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William KOVACIC: A new Chairman for the US FTC

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Interview

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Chairman, US Federal Trade Commission

2008

Chairman of the US Federal Trade Commission

2006

Commissioner at the US FTC

2001-2004

General Counsel of the US FTC

Since 1992

Adviser on antitrust and consumer protection issues to various foreign governments including Egypt, El Salvador, Georgia, Russia and Vietnam

Since 1986

Professor at the George Mason University School of Law and at the George Washington University School of Law

1978

Columbia University

1974

Princeton University

William Kovacic: A new Chairman for the FTC

Stéphanie Yon: You were appointed as Chairman of the FTC in April 2008. However, the FTC is a well-known administration for you. Indeed, from 1979 to 1983, you served as a staff attorney and as an advisor to one of the FTC's Commissioner. Later from 2001 until 2004, you served as the General Counsel of the FTC. How would you compare the FTC of today with the agency you joined nearly 30 years ago?

William Kovacic: The modern transformation of the FTC is one of the great success stories of public administration in the United States and, I think, around the world. The FTC in 1979 had considerable strengths, but the FTC of 2008 is much improved by comparison in several ways. First, the FTC today has a stronger, more systematic approach to setting priorities and selecting competition and consumer protection initiatives that are most likely to benefit consumers. At the Commission level and within individual operating bureaus, the agency has enhanced techniques for defining goals, setting criteria for choosing projects, ensuring that the agency's commitments are well matched to its resources and capabilities, and assessing the results of specific interventions.

A second important change is increased reliance on the full collection of policy instruments that the U.S. Congress entrusted to the FTC in 1914. These instruments include the litigation of cases, especially through the FTC's own administrative adjudication process; the publication of reports using information obtained by use of, among other methods, the agency's data collection powers; the convening of seminars and conferences to learn about current commercial trends; appearances before other government bodies to act as an advocate for pro-consumer and pro-competition policies; providing guidance to the business community; and conducting programs to educate consumers. By engaging all of its capabilities and seeking to apply the best tool or combination of tools, the FTC has made great progress toward achieving policy results that surpass what the agency could achieve by relying entirely or predominantly on the prosecution of cases. A one-dimensional competition or consumer protection agency is not likely to be equal to the challenges that lie ahead. By using all of its capabilities, the FTC has taken major steps toward realizing the destiny that Congress foresaw at the Commission's creation.

"The modern transformation of the FTC is one of the great success stories of public administration in the United States …"

A third difference is a shift in resource allocation to make progressively greater investments in what might be called research and development. To look at the FTC's budget over time is to see how the agency has raised the percentage of budget outlays dedicated to research, studies, data collection, ex post evaluations, and other activities that build knowledge that is essential to formulating effective competition and consumer protection programs. These outlays have enabled the FTC to learn more quickly about current industry developments, to identify important trends in consumer behaviour, and to absorb modern learning in economics and law about competition and consumer protection. The increased emphasis on research and development expenditures also reflects the FTC's awareness that, in a world of widely distributed policymaking authority within and across individual jurisdictions, intellectual leadership is a critical ingredient in shaping doctrine and policy.

* Interview by Mrs Stéphanie Yon, Adviser for International Affairs in the Staff of the President, Conseil de la concurrence, Paris. This is the full version of the interview for the electronic version of the review (www.concurrences.com).

A fourth significant change has taken the form of greater efforts to achieve more integration of the agency's competition policy and consumer protection capabilities. There is a growing realization that in a number of sectors, such as health care and financial services, the FTC can achieve superior outcomes by joining up knowledge that comes from the study of both supply side (the competition policy emphasis) and demand side (the consumer protection policy emphasis) perspectives.

A fifth adjustment has been a dramatic increase in resources devoted to cooperation with competition and consumer protection authorities outside the United States. When I was a junior case handler in 1979, international liaison activities were handled by a single FTC employee. Today we have an Office of International Affairs with over 15 professionals, including members of foreign competition and consumer protection agencies who are spending time with us under our International Fellows program. In 1979, nobody envisioned that competition policy would be a concern beyond a relatively small number of countries with well-established market economies. Few foresaw the day when these jurisdictions would provide advice to socialist states about the development and implementation of competition laws. Those improbable events have come to pass. Today the FTC conducts a substantial technical assistance program literally around the world.

