

# FTC FIT TO ITS PURPOSE: RESPONDING TO KOVACIC'S MARKET INVESTIGATION PROPOSAL

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BY CHRISTINE S. WILSON & PALLAVI GUNIGANTI<sup>1</sup>



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<sup>1</sup> Christine S. Wilson is a Commissioner of the U.S. Federal Trade Commission. Pallavi Guniganti is an Attorney Advisor to Commissioner Wilson. The views expressed herein are solely those of the authors and do not necessarily reflect the views of the U.S. Federal Trade Commission or any other Commissioner.

“Antitrust policy views the government as a referee, not as the manager or star player”

– Timothy Muris<sup>2</sup>

“We focus more on law enforcement than on prescriptive regulation.”

– Edith Ramirez<sup>3</sup>

The idea that “antitrust is law enforcement, it’s not regulation,”<sup>4</sup> has become a bipartisan staple of remarks delivered by chairs of the Federal Trade Commission and Assistant Attorneys General for Antitrust at the Department of Justice. Then-chairwoman Edith Ramirez noted that a statement of Section 5 enforcement policy “prescribes no detailed code of regulations for the business community at large... no such prescriptive code would be feasible or desirable in our variegated and intensely dynamic economy, which is why antitrust has always relied on a case-by-case approach to doctrinal development.”<sup>5</sup> Much as Republican appointee Makan Delrahim speaks of “the Antitrust Division as a law enforcement agency, not a regulatory one,”<sup>6</sup> his Democratic predecessor William Baer said he “recoil[ed]” at the idea of antitrust being regulatory.<sup>7</sup>

The line between law enforcement and regulation can become blurry. For example, the Department of Justice’s *ASCAP/BMI* consent decree arguably turns judges of the U.S. District Court for the Southern District of New York into price regulators. When one of the performing rights organizations cannot agree on the terms to license music to a user, either side can sue based on the antitrust consent decree, asking the “rate court” to determine reasonable rates for the use proposed. But it is the court, not the DOJ, that makes these decisions; indeed, the court at times has ruled against the DOJ’s interpretation of the consent decree.<sup>8</sup> Even structural remedies, like the breakup of AT&T, can embroil judges in quasi-regulatory decision making for decades.<sup>9</sup>

This does not mean that the antitrust agencies work solely on enforcement. The FTC in particular was created with significant competition policy, advocacy and research powers. The agency provides input to federal agencies and state and local authorities regarding the competition impacts of various regulatory and legislative initiatives; through both bilateral and multilateral fora, engages in policy discussions regarding best practices for sound antitrust enforcement and provides technical assistance to new and growing antitrust enforcers; files *amicus* briefs to facilitate the development of sound case law; provides testimony and technical assistance to Congress; solicits and reviews public comments regarding rules, cases, and policies; issues advisory opinions when members of the public ask whether a proposed course of conduct may be deemed anticompetitive; promulgates guidelines that explain the agency’s analytical frameworks; holds workshops, roundtables and hearings on policy issues; publishes reports that examine cutting-edge antitrust concerns; and conducts studies pursuant to Section 6(b) of the FTC Act.

Nonetheless, U.S. antitrust enforcers generally express discomfort with directly regulating competition. They want to deter, find and sue to stop anticompetitive practices and mergers, with the outcome of disputes determined by a neutral judge, rather than deciding the correct way in which different market actors should interact. This approach is driven by the recognition that market forces, rather than regulatory regimes, provide the best outcomes for consumers.

2 Timothy J. Muris, *Competition Agencies in a Market-Based Global Economy*, Prepared Remarks at The Annual Lecture of the European Foreign Affairs Review, Brussels, Belgium, July 23, 2002.

3 Edith Ramirez, *Unfair Methods and the Competitive Process: Enforcement Principles for the Federal Trade Commission’s Next Century*, Keynote Address at George Mason University School of Law 17th Annual Antitrust Symposium, Arlington, VA, Feb. 13, 2014.

