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Confining Competition, Consumer-Protection and Privacy Law to Their Domains

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Thank you, Mr. Durocher, for that introduction. And thank you, Chairperson Lee and the Taiwan Fair Trade Commission, for inviting me to participate in this important event. I am honored to join you all, and particularly delighted to join my distinguished panelists. Not only is this my first trip abroad as a Commissioner, this is my first ever visit to Asia. I am so happy that my first visit to Asia is to the dynamic city of Taipei.

Before I begin, I must issue the standard disclaimer. I am here today in my individual capacity to express my own views and not those of the U.S. Federal Trade Commission or any of my fellow Commissioners.

The topic of this panel is the interaction of competition and consumer-protection law. The U.S. FTC enforces the competition, consumer-protection, and privacy laws, so I confront this interaction every day. Unsurprisingly, I think there is sometimes a tendency to allow these sets of laws to drift into each other. In particular, there is an impulse to use competition law to solve problems having little to do with competition. Take our origin story as an example. When Congress created us 110 years ago, it conferred on us authority only to prohibit conduct injurious to competition.¹ Thanks to the indeterminacy of the text of the statute we enforce, however, the Commission began to push theories of competitive harm that had very little to do with “competition.” Specifically, it targeted false advertising on the theory that false advertising drove sales and capital toward the false advertiser and away from rivals, thereby injuring competition.² But false advertising injures consumers without necessarily injuring competition, and the Commission struggled to shoehorn false advertising into competition claims. Congress responded by granting us authority to protect consumers directly, rather than merely indirectly by protecting competition.³

* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

¹ Fed. Trade Comm’n Act, ch. 311, § 5, 38 Stat. 719 (1914).

² See *FTC v. Raladam Co.*, 283 U.S. 643, 644–46, 652–53 (1931).

³ Wheeler-Lea Act of 1938, Pub. L. No. 75-447, 52 Stat. 111.

The tendency of competition law to drift makes some sense. The end goal of a good society is human flourishing. Free and fair markets contribute to that end. Competition law plays a critical role in keeping markets free. But competitive pressures do not necessarily make markets fair. Competitive markets can reward unfair and unscrupulous behavior. As was the case early on at the FTC, enforcers may stretch competition law to regulate unfair behavior that isn't necessarily anticompetitive. Some other body of law must address those concerns. And that is where consumer-protection and privacy laws step in.

I think it is important that competition law resist this drift—mission creep, as it's called in other contexts. Competition laws should address competition problems, and competition enforcers should enforce those laws. Other important social policies should be left to other bodies of law that better balance the tradeoffs and dueling interests—like consumer-protection and privacy laws—rather than bending our competition laws to embrace concerns outside of the domain of traditional competition objectives.

Competition Law is Not a Panacea for Social and Corporate Ills

The pressure to use competition law to achieve non-competition objectives is high right now. In the United States, prominent antitrust enforcers and academics have urged the use of competition laws to promote, for example, racial equity and labor organization. These are not traditional objectives of competition law. They are the objectives of different bodies of law that reflect a careful balancing of competing interests to promote important social policies wholly apart from market competition—indeed, sometimes inconsistently with it.

In the United States, some have urged competition enforcers to implement non-legislative measures to promote sustainability and environmental policies. I know this was the topic of the previous panel, but I think there is an important point to be made about the interaction of competition law and other laws. Obviously, the deliberate conservation of our natural environment is a laudable objective and a necessary ingredient for human flourishing. But conservation is not a traditional end of competition law. In the United States, for example, we have reams of state and federal laws aimed at promoting conservation and reducing carbon emissions.⁴ Competition law, by contrast, is agnostic about conservation as an objective. Market competition may in some cases promote conservation, especially when consumers demand that firms behave sustainably. But competition does not promote conservation *per se*. Competition law should promote market competition alone. We should leave intentional conservation and sustainability to the bodies of law and agencies specially designed to pursue those objectives.

