



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

**Prepared Remarks of Chairman Joseph Simons¹
Fordham Speech on Hearings Output
September 13, 2019**

I. INTRODUCTION

Good morning, and many thanks to Fordham University for hosting the 46th Conference on International Antitrust Law and Policy. I am pleased to join Kris Dekeyser, Director for Policy and Strategy at DG-Competition, on the panel. I am going to focus my remarks on the FTC's *Hearings on Competition and Consumer Protection in the 21st Century*. The goal of these hearings is to consider whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law and enforcement priorities. The hearings are modeled on the 1995 hearings organized by the late FTC Chairman Bob Pitofsky. The '95 hearings produced important output and were the first step in establishing the FTC as a modern center for "competition R&D."

This past June, we held the last of our fourteen hearings. Our hearings spanned 23 days and featured a wide spectrum of perspectives by legal and economic academics and practitioners and representatives of consumer and business groups. Thousands of people either viewed them via webcast or attended in person. In response to our request for public input, we received over 900 unique comments. The transcripts, presentations, questions, and comments are all available

¹ These remarks reflect my own views. They do not necessarily reflect the views of the Commission or any other individual Commissioner.

on the FTC website, and I highly commend them to anyone interested in the current debates about the future of competition and consumer protection policy.

We are now turning our attention to producing output from the hearings, led by our Office of Policy Planning, or OPP. At the outset of the hearings, we posed a series of difficult policy questions and solicited input to help us develop perspectives on those questions. We are now processing that input and are formulating responses to many of those questions. As a part of that process, we will consider the submitted comments and public testimony. We also will review academic writing and judicial decisions. OPP's output on these topics may take different forms. In some cases, it will be a report. In other instances, we may produce guidance or a policy statement that will clarify the staff's perspective on how best to analyze firm conduct or transactions pursuant to existing law and economics. Where appropriate, the output will identify areas where the Commission may wish to develop the case law through its enforcement efforts or amicus program. We also are developing a protocol for a merger retrospectives program.

Given the international nature of this conference, I will focus primarily on the international hearing, held on March 23-24. I will also talk about the other output that we expect to release in the coming months.

II. INTERNATIONAL HEARING: "THE FTC'S ROLE IN A CHANGING WORLD"

The March hearing, entitled, "The FTC's Role in a Changing World," was devoted to the international aspects of the FTC's competition and consumer protection work. It was organized by our Office of International Affairs and co-sponsored by the George Washington University Law School's Competition Law Center, which is headed by Bill Kovacic. It included eight panels as well as individual presentations, featuring 44 speakers from 17 countries. We expect to

release a staff report of this hearing in the near future. But I can already share with you five “take-aways” and recommendations based on this hearing.

First, there was strong support throughout the hearing for reauthorizing the US SAFE WEB Act and for making it a permanent part of the FTC Act. The SAFE WEB Act gives the FTC critical powers to enhance cross-border cooperation on consumer protection investigations and fraud actions, as well as to support cross-border data transfer mechanisms. It confirms the agency’s legal authority to sue foreign wrongdoers and challenge misleading practices with a nexus to the United States or American consumers. It enhances the agency’s ability to cooperate through memoranda of understanding, international agreements, and staff exchanges. Notably, this recommendation has its roots in this conference. In 2002, FTC Chairman Tim Muris called for legislative changes to improve the agency’s ability to engage in mutual assistance on cross-border consumer fraud matters with our foreign counterparts in his speech here at the Fordham conference.² That call became the SAFE WEB Act, which we have used hundreds of times in various cases, from Internet pyramid schemes and sweepstakes telemarketing schemes to complex advertising and privacy investigations.

The hearings confirmed the Act’s value and success. Foreign consumer protection, privacy, and criminal law enforcement officials, as well as senior U.S. agency officials and academics, singled out the legislation as a “key element” of the FTC’s enforcement program.³ In his keynote presentation, Bill Kovacic explained that the Act created an “indispensable element

² Timothy J. Muris, The Interface of Competition and Consumer Protection at 27-28 (Oct. 31, 2002), https://www.ftc.gov/sites/default/files/documents/public_statements/interface-competition-and-consumer-protection/021031fordham.pdf.

³ Fed. Trade. Comm’n Hearings on Competition and Consumer Protection in the 21st Century: The FTC’s Role in a Changing World, Mar. 25th Hr’g Tr. at 28, 52, 90, 115, 130 (2019) (hereinafter Hr’g Tr.), https://www.ftc.gov/system/files/documents/public_events/1454018/ftc_hearings_session_11_transcript_day_1_3-25-19.pdf.

of the infrastructure that supports international cooperation today. . . .”⁴ Foreign enforcers, including the U.K. Information Commissioner’s Office and several Canadian law enforcement agencies, cited numerous examples of cooperation pursuant to the Act that benefited consumers in the United States and elsewhere. Others foreign officials described how they had developed reciprocal mechanisms modeled on the SAFE WEB Act that enabled them to provide similar assistance to the FTC.