"In 1979, nobody envisioned that competition policy would be a concern beyond a relatively small number of countries with well-established market economies."

A sixth change has been a major upgrading of the FTC's technological infrastructure that permits us to collect and analyze data relevant to our consumer protection programs. When I first joined the FTC, consumer complaints were recorded and filed by hand. In the 1990s, the agency invested heavily in technology and created electronic data bases, such as Consumer Sentinal, and other computer-based information gathering mechanisms. These and subsequent investments in this decade have sharply reduced the time between the first identification of a problem and the day the FTC is in court seeking an injunction to stop an offensive practice.

A final noteworthy improvement has been a progressive enhancement of the FTC's human capital. Compared to the agency of 1979, the FTC's team of administrative professionals, attorneys, and economists is considerably stronger in terms of their skills and experience. An agency goes only as far as its people can carry it, and the FTC's greater success over time in recruiting and retaining a first-rate staff has been indispensable to its success.

In addition to your highly valuable experience at the FTC, you are a prolific writer, and a famous teacher and speaker on antitrust topics both in the US and all around the world.

What benefits can the FTC expect from this tremendous expertise? What experiences do you consider the most influential in leading you to the FTC nomination?

My background brings three useful perspectives to my latest appointment to the FTC. The first is that I have come to understand the agency's culture and habits as only an insider can – in my case, as a junior member of the professional staff, as an advisor to a commissioner, as the General Counsel, and as a commissioner. Second, as an academic, the opportunity to do research and write about the FTC has given me a feel for its history and the forces that have shaped its performance over time. Third, my work in jurisdictions outside the United States has provided many valuable points of comparison and many insights into what makes a competition policy system operate successfully.

All of these experiences prepared the path to my current position. No single experience has been more important than my friendship and professional relationship with Timothy Muris, the FTC Chairman who brought me to the Commission to be the General Counsel in 2001. I first worked with Tim on projects at the FTC in the early 1980s, and I was his colleague on the faculty at the George Mason University School of Law for ten years. Much of what I know about the FTC and the art of public administration I learned from Tim.

What are your top priorities for the FTC both in terms of areas of antitrust law and economic sectors? How the outcomes of the forthcoming US presidential election may affect such priorities?

I have three priorities relating to the FTC's antitrust law and economics programs. The first is to sustain and enhance the agency's litigation and non-litigation initiatives in sectors of the greatest importance to consumers and to economic performance generally. Key areas for our attention include energy, health care, pharmaceuticals, real estate, and standard setting. In addition to important FTC merger and nonmerger litigation matters in these areas, we will be devoting substantial resources to a rulemaking proceeding involving market manipulation in the petroleum products sector and various forms of competition policy R&D, including the completion of a study of authorized generic pharmaceutical products. Among other events, this Fall we are convening what we hope to be the first of what we hope to be an annual conference on developments in industrial organization economics.

The second is to undertake an extensive self-assessment of the agency with an eye toward identifying how best to improve the FTC's operations and organization. This project, called *The FTC at 100: Into Our Second Century*, will use internal deliberations and public consultations to assess what the FTC must do to fulfill the ambitions our Congress set for it early in the 20th Century. We will use our centennial year (2014) as a focal point, and we will use internal deliberations and external consultations to identify means to strengthen the institution. Our external consultations will include workshops and seminars outside the United States to gain insights from the competition policy community abroad. The aim of this exercise is to illuminate the path for the FTC to strengthen its institutional foundation and to establish a norm of routine, periodic self-assessment.

"I have three priorities relating to the FTC's antitrust law and economics programs."

The third priority is to pursue innovations in intergovernmental cooperation relating to competition policy inside the United States and with our counterpart agencies abroad. I see many opportunities to improve the effectiveness of law enforcement and policy making through collective efforts to identify superior analytical techniques and operational methods and to cooperate in law enforcement and research matters of shared interest. Achieving higher degrees of interoperability and cooperation assumes ever greater importance in an environment that features tremendous fragmentation of authority inside and across individual jurisdictions.

