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Hearings on Competition and Consumer Protection in the 21st Century

Topic 1
The state of antitrust and consumer protection law and enforcement, and their development, since the Pitofsky hearings
Comment

Katherine McAuliffe, Executive Director of Digital Liberty
Demri Scott, Fellow at Digital Liberty

Introduction

On June 20, 2018 the Federal Trade Commission invited public comments ahead of hearings on competition and consumer protection in the 21st Century. The following seeks to provide comment generally about regulatory effects on competition.

"Well-meaning, intelligent regulators, trying to carry out their regulatory tasks sensibly, can nonetheless bring about counterproductive results."[1] ~ Supreme Court Justice Stephen Breyer

While government officials might try to solve one problem, they often create thousands more by distorting the market through regulatory impositions. Federal agencies, therefore, must be careful of the adverse effects of intervention in the market by looking at the costs and benefits of imposing a new regulation on the market.

We suggest that as the FTC develops policy statements, reviews mergers and acquisitions, and considers emerging markets, the agency should indeed practice regulatory humility. The idea espoused by Acting Chairman Maureen Ohlhausen that since practical skills, acquired knowledge and concrete data quickly change according to the natural and human environment, government officials have limited tools to provide purely prescriptive regulation for many markets. Knowing this, bureaucrats must recognize that there is a fundamental knowledge gap between themselves and the market Consequently, government intervention in markets

[1] Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Cambridge, MA: Harvard-Univ.-Press, 1999).
[2]Maureen Ohlhausen, "Regulatory Humility in Practice: Remarks by FTC Commissioner Maureen K.

should be limited, and any intervention should consider only present market factors through cost-benefit analysis.[2]

Former FTC Chairman Tim Muris highlighted the adverse effects of regulation, explaining that sectoral regulation is limited in its scope and is the "antithesis of competition, with its restrictions on price, entry, and conduct. A large and sad literature documents how sectoral regulation often has harmed consumers by imposing needless controls on entry, pricing, and new product development." [3]

Executive Order 12866, signed by President Clinton, directs federal agencies to ensure that regulations, "address a compelling public need such as material failures to private markets, be based on an assessment of all costs and benefits of available regulatory alternatives, including the alternative of not regulating and maximize net benefits."[4] While the Executive Order was signed in 1993, federal agencies often neglect cost-benefit analysis of regulatory effects.

The FTC's history of economic analysis fairs better when compared to other agencies. For an action to be considered unfair it must create substantial injury to consumers that is not outweighed by benefits to consumers. It must be an injury that consumers couldn't have avoided.[5] Regulatory humility through a strong cost-benefit analysis needs to continue at the FTC, but there are also things that can be done like increasing economist independence within the FTC to ensure that regulations are analyzed critically.[6]

The FTC should remember that government supported businesses and regulations that protect businesses from competitors negatively affect the economy. Regulations depress the economy, create barriers to new market entrants, and favor incumbent businesses and business models.

<u>Regulations Create Barriers to Entry</u>

Regulation negatively impacts the natural growth of the economy by increasing the number of steps necessary for a business to enter the market. These steps to enter the market can act as a deterrent for entrepreneurs and can limit the breadth of new ideas and innovation that could create lifesaving or revolutionary products. It also

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[2]Maureen Ohlhausen, "Regulatory Humility in Practice: Remarks by FTC Commissioner Maureen K. Ohlhausen," (presentation, Washington, DC, April 1, 2015).

[3] Timothy J. Muris, "Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy." Speech, The Milton Handler Annual Antitrust Review, New York City, December 10, 2002.

[4] Exec. Order No. 12866, 3 C.F.R. (1993).

[5] U.S. G.P.O. (1992) (enacted).

[6] Jerry Ellig, "Why and How Independent Agencies Should Conduct Regulatory Impact Analysis," *Mercatus Center at George Mason University,* 2018, https://www.mercatus.org/system/files/ellig-ria-independent-agencies-mercatus-working-paper-v1.pdf.

tends to disproportionately harm low-income entrepreneurs since they have fewer resources than high-income earners to combat regulatory barriers in the market[7]

Regulation clearly creates negative consequences for all industries. Some studies demonstrate the adverse effects of regulation, showing that industries that should be high entry industries experience diminishing entry into the market due to regulation.[8] Over-regulation negatively impacts new entrants into the market but ultimately impacts consumers the most. Without the innovative ideas brought by entrepreneurs, consumers will have fewer choices because small businesses are not incentivized to join the market.