4 Makan Delrahim, *Antitrust and Deregulation*, Remarks as Prepared for Delivery at American Bar Association Antitrust Section Fall Forum, Washington, DC, Nov. 16, 2017.

5 Edith Ramirez, Address at George Washington University Law School Competition Law Center, Washington, DC, Aug. 13, 2015.

6 Makan Delrahim, Remarks at the Antitrust Division’s Second Roundtable on Competition and Deregulation, Washington, DC, April 26, 2018.

7 William J. Baer, Remarks at the Global Competition Review Fourth Annual Antitrust Law Leaders Forum, Miami, Florida, Feb. 6, 2015 (“We must remember our mission. It is about effective law enforcement. I recoil at the suggestion that antitrust equates to regulation. That is not what we do. And it is not how we ought to think about what we do. Our work is to use our statutory authority to remove restraints on competition and prevent behavior or consolidation that risks limiting competition. We do not aspire to be regulators or to pick winners and losers. Instead antitrust enforcement, done right, focuses on removing impediments to competitive markets and protecting market structures that facilitate competition.”)

8 *U.S. v. Broadcast Music, Inc.*, 207 F. Supp. 3d 374 (SDNY 2016).

9 *U.S. v. Western Elec. Co., Inc.*, 767 F. Supp. 308, 309 (D.D.C. 1991) (“The issue before the Court in this, the most recent chapter of this antitrust case, is whether the Court should remove the restriction on information services imposed as part of the consent decree.”)

Recently, however, one of the world's foremost commentators on competition issues, William Kovacic, has called for the agency to be given powers similar to those of the UK competition authority, where he is now a non-executive director. Kovacic is quite familiar with the FTC, having served as General Counsel, Commissioner, and ultimately Acting Chairman of the agency. In his submission to the House of Representatives' Committee on the Judiciary, Kovacic suggested that Congress "confer powers on the FTC to conduct market studies and obtain information necessary to allow it to carry out its functions, and investigations in the same way as the UK's Competition and Markets Authority. ... This would enable to FTC to study sectoral or economy-wide phenomena and to impose remedies *regardless of whether the conditions or practices in question violate the antitrust laws.*"<sup>10</sup>

**Congress structured the FTC** with an internal judicial process, unlike the CMA. The UK competition agency can issue decisions without ever going before a judge. The FTC, like many other administrative agencies in the United States, has judges who come to it through recruitment and screening by the Office of Personnel Management for the federal government. While the Commissioners can override a decision by an administrative law judge, the judge is an independent and impartial fact-finder in considering the allegations brought by agency staff. And any decision to override the ALJ's opinion can be appealed to a generalist federal appellate court. If the agency brings its case in federal district court instead of in its administrative tribunal, staff face a generalist trial judge. This structure ensures that before the FTC can mandate or prohibit conduct by the private sector, its evidence and allegations are put to the test through a judicial process.

In the U.S. context, a statute that enabled the FTC to impose unwanted remedies without traditional legal procedures, such as a finding of wrongdoing and a hearing before a neutral judge, could incur

constitutional challenges. Giving an agency the sole power to force divestitures at fire-sale prices absent law violations, for example, could be found to run afoul of the Fifth Amendment. While companies in the UK may be more amenable to the market investigation process because it lets them avoid findings of violations and monetary penalties, the FTC generally does not require admissions of liability in consent decrees and rarely imposes monetary penalties in civil antitrust cases.<sup>11</sup>

The FTC's existing market study tool authorizes it to obtain the data and information needed to analyze the nature of competition – or lack thereof – in various industries and markets. Specifically, Section 6(b) of the FTC Act empowers the Commission to require an entity to file "reports or answers in writing to specific questions" to provide information about the entity's "organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals." Following in-depth analysis of detailed information from industry participants, the FTC is well-positioned to make informed recommendations to legislators and regulatory agencies regarding needed policy changes. Even scholars who criticize the FTC for insufficient anti-monopoly enforcement have praised 6(b) studies as a powerful tool.<sup>12</sup>

