



The Daily Dish

Understanding the FTC

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Washington used to be a simpler place. Budgets got done by the House, Senate, and White House. Appropriations were done on time. Policymaking was serious and politics were civil. Nobody knew who the Federal Trade Commission (FTC) was, and those who did could reliably predict its philosophy, process, and metrics. Okay, none of that is true, except the last part. The FTC used to be an obscure agency that performed an important role in a reliable fashion. Those were the days.

Now the FTC is an enigma, wrapped in mystery philosophy, running unpredictable processes, with an egomaniac's metric for success. Large swaths of the economy now operate with the fear that they, too, may fall into the FTC's net, but not know why, what the process of inquiry will hold, or what the standards for judgment will be.

Begin with philosophy and principles. It used to be that the FTC (and the Department of Justice) evaluated mergers and acquisitions (and competition issues more generally) using the widely accepted [consumer welfare standard](#). "The consumer welfare standard guides antitrust enforcers and the courts when evaluating the effects that a particular business practice or merger has on the consumer. To do this, economic tools and data are used to measure if the business practice or merger in question will raise prices, reduce output, or stifle innovation. Any result negatively impacting the consumer, as defined by the consumer welfare standard, may be deemed violative of antitrust laws."

Biden's FTC has jettisoned the consumer welfare standard in favor of...what? It is sometimes referred to as a New Brandeis approach to antitrust policy, which is concerned with firm size in isolation. That, for example, undergirds its case against [Meta](#) in which it largely ignores substitutable products when defining the Virtual Reality fitness app market. (Defining the relevant market is a critical task for the agency when adjudicating such antitrust cases.) It also ignores the competitive effects of banning companies attempting to gain access to a new market through the acquisition of another company. But sometimes the analysis seems to be something other than size, raising the question: What is the principle that now guides the FTC?

This also casts uncertainty on how the analysis will get done. Merger decisions used to be guided by the horizontal merger guidelines (HMG) established in 2010, but the FTC [tossed those overboard](#) as well. The FTC and DOJ claim they wish to "'meet the challenges and realities of the modern economy;'" such changes could introduce novel theories of harm, adjustments to concentration thresholds, and other modifications to the HMG that threaten to abandon decades of economic advancements and limit the HMG's persuasiveness in the courts." More generally, there are numerous press reports of traditional internal processes being trod upon in the course of daily events.

And there seems to be no [understood limit](#) to the scope of FTC action. “On November 10, 2022, the Federal Trade Commission published a policy statement broadening the agency’s interpretation of its authority to challenge ‘unfair methods of competition’ under Section 5 of the FTC Act, signaling a monumental shift in enforcement policy.” For example, the FTC recently undertook the breathtaking rulemaking to [ban non-compete agreements](#), retroactively rescinding an untold number of private contracts agreed upon in good faith.

It is genuinely hard to understand exactly what is going on other than the arbitrary and capricious exercise of executive authority. This runs the risk of [undermining the agency’s credibility](#) with the courts, making future FTCs less effective.

Fortunately, the Innovation, Data, and Commerce Subcommittee of the House Energy and Commerce Committee will have a hearing on the FTC’s Fiscal 2024 Budget on Tuesday of this week. This is a great chance to get the key questions answered:

- What, if any, are the principles that undergird the new approach to competition policy?
- Does the FTC believe that it has any restrictions on its authority to regulate the economy? What are the boundaries of its authority?
- Does Chair Lina Kahn believe that she is being a good curator of the FTC’s judicial record and credibility with the courts?

I plan to watch. You should, too.