

Properly Balancing Consumer Protection and Innovation in Broadband Markets (FTC Hearings, ICLE Comment 9)

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The necessity of the FTC's involvement in regulating broadband competition arises most recently from the Federal Communication Commission's ("FCC") 2018 Restoring Internet Freedom Order ("2018 RIFO"). In the 2018 RIFO, the FCC adopted a competition-oriented approach to preventing what are otherwise violations of so-called "net neutrality" principles. This approach, consistent with the FCC's historical deregulatory approach to information services, directly implicates the FTC as an important part of preventing competitive injuries that harm downstream consumers.

Rather than simply presuming harm, the FCC undertook an extensive, thorough, and fact-based analysis to first assess the likely risk of competitive harms that could arise in the broadband market. Based on this analysis, it concluded that the risk of harmful conduct is low, in terms of both the likelihood that ISPs will engage in such conduct and its potential adverse effects on consumers. Because this risk is low, the FCC determined that a "light-touch," competition-oriented regulatory approach was appropriate for regulation of broadband.

This conclusion also followed from the FCC's review of the Communications Act. As the FCC observed, "[t]he Communications Act includes an antitrust savings clause, so the antitrust laws apply with equal vigor to entities regulated by the Commission." Recognizing this, the Commission carefully structured the 2018 RIFO so that consumers would be protected under existing consumer protection and antitrust laws, while still leaving room for the historically applied light-touch regime for information services under Title I of the Communications Act.

In so doing, the FCC struck the proper balance between indirect antitrust enforcement and direct regulation under the Communications Act, which incorporates competition policy as the generally applicable regulatory "default" in the absence of specific statutory mandates.

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