New presidential administrations have tended to make at least some adjustments in the existing mix of activities of the FTC. Notwithstanding these adjustments, I anticipate that continuity will be the dominant theme for the FTC. When they study the current programs of the FTC and assess its activities in this decade, I expect that the appointees of the new president will understand three things clearly. First, they will see the large extent to which path to success for the FTC has taken the form of incremental, progressive enhancements of existing programs. They will come to appreciate how the many successful litigation and non-litigation programs of the FTC in this decade – for example, the FTC's report on the patent system and competition policy, *T omote Innovation* — have built creatively and wisely upon foundations established in the 1980s and 1990s. Second, they will how the diversified, ambitious portfolio of existing FTC initiatives supplies a superior foundation for the agency's future work. Third, they will see how massively the FTC in this decade has invested in improving the institutional infrastructure of competition policy within the Commission, inside the United States, and throughout the global competition community, and they will view this as a practice worth continuing.

Do you think there are areas of potential evolution of the US antitrust law and policy? In this respect, what are, if any, the most interesting recommendations suggested by the Antitrust Modernization Commission in its report released on 2 April 2007 that you think would be worth adopting?

I expect that all areas of US antitrust law and policy will feature continuing evolution. This has been the US experience since 1890. It stems from the decision of the Congress, in designing the Sherman Act, to adopt a consciously evolutionary scheme through which courts over time would interpret and reinterpret the broad, relatively open ended terms of the statute to account for developments in learning about economics and the law. Some areas of antitrust law and policy – such as the treatment of supplier cartels – would experience less drastic doctrinal adjustments than others, but even the prosecution of cartels has featured dramatic administrative innovations in the form of experiments with more powerful sanctions and stronger detection through enhanced leniency. This process of adjustment and refinement will continue, although the rate of change for specific areas of antitrust law and policy is difficult to predict.

There is one major implication for the FTC from the choice of Congress to create this deliberately evolutionary system. The FTC must invest resources to assist in identifying important new analytical concepts, in understanding current commercial trends, and in implementing the insights from this process into the formulation of new policies and the upgrading of existing policy frameworks. Congress intended the FTC to be a major instrument in the processes of adjustment and evolution. That is why we invest so heavily, and will invest more heavily, in non-litigation R&D activities that are designed to assist us in helping shape the evolutionary path for doctrine and policy.

The US FTC is empowered to enforce both antitrust and consumer protection policy. What strengths and weaknesses does this double responsibility imply?

Giving two or more functions to a single agency tends to create problems when the functions are wholly unrelated or fundamentally in conflict. I see antitrust and consumer protection as closely related compliments. Antitrust policy tends to press suppliers to offer the best possible array of goods and services, and consumer protection serves to ensure that consumers can make well-informed choices, free of fraud or duress, among the alternatives that suppliers provide. The choices of wise consumers, in turn, drive producers to create products or services that best match consumers' preferences.

In principle, having these two functions in the same agency can produce several benefits. The antitrust perspective reminds the consumer protection specialists that robust competition can be one of the very strongest sources of consumer protection. Antitrust economics and law caution against excessively stringent controls on advertising and marketing that, by forestalling entry and expansion by new firms, insulates incumbents from pressure to improve performance. The learning associated with consumer protection can provide antitrust specialists with valuable insights into the behaviour of consumers – for example, by illuminating how consumers absorb information and make choices among a range of products. We have seen both of this positive phenomena at work at the FTC.

Creation of a Domestic Competition Network: *"There is a long history of Federal-State cooperation. A DCN would expand and deepen that cooperation and help the US enforcement community to achieve results collectively…"*

In practice, the institutional challenge for the FTC and agencies with a similar portfolio of duties is to achieve genuine integration between these perspectives in the routine administration of the agency's work. The body of attorneys who specialize in antitrust and consumer protection, respectively, tend to have different cultures and attitudes toward the role of intervention by the state in the economy.

If the conceptual benefits of a dual function agency are to be realized, the agency must take a number of organizational and operational steps to integrate these perspectives, to ensure that alternative views are brought to bear on problems. This does not happen automatically. I would say that the FTC has made substantial progress in this direction in areas such as health care and data protection. This is a work in progress, and there is more to be done to realize the potential gains from our dual-function configuration.