⁴ See, e.g., Clean Air Act, 42 U.S.C. §7401, et seq.; Clean Water Act, 33 U.S.C. §1251, et seq.; Endangered Species Act, 16 U.S.C. §1531 et seq.; National Environmental Policy Act, 42 U.S.C. §4321, et seq.; Resource Conservation and Recovery Act, 42 U.S.C. §6901, et seq.; Congressional Research Service, Environmental Laws: Summaries of Major Statutes Administered by the Environmental Protection Agency (Dec. 20, 2013), <https://crsreports.congress.gov/product/pdf/RL/RL30798> (“EPA’s responsibilities grew over time as Congress enacted an increasing number of environmental statutes and major amendments to these statutes. . . . The implementation and enforcement of many of these federal authorities is delegated to the states. EPA also provides financial assistance to states and local governments to aid them in administering pollution control programs and in complying with certain federal environmental requirements.”).

Consider one example from my country. A recent report from the U.S. Congress revealed that some asset-management firms may have been colluding to reduce output in energy markets and drive up the price of fossil fuels to achieve carbon-emissions goals set by the colluding firms.⁵ There are not many bright-line rules in competition law, but the prohibition on horizontal agreements between competitors to drive down output or drive up prices is one of them.⁶

I am concerned about competition-law enforcers creating exceptions for horizontal conduct with a sustainability goal for two reasons. First is the issue of competence. Competition enforcers are good at promoting competition, and at sniffing out anticompetitive behavior and conditions. But creating enforcement exceptions for putatively pro-conservation, anti-competitive conduct would require weighing the incommensurate values of competitive injury against conservation benefit. I do not think competition enforcers would be particularly well suited at this complicated form of balancing. This is too big a question, and involves too many dimensions, to leave it to bureaucrats. Second, I fear that competitors will not limit their collusion to environmental issues. Adam Smith—rarely invoked in defense of robust antitrust enforcement—famously warned that “people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”⁷ Exemptions for environmental collusion may lead to collusion on other topics, and the exemption for the former will make the prohibition against the latter more difficult to enforce.

The principle I’m advocating for is not limited to environmental issues. I am arguing more broadly about the importance of confining competition law to its traditional domain and relying on other laws to pursue other values we care about.

Consumer-Protection and Privacy Law Is an Important Complement to Competition Law in Safeguarding Consumer Interests

Consumer-protection and privacy law is a great example of a body of law that vindicates important social policies that competition law cannot. That is particularly true for one of the most pressing questions we confront today—what to do about data privacy. Try as some might, we cannot collapse privacy into competition law. Competition law will not get us the privacy standards we seek, nor is it intended to.

Of course, we hope that market competition by itself creates a sufficient incentive for companies to treat consumers well. But that is not always the case.

Sometimes, there simply is not enough competition. Some markets are naturally concentrated. Other markets may have become concentrated thanks to enforcement failures. With

⁵ Interim Staff Report of the Committee on the Judiciary, U.S. House of Representatives, Climate Control: Exposing The Decarbonization Collusion in Environmental, Social, and Governance (ESG) Investing (June 11, 2024), [https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-06-11%20Climate%20Control%20-%20Exposing%20the%20Decarbonization%20Collusion%20in%20Environmental%2C%20Social%2C%20and%20Governance%20\(ESG\)%20Investing.pdf](https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-06-11%20Climate%20Control%20-%20Exposing%20the%20Decarbonization%20Collusion%20in%20Environmental%2C%20Social%2C%20and%20Governance%20(ESG)%20Investing.pdf).

⁶ See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (“Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused.”).

⁷ Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Book 1, chapter 10 (1776).

low competitive pressure, companies in these markets will have lower dependence on consumer goodwill and greater incentive to profiteer from harmful conduct that consumers cannot avoid. A concentrated market undermines incentives to deal honestly with consumers. And U.S. regulators cannot break up a company merely because a market is concentrated.

Even with vibrant competition, unfair business practices can still proliferate in a market. There are some harmful practices consumers cannot avoid, especially in a modern economy where consumers must regularly do business with far-away strangers whose reputations they cannot reliably ascertain and with whom, in many cases, they will never do business again. In such scenarios, consumers depend on consumer-protection and privacy laws to uphold their reasonable expectations, and to deter, punish, and win restitution from those who deceive them into parting with their money or who otherwise take advantage of their trust.