The agency deploys market studies frequently, and for a variety of purposes. These can range from determining whether changes to the law are necessary (as in the study of large technology companies' acquisitions that were not reported under current pre-merger notification rules<sup>13</sup>); to updating the FTC's knowledge of an evolving industry (as in the study of internet service providers' privacy practices in the wake of vertical integration of telecommunications companies with platforms that provide advertising-supported content<sup>14</sup>); to supporting the agency's competition advocacy efforts (as in the study of certificates of public advantage required by states for the provision of healthcare services, which appear to insulate anticompetitive transactions from merger challenges<sup>15</sup>).

10 Alison Jones & William E. Kovacic, "The Institutions of U.S. Antitrust Enforcement: Comments for the U.S. House Judiciary Committee on Possible Competition Policy Reforms," April 17, 2020 (emphasis added).

11 The FTC may seek disgorgement of ill-gotten gains, but this is an equitable remedy and, in the U.S. legal context of frequent antitrust class actions, can be a substitute for money that would have been obtained by private plaintiffs anyway. See, e.g., "Cardinal Health Agrees to Pay \$26.8 Million to Settle Charges It Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospitals and Clinics; Under Settlement, Money to Be Deposited Into a Fund for Distribution to Injured Customers," April 20, 2015. Although the FTC in 2012 withdrew the Policy Statement on Monetary Equitable Remedies in Competition Cases that was issued in 2003, the agency still considers the factors outlined in the policy – including whether private plaintiffs could obtain monetary remedies – when determining whether to seek disgorgement.

12 See, e.g. Ganesh Sitaraman, *Taking Antitrust Away from the Courts: A Structural Approach to Reversing the Second Age of Monopoly Power* (Sept. 2018) ("How do we know if an industry is overly concentrated? How do we know where exclusionary and anticompetitive practices are taking place? In the early 20th century, the answer was simple: the FTC conducted industry-wide investigations. These were in-depth investigations using the FTC's section 6b powers to identify and expose competitive and market power problems in industry.")

13 Press Release, FTC to Examine Past Acquisitions by Large Technology Companies; Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp., Feb. 11, 2020.

14 Press Release, FTC Seeks to Examine the Privacy Practices of Broadband Providers, March 26, 2019.

15 Press Release, FTC to Study the Impact of COPAs, Oct. 21, 2019 ("The Federal Trade Commission issued orders to five health insurance companies and two health systems to provide information that will allow the agency to study the effects of certificates of public advantage (COPAs) on prices, quality, access, and innovation of healthcare services. The FTC also intends to study the impact of hospital consolidation on employee wages.")

Some may view as a shortcoming the FTC's inability to impose changes directly on a market following a 6(b) study. But the FTC's history features powerful instances of beneficial outcomes of the 6(b) process – without turning the agency into a competition regulator. For example, the Commission in October 2000 gave notice of the orders under Section 6(b) that it would serve on brand name pharmaceutical companies and generic drug makers. The resulting 2002 report on “Generic Drug Entry Prior to Patent Expiration” recommended legislative and regulatory changes to Congress and the Food and Drug Administration, respectively, which both entities implemented.<sup>16</sup> Rather than setting itself up as a rival to the FDA, the FTC thanked the pharmaceutical regulator for its contributions in the preparation of the report and advised the FDA that anticompetitive conduct the FTC had challenged was far from atypical.<sup>17</sup>