You have always favored the development of stronger cooperative relationships with other competition institutions and state bodies in the US in order to improve the institutional framework of competition policy and to promote greater awareness of competition to the various stakeholders. In this respect, you recently declared having some plans to create a "domestic competition network". In building such a network, how would you ensure that States comply with antitrust law? How would they fit in this network?

Under the federal antitrust statutes, our States have authority to bring their own lawsuits and do not require the consent of the federal antitrust agencies to do so. In their selection of cases and choice of theories, they are constrained essentially by the same force that constrains the federal agencies – namely, the decisions of the Supreme Court and the other federal courts. Even so, within the boundaries set by the jurisprudence established by the federal courts, the federal agencies and the State agencies enjoy discretion to decide how to act.

A domestic competition network (DCN) would serve several aims. It would seek, by a process of consensus building, to attain agreement on what analytical tests and enforcement norms the federal and State authorities might collectively embrace. Where there are differences in preferences, a DCN would provide a forum for regular discussion and debate with an eye toward achieving better understanding of the basis for differences and seeing how common positions might be attained. A second purpose is to develop better means for cooperation in conducting investigations and pursing enforcement actions. There are many instances in merger control and other areas where the federal and State authorities cooperate in law enforcement. There is room to enhance this cooperation to streamline investigative work and raise the effectiveness of collaborative projects. As I mentioned earlier, interagency cooperation is an important and under-developed source of increased productivity for the competition policy and consumer protection community. A third aim is to improve the quality of advocacy directed at State legislative or regulatory measures that suppress competition. States are in an excellent position to spot potentially restrictive measures and to engage the federal agencies, which have larger resources for research and empirical study, to assist in attacking such measures. A fourth purpose is to develop common programs for training professional staff and for sharing knowhow about investigative methods and industry developments. This can be done in the form of seminars and workshops and simulation exercises.

The Leegin case: *"I believe the position articulated by the majority in the Supreme Court's decision was not an empty prediction but instead was a genuine and accurate assessment about the future evolution of vertical restraints doctrine."*

Over the past two years, the FTC and various States have pursued initiatives that have, I believe, laid a foundation for taking further steps toward establishing a DCN. There is a long history of federal-State cooperation. A DCN would expand and deepen that cooperation and help the US enforcement community to achieve results collectively that cannot be attained through individual initiative.

On unilateral conducts, do you think that, beyond the linguistic differences between the US and EU standards, the US and EU approaches tend to converge on the substance?

In some areas, we do see convergence between the EU and the US with respect to unilateral conduct. For example, when one examines recent speeches of officials from both jurisdictions, one observes a common commitment to the application of analytical approaches that focus on an assessment of actual or likely competitive effects, as opposed to resolving issues of legality simply by classifying the behaviour in question and condemning conduct that falls within forbidden categories, without reference to actual or likely effects. I also would take note of the extensive discussion and agreement on key conceptual issues such as the appropriate methodology for defining relevant markets and measuring market power. I think the common agreement on the value of an effects-based approach is important, yet one must recognize that, within the general rubric of effects based methodology, there is room for each jurisdiction to achieve difference outcomes in the actual application of such a methodology.

Unilateral conducts: *"… EU doctrine and enforcement policy are more intervention-minded that US doctrine and enforcement policy."*

At the same time, some differences also are unmistakeable. As a broad proposition, I would say that EU doctrine and enforcement policy are more intervention-minded that US doctrine and enforcement policy. The important question for all of us is to reach a sophisticated understanding of why this is so. I do not think the answers can be found in the clichés and slogans that surface so often in discussions of this topic. We will not get very far, for example, if we assume the difference stems from a predilection of EU unilateral conduct doctrine and policy to protect competitors as an end in itself. Nor will enlightenment be found in the assertion that the

equilibrium in the US is the product of a successful hijacking of doctrine and policy by ideologues associated with the Chicago School. In my former role as an academic who marks student examinations, I would give either interpretation no better than a "C+."