The Act is currently subject to a “sunset” provision that will terminate it on September 30, 2020.⁵ Recognizing its importance to our mission, we have asked Congress to reauthorize the Act and eliminate the sunset provision so that its provisions can become a permanent part of the FTC Act.⁶

Second, there was strong support for pursuing mechanisms for enhanced information sharing and investigative assistance in antitrust investigations. In today’s interconnected world, the agencies need to obtain and share information quickly and efficiently in order to conduct effective cross-border investigations. Participants stressed the need to improve opportunities for obtaining information, including confidential information, and investigative assistance from the FTC’s counterpart competition agencies.

Although the FTC’s current network of international agreements provide important legal frameworks for cooperation in competition investigations, they do not provide for the ability to share confidential information or to use domestic investigative tools to provide reciprocal investigative assistance. The International Antitrust Enforcement Assistance Act of 1994 had the

⁴ Hr’g Tr. at 28.

⁵ Undertaking Spam, Spyware, and Fraud Enforcement With Enforcers Beyond Borders Act (U.S. SAFE WEB Act), Pub. L. No. 109-455, 120 Stat. 3372, extended by Pub. L. No. 112-203, 126 Stat. 1484 (amending 15 U.S.C. §§ 41 et seq.).

⁶ *E.g.*, *Oversight of the Federal Trade Commission: Hearing Before the Subcomm. on Consumer Prot. and Commerce of the H. Comm. on Energy and Commerce*, 115th Cong. 25-27 (May 8, 2017) (statement of Fed. Trade Comm’n).

laudable intention of filling those gaps. But the agencies have only been able to conclude one agreement (with Australia) pursuant to the Act.⁷ Based on testimony at the hearing, staff recommends that the FTC should, with the Department of Justice (“DOJ”), redouble its efforts to pursue more such agreements.

Third, the staff recommends that the FTC should continue to exercise its international leadership, leveraging its competition and consumer protection expertise to address emerging issues. Panelists recognized the FTC’s leadership in promoting sound antitrust enforcement internationally, and suggested ways in which we could expand our leadership. For example, they cited the FTC’s role in the ICN where we have led projects resulting in ICN best practices, including on merger notification and review, the assessment of dominance, and most recently, important due process principles. Panelists urged the FTC to continue its ICN leadership and to prioritize its work in this critical area of procedural fairness. Panelists also recognized the FTC’s role in positively influencing the antitrust enforcement approaches promoted through the OECD and UNCTAD.

Panelists encouraged the FTC to continue to share its research, policies, and practices with the international community, including through reports and guidelines. An example of how this can play an important role is the revised *FTC-DOJ Antitrust Guidelines for International Enforcement and Cooperation*, which explained our policy regarding extraterritorial remedies.⁸ These *Guidelines* have helped influence the enforcement policies of other agencies.

The hearing identified challenges for FTC leadership as other jurisdictions, such as the EU, adopt new privacy laws and frameworks. The panelists, however, agreed that the FTC has

⁷ *U.S.-Australia Mutual Antitrust Enforcement Assistance Agreement*, <https://www.ftc.gov/policy/cooperation-agreements/usaaustralia-mutual-antitrust-enforcement-assistance-agreement>.

⁸ Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidelines for International Enforcement and Cooperation* § 5.1.5 (Jan. 13, 2017), <https://www.ftc.gov/public-statements/2017/01/antitrust-guidelines-international-enforcement-cooperation-issued-us>.

an important leadership role to play internationally. As Bill Kovacic explained, the FTC Act “has the broadest jurisdiction of any type of law that we [in the United States] have to regulate privacy and security” and, where we do have privacy laws, they “can bite you pretty hard.”⁹ (Our record Facebook civil penalty is a good example.¹⁰) He and other panelists recognized that it is important for Congress to pass strong, comprehensive privacy legislation, as endorsed by the FTC, to support U.S. leadership on privacy and data security internationally.

Fourth, panelists supported expanded initiatives to build strong relations with counterparts. Witnesses praised the FTC’s efforts to promote international convergence and encouraged the FTC to continue to build strong partnerships through direct engagement with our foreign counterparts at leadership and staff levels, both bilaterally and through multilateral organizations. Panelists also suggested that, in addition to case cooperation, the FTC explore joint workshops and studies and more regional engagement.