Conversely, the Commission's 2011 report on “Authorized Generic Drugs: Short-Term Effects and Long-Term Impact” provided an empirical basis for not imposing a prohibition on such drugs. It resulted from a 6(b) study that was requested by a bipartisan trio of senators.<sup>18</sup> Understanding the effect of statutes and regulations on competition can be difficult – especially in sectors already overlaid with complex legal rules – without facts that the companies involved may be unwilling to disclose in the absence of compulsory process.<sup>19</sup> The FTC report delivered complex conclusions: the introduction of an authorized generic version of a branded drug can reduce prices, but by lowering expected profits it theoretically could affect whether a generic drug maker would bother to challenge patents on drugs with low sales – yet empirically, patent challenges by generic competitors remained robust. Legislation to remove the theoretical disincentive – by banning introduction of an authorized generic while a generic competitor's FDA application was pending and during the 180-day exclusivity period – died in both houses of Congress.<sup>20</sup> Instead of a blanket market regulation that might

have deprived consumers of some of the benefits of authorized generics, pharmaceutical companies face targeted antitrust enforcement by the FTC.<sup>21</sup>

Short of the 6(b) process, the FTC can analyze market dynamics and recommend alterations to legislation and regulations to enhance competition. Along with the DOJ, the FTC in February 2002 convened 24 days of hearings about the proper balance of competition and patent law and policy. The information gleaned from more than 300 panelists from large and small businesses, the independent inventor community, patent and antitrust organizations, and relevant legal and economics scholars, as well as 100 written submissions, provided a basis for the FTC report's recommendations.<sup>22</sup> Again, rather than setting itself up as a rival to a regulator, the FTC sought to increase communication with patent institutions: filing *amicus* briefs in important patent cases that can affect competition, asking the Patent and Trademark Office director to reexamine questionable patents that raise competitive concerns, and recommending the establishment of a Liaison Panel between the antitrust agencies and the PTO and an Office of Competition Advocacy within the PTO.

These examples illustrate the power of FTC's competition advocacy – and the impact that the FTC can have, within its appropriately circumscribed place in a modern system of government that does not lack for regulators. Going beyond this role would make the FTC a star player in the market instead of a referee.

**The CMA's market investigation tool**, like the FTC's 6(b) authority, enables the agency to subpoena information from market participants to facilitate an analysis of the industry's market dynamics. But the similarities between the CMA's market investigation tool and the FTC's 6(b) authority end there, because the CMA is also empowered to intervene in situations in which there are “features of a market” that cause an “adverse effect on competition.” Kovacic has described the CMA market investigation as a “more substantial” kind of market study, one that

16 Medicare Prescription Drug, Improvement, and Modernization Act of 2003.

17 Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration* (July 2002).

18 Federal Trade Commission, *Authorized Generic Drugs: Short-Term Effects and Long-Term Impact* (August 2011); Notice: Authorized Generic Drug Study: FTC Project No. P062105, 71 Fed. Reg. 16,779 (April 4, 2006); Press Release, Grassley, Senators Request Study on Impact of “Authorized” Generics, May 12, 2005 (“It has come to our attention that the practice of ‘authorized’ generic drugs may produce anti-competitive results and, thus, present an issue worthy of study by the Federal Trade Commission.”).

19 Transcript, Federal Trade Commission: *Into Our 2<sup>nd</sup> Century*, p. 156 (July 29, 2008) (quoting Susan DeSanti: “lots of people had been lobbying on the Hill for two years about whether authorized generics were good for competition or bad for competition. Nobody was coming forth with the facts about this because it was all proprietary data. Congress would like to know because they wanted to know whether the current provision, which allows authorized generics, was causing yet another problem for generic competition.”).

20 112th Congress, H.R. 741 and S. 373.

21 Press Release, *FTC Concludes that Impax Entered into Illegal Pay-for-Delay Agreement*, March 29, 2019 (“The Commission found that Endo possessed market power in the market for branded and generic oxycodone ER. The Commission found that Impax received a large and unjustified payment, which included: (1) a ‘No AG’ commitment, i.e., a promise from Endo not to launch an authorized generic during the 180-day exclusivity period that the Hatch-Waxman Act provides to the first generic filer; and (2) an additional credit that Endo would pay Impax in the event the market for Opana ER declined before Impax's entry date.”)