Where do we find "A+" answers? One place to look is at how the antipathy of US courts toward the current system of private rights of action has led judges to impose ever more demanding standards for establishing the fact of an infringement. I believe US abuse of dominance law would look much more like EU law if the courts had not concluded, rightly or wrongly, that the existing system of private rights creates excessive risks of overdeterrence. Another place is to study how differences in assumptions about the operation of the economic systems in the EU and the US, respectively, affect the definition of liability standards. The US preference for permissive rules reflects that view that looser controls are appropriate due to the adaptability of rivals, customers, and suppliers. This adaptability inheres in strong capital markets, relatively few limits on the establishment and operation of new businesses, an absence of social stigma for operating a failed enterprise, relatively few rigidities in the market for labor, and a fluid mechanism for injecting the assets of bankrupt firms back into the economy. EU courts and enforcement officials may perceive economic conditions differently in the Community. The choice of assumptions can deeply influence how you set and apply abuse of dominance rules.

There are a number of ways to achieve greater understanding and, perhaps, more consensus: deeper collaboration on individual abuse cases, fuller contacts at the case handling and management levels on unilateral conduct issues, pursuit of common research agendas to study specific sectors, and fuller exploration of the assumptions that guide current policy. The EU and US agencies do some of this now and ought to do more in the future. This process will require considerable future effort and patience. The success achieved regarding cartels and mergers shows the positive results from a common commitment to work constructively together over the long run.

Turning now to international affairs, as mentioned before, you have acquired a strong expertise in international competition cooperation. The current international competition landscape might be extremely different from the one you discovered when you started being involved in competition matters abroad. What are the big challenges faced by the international competition community today? Bilateral as well as multilateral cooperation have both shown their limits. However, globalization imposes more international cooperation. How can we be more successful in that respect?

International cooperation initiatives undertaken under the auspices of networks such as the International Competition Network (ICN) and the Competition Committee of the Organization for Economic Cooperation and Development (OECD) have made great progress of four types: increasing interoperability across different national systems, fostering understanding about experience in individual jurisdictions, building a consensus about superior norms regarding substantive analysis and procedural methods, and transferring knowhow. A major challenge for the members of these organizations is to make a commitment to continue and perhaps expand the resources they are applying to these efforts. I worry about whether our agencies might at some point suffer from a form of network fatigue, especially as we attempt to address some of the most difficult issues (e.g., unilateral conduct standards) on the policy agenda. Investments in these international cooperation activities are the equivalent to long-term capital investments in infrastructure assets. They require far-sighted commitments and applications of resources to what sometimes is dismissed as "overhead." The resources we commit to building the international infrastructure of cooperation are resources (some of our very best people) that cannot be applied to the development of specific enforcement measures – the basis on which most of us are evaluated in our individual jurisdictions. I hope all of our agencies continue to act, as we have to date, as though these long-term investments matter greatly and are well worth our support.

I would like to see the international cooperation measures continue the recent trend of focusing more heavily on operational issues such as how to set priorities, how to select cases, how to deal with political constraints, how to organize internal operations, how to integrate economists into the development and evaluation of cases, how to conduct ex post assessments of agency performance, how to recruit and retain good personnel, how to deal with external media organizations? These operational questions are important complements to the assessment of conceptual issues involving liability standards and analytical techniques. There is great room for additional effort to discuss and share experiences about these matters. One dimension of this type of discussion is to examine how the needs of an agency change during its lifecycle, and to address special problems that accompany the building of a successful institution during different phases of its existence. ■

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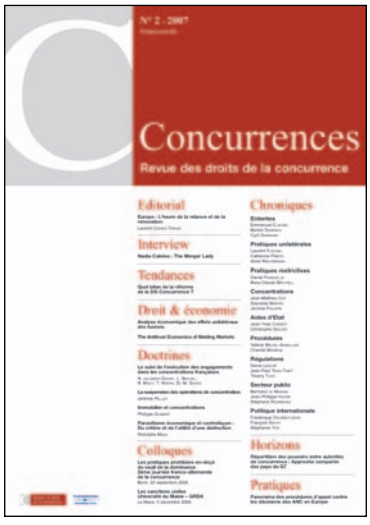

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