Regulations Favor Incumbent Business Models And Businesses

Burdensome regulatory requirements inhibit competition and reduce the amount of options for consumers. Regulation tends to favor pre-existing companies over new entrants. Small, new entrants into the market tend to be hurt disproportionately more than pre-established businesses. As regulation increases in a specific industry, the number of and employment in small firms decreases while large firms do not experience these changes.[9] This suggests that established businesses tend to have more resources to account for regulatory burdens whereas smaller, new entrants tend not to have the same resources on hand to keep up with competitors to combat regulations. Regulation means that some businesses will have little costs while others will see zero benefits and pay the price of the regulation.

Consequently, over-regulation makes the economic environment unsustainable for a small business that would emerge as a competitor to incumbent businesses.[10] Increased bureaucratic red tape is also correlated with reduced productivity growth in existing firms because regulations inhibit competition and small business growth.[11]

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[7] Patrick A. McLaughlin and Laura Stanley, "Regulation and Income Inequality," *Mercatus Center at George Mason University,* January 2016, https://www.mercatus.org/system/files/McLaughlin-Regulation-Income-Inequality.pdf.

[8] Leora Klapper, Luc Laeven, Raghuram Rajan, "Entry regulation as a barrier to entrepreneurship," *Journal of Financial Economics*, June 2006, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.576.1585&rep=rep1&type=pdf.

[9] Dustin Chambers, Patrick A. McLaughlin, and Tyler Richards, "Regulation, Entrepreneurship, and Firm Size," *Mercatus Center at George Mason University*, 2018, https://www.mercatus.org/system/files/chambers-regulation-entrepreneurship-mercatus-working-paper-v1.pdf.

[10] Pontus Braunerhjelm, Sameeksha Desai, Johan E. Eklund, "Regulation, firm dynamics and entrepreneurship," *Centre of Excellence for Science and Innovation Studies*, May 2015, https://static.sys.kth.se/itm/wp/cesis/cesiswp405.pdf .

[11] Dustin Chambers and Jonathan Munemo, "The Impact of Regulations and Institutional Quality on Entrepreneurship," *Mercatus Center at George Mason University,* 2017, https://www.mercatus.org/system/files/chambers-regulations-entrepreneurship-mercatus-working-paper-v1.pdf.

Regulations Depress the Economy

Regulation also tends to have wide-scale depressant effects on the economy. Some estimates found that if regulations froze at 1980 levels, the US economy would have been 25% larger in 2012.[12] Other reports found that annual output in 2005 was 28% less than what it would have been had regulation remained at its 1949 level.[13]

Regulations also affect Gross Domestic Product. Actual GDP was $4 trillion less in 2012 than if regulations stayed at 1980 levels - a loss of $13,000 per capita.[14] In addition, federal regulations added to the Federal Register from 1949-2005 decreased the real output growth by 2% on average. Poor regulatory practices also account for a loss of around $38.8 trillion in GDP as of the end of 2011.[15]

Simply reducing the federal regulatory budget would create economic gains. A 5% reduction in the regulatory budget, roughly $2.8 billion in spending, would increase GDP by roughly $75 billion and create 1.2 million jobs annually.[16]

Not only does regulation negatively impact GDP, regulations have statistically and economically significant effects on other indicators of a healthy economy such as output, total factor productivity, labor and physical capital.[17] Intervention in the market has deterrent effects on knowledge growth and the accumulation of regulations can slow down an economy's growth rate.[18] Regulation effectively slows down and kills the natural growth of the economy.

Negative consequences on the economy of over active bureaucrats tend to compound with each newly adopted regulation. If agencies aren't careful, regulations can build up and layer on top of pre-existing rules. As a result, companies must comply with thousands of outdated and redundant rules , which create economic uncertainty that has concrete consequences.[19] For example,

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[12] Bentley Coffey, Patrick A. McLaughlin, and Pietro Peretto, "The Cumulative Cost of Regulations," *Mercatus Center at George Mason University,* April 2016, https://www.mercatus.org/system/files/Coffey-Cumulative-Cost-Regs-v3.pdf.

[13] John W. Dawson and John J. Seater, "Federal Regulation and Aggregate Economic Growth," *Journal of Economic Growth,* March 2013, https://www.researchgate.net/profile/John_Dawson5/publication/23968096_Federal_Regulation_and_Aggregate_Economic_Growth/links/56057a0808ae8e08c08c145e.pdf.

[14] Coffey, McLaughlin and Peretto, "The Cumulative Cost of Regulations."

[15] Dawson and Seater, "Federal Regulation and Aggregate Economic Growth."

[16] T Randolph Beard, George S. Ford, Hyeongwoo Kim, Lawrence J. Spiwak, "Regulatory Expenditures, Economic Growth and Jobs: An Empirical Study," *Phoenix Center*, April 2011, http://www.phoenix-center.org/PolicyBulletin/PCPB28Final.pdf.

[17] Dawson and Seater,"Federal Regulation and Aggregate Economic Growth."