There was also strong support among hearing participants for the FTC’s technical assistance and International Fellows programs. The FTC has a long history of providing technical assistance to foreign competition and consumer protection agencies, including by commenting on proposed laws, regulations, and guidelines, and through short- and long-term training missions. The FTC has used authority from the SAFE WEB Act to host over 140 foreign officials for periods of several months and to exchange staff with foreign counterpart agencies. Panelists highlighted the value of these programs in helping agencies bring their laws and policies in line with international best practices and to strengthen cooperative ties among agency staff.

⁹ Hr’g Tr. 1 at 34-35.

¹⁰ FTC Press Release, *FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook* (July 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions>.

Fifth, the hearings provided support for the FTC’s role in formulating broader U.S. government policies that involve international issues within our mandate. The FTC’s long and deep experience and expertise enables us to advocate effectively for policies that promote consumer welfare and sound economics, and to assess the impact of foreign government enforcement and policies on U.S. competition policies and interests. For example, in recent years, U.S. companies have increasingly gone to other parts of the U.S. Government (for example to the Office of the U.S. Trade Representative and our foreign embassies) to complain about foreign antitrust investigations (sometimes with good justification). But these other parts of our government do not focus like we do on competition policy and enforcement implications, and so it is important that they hear from the antitrust agencies. The most obvious reason is that we sometimes are investigating the same firms for the same conduct, sometimes based on similar legal theories. Even if not, we do not want other U.S. agencies to complain to foreign agencies based on theories we think are valid and might use in similar matters. This makes convergence more difficult.

Now that I have covered some of the key takeaways from the international hearing, I want to turn to some examples of what we will be producing on some of the other topics covered by the hearings. I will focus on competition topics because this is a competition program, but we also are considering output on privacy and data security issues.

III. OTHER HEARINGS OUTPUT

We are drafting a guidance document explaining how the antitrust laws might apply to conduct by technology platforms. The questions that we posed leading up to our “Multi-Sided Platforms” hearing will give you a good sense of the substantive issues this guidance document will address. We expect this document to be similar in format to the *Competitor Collaboration*

Guidelines (CCGs).¹¹ I am hoping we can articulate a framework for evaluating tech platforms similar to the way the CCGs did for joint ventures, and that we can provide a structure to guide our existing and future tech platform cases.

We are preparing a guidance document on vertical mergers. This document will be similar to the 2006 Commentary on the Horizontal Merger Guidelines.¹² The DOJ's case against AT&T/Time Warner exposed significant misconceptions about the government's interest in and willingness to challenge vertical mergers, and the extent to which any particular merger should have a presumption of legality. This Commentary will help explain the staff's analytic framework for evaluating vertical mergers. It will make clear that anticompetitive vertical mergers are not unicorns, and there should not be a presumption that all vertical mergers are benign. There are well-known ways in which vertical mergers can be anticompetitive, and although such mergers may not arise every day, they are common enough that we need to pay careful attention to look for and challenge them.

We are also working with the DOJ to develop vertical merger guidelines, but it is too early to say whether that effort will be successful. In any event, we do expect to produce a commentary on vertical mergers that will provide significant guidance.

In addition, we will be developing an addendum to the 2006 Horizontal Merger Commentary explaining how staff analyzes acquisitions of nascent competitors and how staff accounts for non-price factors in horizontal merger analysis.

¹¹ See Fed. Trade Comm'n & Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 7, 2000), <https://www.ftc.gov/public-statements/2000/04/policy-statement-ftc-doj-issue-antitrust-guidelines-collaborations-among>.

¹² See Fed. Trade Comm'n & Dep't of Justice, Joint Commentary on the Horizontal Merger Guidelines (Mar. 27, 2006), <https://www.ftc.gov/news-events/press-releases/2006/03/ftc-doj-issue-joint-commentary-horizontal-merger-guidelines>.

OPP is looking closely at the economic literature on “common ownership” or horizontal shareholding and will consider and recommend to the Commission whether that literature supports any enforcement or policy changes at or by the Commission. We are also considering whether a 6(b) study might be helpful.

Finally, OPP will do an analysis of the consumer welfare standard, and alternatives to that standard. We expect this analysis will include a review and evaluation of the literature on trends in concentration in product and labor markets, and discuss concerns over whether enforcement has been too lax.

IV. CONCLUSION

That is a lot of work for our Office of Policy and Planning to do and to manage. But they are a dedicated group working very hard to generate what we hope will be valuable output. I would also like to thank all of those who contributed to our international hearings. We greatly value their input. Although the period for submitting public comments has ended, in the FTC tradition of continual self-reflection, our doors are always open to hearing your thoughts. In closing, I want to thank you for your time this morning, and I look forward to the discussion.