Other harmful practices drive a competitive race to the bottom. Take the practice by some hotels of charging a resort fee, which is a mandatory but separate fee added to every night of a hotel stay. Hotels, search engines, and comparison sites rarely include this fee in the advertised price, meaning that consumers are often making their purchasing decisions without understanding the full price of the room. Hotels are in competition with other hotels, so being the lone business to include such charges in the advertised price up front would make that hotel's price seem higher than that of its competitors. Of course, consumers might notice the resort fee on the checkout page, but at that point they may have some level of psychological commitment to their choice and may be less inclined to begin their search anew.

This example illustrates two interesting points about the interaction of competition and consumer-protection and privacy law. First, competition itself can be the impetus for anti-consumer conduct in the first place, as well as the force that drives the race to the bottom that causes other firms to emulate the misconduct. And second, consumers may not behave like *homo economicus*, and may instead engage in predictable, exploitable behaviors that an economist might call irrational. Consumer-protection and privacy law exists in no small part to address these market problems that competition cannot necessarily resolve.

In the Digital Economy, Absent Consumer-Protection and Privacy Laws, Worst Practices Take Hold and Drive a Race to the Bottom

This all brings me to some observations about the technology industry and privacy harms, and the interplay between competition and consumer protection and privacy in digital markets.

The digital marketplace offers consumers a huge number of services seemingly free of charge. For zero dollars, consumers can use sophisticated search engines, e-mail services, and social networks. They can listen to almost every song ever recorded, and watch enough hours of video entertainment to fill multiple lifetimes.

But as we know, although these services may not involve an exchange of money, they come with a price. That price is paid in at least three ways. First, in the attention of consumers to advertising placed on those platforms, adjacent to or embedded within the content they want to see; second, in the data gathered about those consumers—their identity, interests, location,

conversations, and in some cases, quite intimate information such as their medical conditions, sexual interests, or political views; and third, in the time spent by consumers using one platform over another, strengthening one platform's network effects and weakening another's.

As far as I can tell, the “privacy paradox” is real: while consumers profess in surveys to care a great deal about privacy, they seem to care very little when they decide which online services to use. I think one major reason for this behavior is that privacy harms seem theoretical and nebulous, especially compared to the immediate, concrete utility of using these seemingly free services. Further, the availability of a zero-dollar alternative makes consumers extremely reticent to consider even a low-priced competitor. Indeed, there are privacy-oriented email services that charge a monthly fee for use, but they make up a very small percentage of the personal email market, which is dominated by free of charge providers. What we can observe from this reality is that once there is a “good-enough” zero-dollar option in the market, low-dollar competitors struggle to compete for anyone other than the small niche of intensely privacy-focused consumers.

Even consumers who meaningfully factor privacy into their decision-making might find it difficult to operationalize their concerns. Privacy policies are normally opaque legal documents and change constantly, making them difficult for ordinary consumers to understand. Even when a company is clear about what information it gathers and with whom it shares that information, consumers may not grasp the implications and risks of de-anonymization and data transfers. And for services with strong network effects, like social media, even those consumers who would in principle be willing to pay for a privacy-respecting, fee-for-service alternative have little choice but to use the dominant platform. Why use a privacy-protecting social media alternative if none of your friends are on it?

All of this is to say that experience shows that market competition cannot, and will not, adequately address privacy concerns. In fact, in the absence of adequate consumer-protection and privacy laws, competition enforcement could paradoxically worsen privacy issues. Vertically integrated and horizontally dominant firms in the internet advertising markets have some inherent advantages in protecting consumer privacy. Data transfers generally present the greatest risk of breach and misuse. Large vertically integrated and horizontally dominant platforms don't need to transfer user data in order to monetize it. They collect the data directly from users and deploy it for targeted advertisements on their own platforms. Non-integrated firms, by contrast, can participate in these markets only by either selling data they collect, or by acquiring data to target advertisements. But that disaggregation of functions is the greatest risk to privacy.

That competition law cannot fully protect consumers' privacy interests is no cause for alarm. We have at our disposal, and can further develop, bodies of law to address privacy directly. But we should not bend or alter our competition laws to address concerns like data privacy. We should leave competition law for what it does best—promoting market competition—and rely on other laws to vindicate other important interests. Thank you.