building on these themes, the panel discussed how the FTC could enhance its position as an international thought-leader in antitrust and consumer protection. Andrew Wyckoff, Director for the Directorate for Science, Technology and Innovation of the Organisation for Economic Cooperation and Development, discussed the role of transparency in decision making to provide guidance to regulated companies, as well as giving those companies incentives for compliance rather than punishment for non-compliance. Eduardo Pérez Motta, former president of COFECCE and Senior Partner at SAI Law and Economics, laid out five principles that built off of Wyckoff's discussion for an effective agency, emphasizing independence from political persuasions.

Rod Sims, Chairman of the Australian Competition and Consumer Commission, noted the role of regulatory agencies not only in policing bad actors, but in conducting market studies to understand why markets operate the way they do, as well as identifying the pain points and shortcomings in current institutions and enforcement. Bojana Bellamy, President of the Centre for Information Policy Leadership at Hunton Andrews Kurth, concurred, and highlighted the importance information asymmetry between regulators and companies in high tech markets. However, Terry Calvani, Of Counsel with Freshfields Bruckhaus Deringer LLP, cautioned the FTC against embarking upon regulation in this area given both its mixed history with regulation, and compelling history as an enforcement agency.

### **Conclusion**

The FTC's 11<sup>th</sup> Hearing was a significant success, providing the Commission with numerous ideas for the agency to consider in shaping its future international engagement efforts.

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