[18] Coffey, McLaughlin and Peretto, "The Cumulative Cost of Regulations."

[19] Michael Mandel and Diana G. Carew, "Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform," *Progressive Policy Institute,* May 2013, http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf.

regulations adopted between 1980 and 2012 could have slowed GDP growth by 1% and reduced the aggregate growth rate on average by 2%.[20] The adverse effects of regulation build-up must also be considered when evaluating regulatory policies.[21]

President Trump recognized this when he signed Executive Order 13771, which directs executive branch agencies to eliminate at least two regulations for every newly enacted regulation so the total cost of regulation does not increase

As a result of the Executive Order, 22 regulations were cut for each new regulation adopted, totaling $8.1 billion in lifetime net regulatory cost savings, and the equivalent of $570 million per year. [22]

President Trump also signed Executive Order 13777, which requires agencies to designate an agency official as a Regulatory Reform Officer who identifies job killing or outdated regulations. [23]

While the FTC is not beholden to Executive Orders as an independent agency, Acting Chairman Ohlhausen has expressed a desire for continuous improvement to eliminate unnecessary and burdensome regulatory barriers that hurt the American economy. [24] In response to Executive Order 13777, the FTC created new groups within the Bureau of Competition and the Bureau of Consumer Protection to eliminate unnecessary costs to companies during investigations as well as reviewing and closing older investigations. The entire agency, most importantly, is working to identify unnecessary regulations. [25]

Closing/Recommendations

While the FTC itself is an enforcement not a regulatory agency its enforcement actions can create negative effects similar to those caused by regulation.

Government intervention distorts the market, making a comprehensive cost-benefit analysis important in assessing whether in rare cases an agency should intervene. A good regulatory impact analysis evaluates current market factors, identifies

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[20] Coffey, McLaughlin and Peretto, "The Cumulative Cost of Regulations."
[21] "Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform"
[22] "President Donald J. Trump Is Delivering on Deregulation." The White House. December 14, 2017. https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-delivering-deregulation/.
[23] "List of Agencies with Current Waivers under Executive Order 13777." The White House. May 30, 2018. https://www.whitehouse.gov/wp-content/uploads/2018/06/EO13777_EnforcingRegulatoryReformAgenda.pdf.
[24]Maureen K. Ohlhausen,"The First 100 Days." Speech, Remarks of Acting Chairman Maureen K. Ohlhausen, Watergate Hotel, Washington, D.C.
[25] See FTC, Press Release, "Process Reform Initiatives are Already Underway at the Federal Trade Commission" (Apr. 17, 2017), https://www.ftc.gov/news-events/press-releases/2017/04/process-reform-initiatives-are-alreadyunderway-federal-trade.

alternate solutions and defines the benefits and the outcomes of implementing new rules as well as the good things that must be sacrificed in the name of a supposed desired outcome in an unpredictable future.

This also allows an agency to establish areas where the same outcomes can be achieved at a lower cost. These impact analyses should not be self-confirming biases for bureaucrats; rather, they should provide a roadmap for good regulatory practices.[26]

Additionally, there is a fundamental knowledge gap between bureaucrats and the market that makes the idea of regulatory humility integral in evaluating impositions within the market.[27]

FTC Chairman Muris understood regulatory humility and explained, "competition agencies have neither the resources nor the authority to stop every anticompetitive policy… competition ultimately cannot flourish if the public is convinced that sound economic policy involves protecting producers… state and local officials have fewer resources to review regulation for its competitive impact." Performing a cost-benefit analysis is key in ensuring bureaucrats are using their resources in the best possible way.[28]

The FTC has a strong history of cost-benefit analysis that can inspire other federal and state agencies and lawmakers, who do not perform extensive cost-benefit analyses, to follow in the footsteps of the FTC to inspire regulatory humility. The FTC's focus on economic outcomes creating market benefits for consumers can influence regulatory humility throughout the country.

But this begins by maintaining a strong cost-benefit analysis at the FTC that understands the costs of regulatory impositions and evaluates present factors in the market, not future, unforeseeable circumstances. In the Commission's cost-benefit analysis, the FTC should remember that market intervention negatively affects the economy on many levels. Regulations depress the economy, favor incumbent businesses and business models, and create insurmountable barriers for new market entrants. Regulation ultimately distorts the natural growth of the market, making regulatory humility an important philosophy that the FTC and all agencies should follow.

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[26] Ellig, "Why and How Independent Agencies Should Conduct Regulatory Impact Analysis."

[27] Ohlhausen, "Regulatory Humility in Practice: Remarks by FTC Commissioner Maureen K. Ohlhausen."

[28] Timothy J. Muris, "State Intervention/State Action—a A U.S. Perspective." Speech, Fordham Annual Conference on International Antitrust law & Policy, New York City, October 24, 2003.