22 Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003).

“goes beyond persuasion as a mechanism for reform and gives the competition agency power to implement remedial measures to correct deficiencies identified in the agency’s inquiry.”<sup>23</sup> The Enterprise Act of 2002, as amended by the Enterprise and Regulatory Reform Act 2013, gave this tool to the CMA’s predecessor agency, the Competition Commission, and since then the UK competition authority has undertaken 19 market investigations.

The context in which the Competition Commission obtained this power highlights a difference from the U.S.’s history of antitrust as law enforcement. The UK government in July 2001 proposed that decisions should be taken primarily by the competition agencies based on their mandate to stop the prevention, restriction or distortion of competition.<sup>24</sup> This proposal constituted a significant move away from the public interest test in the Fair Trading Act 1973, which entailed frequent involvement by the Secretary of State.<sup>25</sup> In other words, the UK gave its competition authority a market investigation tool as a liberalizing reform of a prior regime in which a non-antitrust government actor regulated markets.

The CMA has said the market investigation tool is not “a self-standing solution,” but rather “a valuable complement” to competition enforcement – which can result in civil or criminal penalties – and direct regulation.<sup>26</sup> At the same time, the agency acknowledges that “where the Orders arising from MIs are behavioral (which is often the case), they effectively constitute a form of ex ante regulation.” According to the CMA, this tool enables the agency

to look holistically at and intervene (where appropriate) to address a range of different possible features of markets (be they conduct and/or structural) which may be creating competition issues that negatively impact consumers. Examples of these are demand and/or supply-side behavior, barriers to entry and expansion by

firms, switching difficulties by customers, and regulatory restrictions. An MI is particularly helpful in circumstances where each of these features or a combination of them may have evolved in such a way as to impede the competitive process and the effective functioning of that market, without any one or more firms breaking any particular competition or consumer laws.<sup>27</sup>

A market investigation does not require the CMA to find dominance, much less any violation of existing laws, before imposing forward-looking, market-wide remedies. While the CMA consults with relevant stakeholders and its remedies are subject to judicial review, it does not have to reach a consensus with businesses or obtain a ruling from an independent decisionmaker before it requires them to alter their conduct. Based on market investigations, the CMA has introduced a data portability regime in the banking sector, created a Grocery Code to limit certain types of provisions in agreements between food producers and retailers, and required divestitures in the aggregate and airport markets.

As Kovacic notes, “In the United Kingdom, the market studies mechanism also permits the dissolution of concentrated market positions that owe their existence to public policies that have created or maintained positions of dominance.”<sup>28</sup> For example, the airports investigation found a lack of competition among the seven UK airports owned by the British Airports Authority, which had been a government entity responsible for state-owned airports but was privatized under Margaret Thatcher in 1986. The Competition Commission in 2009 concluded that BAA must divest both London-area Stansted and Gatwick Airports to different purchasers, and either Edinburgh or Glasgow Airport in Scotland.<sup>29</sup> This example highlights another difference between the histories of market regulation in the UK and the US. Because the U.S. government rarely owned companies, it never went through a privatization phase like the UK’s of state-owned British Airways, British Rail, British Telecom, Britoil, British Gas, etc.<sup>30</sup>

23 William E. Kovacic, “Market structure and market studies,” in *COMPETITION LAW AND ECONOMICS: DEVELOPMENTS, POLICIES AND ENFORCEMENT TRENDS IN THE US AND KOREA*, ED. JAY P. CHOI, WONHYUK LIM & SANG-HYOP LEE (2020).

24 Department of Trade and Industry, “A World Class Competition Regime” (July 2001).

25 Richard Whish, *COMPETITION LAW*, 5TH ED., P. 411.

26 Competition and Markets Authority, “The CMA’s response to the European Commission’s consultations in relation to the Digital Services Act package and New Competition Tool” (September 14, 2020).

27 *Id.*

28 See *supra* note 11.

29 Competition Commission, *A report on the supply of airport services by BAA in the UK*, March 19, 2009. The Commission also imposed behavioral remedies regarding quality of service at Heathrow, and disclosure and consultation with stakeholders on capital expenditures at Aberdeen. It further made recommendations to the Department for Transport on economic regulation of airports.

30 Perhaps the closest U.S. equivalent of the privatization push under Thatcher in the UK was the deregulatory movement of the late 1970s and 1980s. However, the United States, with a land mass 40 times the size of the UK’s, arguably has been *more* inclined to have the federal government run services that might not survive on a nationwide basis in the private sector: passenger rail (compare Amtrak to the privatization of British Rail and multiple competing private rail companies) and postal service (compare the U.S. Postal Service to the Royal Mail – founded by Henry VIII and now a company traded on the Exchange).

The majority of UK market investigation remedies have been behavioral in nature. This type of remedy obligates the relevant authority to expend significant resources monitoring companies' compliance, engaging with the companies regarding application of the remedies in nuanced situations and as market dynamics evolve, and enforcing them as appropriate. "This can be costly and time-consuming relative to the resources typically available within agencies," the CMA acknowledges.<sup>31</sup> With the behavioral remedies effectively functioning as *ex ante* regulation, in markets that are overseen by sectoral regulators, this work "can potentially be passed to the [sectoral] regulator to be carried out alongside other monitoring and enforcement activity."<sup>32</sup> This is an admission that regulation of this type does not fall within the domain of antitrust agencies and is more appropriately undertaken by sectoral regulators.

**Congress intended the FTC to function** as an expert agency that could advise regulators, not act in their place. Indeed, the statutory carve-outs from the FTC's authority to enforce against unfair methods of competition – banks, savings and loan institutions, federal credit unions, common carriers, air carriers, and entities subject to the Packers and Stockyards Act – are based on the sectors that, at the time of legislation, already were being extensively regulated by other federal or state agencies.

Such market regulation can pose its own problems, as demonstrated by the output- and innovation-stifling rules formerly imposed on transportation networks.<sup>33</sup> But giving the FTC the power to regulate rather than enforce competition in markets is likely to create conflicts with existing sectoral regulators. Currently, the FTC's advisory role enables it to support other agencies in efforts to increase competition, rather than potentially clashing with them.<sup>34</sup> Where a sector already has a regulator, unless that regulator is so captured as to be useless, it may be better for the FTC to provide its competition expertise to encourage that sectoral regulator to act in ways that minimize market distortions and maximize benefits to consumers.

Admittedly, competition advice can take time to have effect. For example, the FTC during the 1980s aggressively pushed for more competition in taxi services, which are regulated at the state or local level, often through licensing regimes that control entry. In addition to making 18 advocacy filings with various local authorities from 1984 through 1989, the FTC sued two cities in 1984, accusing each of combining with incumbent taxi operators to impose regulations that limited licenses and increased fares. While the FTC withdrew its complaint against Minneapolis after the city amended its law to be more pro-competitive, the lawsuit against New Orleans had to be dropped due to the state action doctrine when Louisiana authorized the city's conduct. As of 2007, the FTC deemed its "major contribution" toward deregulation to be a 1984 Bureau of Economics staff report on taxicab regulation, which concluded that restrictions on entry appeared to be unnecessary.<sup>35</sup>

"As of 2007, the general description of the taxicab industry and taxicab regulation in the United States remains much as it was when Frankena and Pautler described it in 1984. That is, nothing dramatic has happened to alter the U.S. industry in the interim," the FTC said then.<sup>36</sup> But dramatic change would soon arrive through software applications on smartphones, which enabled not only incumbent taxi operators to find customers more readily, but also new entrants who lacked taxi licenses. Drawing on its prior expertise regarding unnecessary restrictions in the taxi industry, the FTC in 2013 began commenting on regulatory proposals to allow the development of these new vehicle-for-hire services.<sup>37</sup> These comments to sectoral regulators in Colorado, Anchorage, Chicago and Washington, DC were all at least partially successful, as the relevant authorities opted to permit more entry into the market.

Had the FTC been empowered to structure vehicle-for-hire markets across the U.S. in the absence of any antitrust violation, it might not have had to wait for a technological shift to force regulators to rethink stale rules. But its remedies arguably would

31 See *supra* note 14.

32 *Id.*

33 Christine S. Wilson & Keith Klovers, *The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech*, JOURNAL OF ANTITRUST ENFORCEMENT, VOL. 8, ISSUE 1, MARCH 2020, PP. 10–29, <https://doi.org/10.1093/jaenfo/jnz029> (describing how replacing free markets with regulatory regimes imposes significant harm to consumers and noting that Congress phased out the Interstate Commerce Commission and the Civil Aeronautics Board as the deadweight losses of the agencies' efforts to structure transport markets became apparent).

34 For example, the FTC was closely involved with "Reforming America's Healthcare System Through Choice and Competition," a report submitted by the Departments of Health and Human Services, Treasury and Labor to President Donald Trump in December 2018. Several of the proposals—reforming state certificate-of-need and certificate of public advantage laws, reducing licensing barriers, boosting telemedicine—have long been advocated by the FTC on a bipartisan basis.

35 United States submission to Working Party No. 2 of the OECD Competition Committee, *Taxi Services Regulation and Competition*, Sept. 27, 2007 (citing Mark W. Frankena & Paul A. Pautler, *An Economic Analysis of Taxicab Regulation* (May 1984), available at <https://www.ftc.gov/sites/default/files/documents/reports/economic-analysis-taxicab-regulation/233832.pdf>).

36 *Id.*

37 Note by the United States to Working Party No. 2 of the OECD Competition Committee, *Taxi, Ride-Sourcing and Ride-Sharing Services*, May 25, 2018.

have lacked the democratic legitimacy of the local tax authorities' decision-making. The persuasive force of competition advocacy lacks the faster gratification of imposing remedies upon spotting a market imperfection, but it preserves sectoral regulators' role in accounting for preferences beyond competition.

Too often, regulation results in harm to consumers because it distorts markets. Even assuming it is appropriate at the time it is first implemented (a big assumption), regulation frequently becomes stale as markets evolve and ends up inhibiting innovation; frequently becomes more expansive as market dynamics are better understood; and frequently ends up protecting competitors – especially incumbents who adapt to regulation and lobby the regulator – rather than competition.<sup>38</sup> Nonetheless, if market failures require government intervention through regulation, sectoral regulators are better-placed than a competition authority. The FTC's specific missions and existing tools have shaped its ability to enforce competition and consumer protection laws while making recommendations to the appropriate fora for changes in laws and regulations.<sup>39</sup> ■

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38 See *supra* note 21 (describing how the Interstate Commerce Commission's mandate started with railroads but expanded to railroads' competitors in trucking and then barges, which compete with both; and how the ICC and Civilian Aeronautics Board refused to authorize route entry based on concerns about harms to competitors).

39 See Randal C. Picker & Dennis W. Carlton, *Antitrust and Regulation*, Working Paper 12902 (Feb. 2007), at 51 ("Regulation and antitrust are two competing mechanisms to control competition. The early history in which special courts were established and then abolished, and in which the FTC was created illustrate this point. The relative advantages and disadvantages of each mechanism became clearer over time. Regulation produced cross-subsidies and favors to special interests, but was able to specify prices and specific rules of how firms should deal with each other. Antitrust, especially when it became economically coherent within the past 30 years or so, showed itself to be reasonably good at promoting competition, avoiding the favoring of special interests, but not good at formulating specific rules for particular industries."), available at <http://www.nber.org/papers/w12902.pdf>.