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One Agency, Two Missions, Many Benefits: The Case for Housing Competition and Consumer Protection in a Single Agency

I. Introduction

Recent developments in the area of institutional design have included the integration of competition and consumer protection missions within the same agency. Such integration recently has occurred in the Netherlands, Finland, and Denmark, and is under way in Ireland. Although a few countries have taken steps away from a dual-mission structure,[2] the clear global trend in recent years has been to integrate competition and consumer protection missions.

This article makes the case for housing competition and consumer protection authority in a single agency, with a particular focus on the U.S. Federal Trade Commission (FTC). This article does not necessarily argue that other jurisdictions with separate competition and consumer protection agencies should combine those agencies, given the potential costs involved in any such integration and the various jurisdiction-specific considerations that must be taken into account before proceeding with such integration. In the United States, however, where the integration has been in place in some form for a century, there are strong reasons for the FTC to remain a dual-mission agency.

This article proceeds as follows. Section II presents an overview of the dual mission at the FTC, including the authority and the tools utilized by the agency in pursuit of each mission.

[1] The views expressed in this article are solely those of Commissioner Ohlhausen and do not necessarily reflect the views of the Commission or any other Commissioner. A version of this article will be included in EUROPEAN COMPETITION LAW ANNUAL 2014: INSTITUTIONAL CHANGE AND COMPETITION AUTHORITIES (Philip Lowe, Mel Marquis & Giorgio Monti eds., Hart Publishing, forthcoming).

[2] It does not appear that such moves away from a dual-mission structure were based on any incompatibility between the competition and consumer protection missions at these particular agencies.

Section III discusses the various benefits that a dual-mission agency may obtain, including most importantly improvements in the performance in one mission based on the learnings from the other mission. Section III also addresses some areas in which the FTC may not have fully achieved such benefits in practice. Section IV argues that, notwithstanding the many benefits of integrating the two missions, there are some limits, including for example with respect to the importation of privacy considerations, which currently play a prominent role in the consumer protection mission, into the competitive effects analysis on the antitrust side of the house. Finally, Section V provides some recommendations for the FTC to consider in achieving an optimal integration of the competition and consumer protection missions and to maximize the benefits of the agency's dual mission.

II. Overview of the Dual Mission at the FTC

The FTC pursues a dual mission, as the only federal agency with both competition and consumer protection jurisdiction in broad sectors of the U.S. economy. First, the FTC enforces the federal antitrust laws to protect consumers from anticompetitive mergers and business conduct. Second, the Commission engages in enforcement efforts to protect consumers from fraudulent, deceptive, and unfair business conduct and to safeguard consumers' privacy and personal information.

As reflected in the FTC's current strategic plan, this dual mission can be described as follows: "Working to protect consumers by preventing anticompetitive, deceptive, and unfair business practices, enhancing informed consumer choice and public understanding of the competitive process, and accomplishing this without unduly burdening legitimate business

activity."[3] Accompanying, and closely related to, this mission is the agency's vision: "A vibrant economy characterized by vigorous competition and consumer access to accurate information."[4]

A. Authority and Tools Utilized in Pursuit of the Competition Mission

The FTC's competition mission is executed in principal part by the Bureau of Competition (BC), which enforces the "unfair methods of competition" prong of Section 5 of the Federal Trade Commission Act.[5] A violation of the Sherman Antitrust Act[6] is considered a violation of Section 5 of the FTC Act. The FTC also enforces the Clayton Act,[7] which, among other things, prohibits corporate acquisitions that may tend substantially to lessen competition. Finally, the courts and the FTC have interpreted Section 5 to go beyond the scope of the antitrust laws.[8]

The FTC uses several tools – both enforcement and non-enforcement – in pursuit of its competition mission.

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[3] FED. TRADE COMM'N, STRATEGIC PLAN FOR FISCAL YEARS 2014 TO 2018 3 (2014), *available at* http://www.ftc.gov/system/files/documents/reports/2014-2018-strategic-plan/spfy14-fy18.pdf.

[4] *Id.*

[5] Section 5 of the FTC Act provides in relevant part: "Unfair methods of competition in or affecting commerce . . . are hereby declared unlawful." 15 U.S.C. § 45(a)(1). The other prong of Section 5 involves unfair or deceptive acts or practices and serves as the basis for the FTC's consumer protection authority. *See infra* note 14. An overview of the FTC's investigative and enforcement authority on both the competition and consumer protection side is available on the agency's website at http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority.

[6] 15 U.S.C. §§ 1 *et seq.*

[7] *Id.* §§ 12 *et seq.*

[8] Although this topic is beyond the scope of this paper, much ink has been spilled over the extent to which Section 5 should reach beyond the antitrust laws. *See, e.g.*, Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENFORCEMENT 1 (2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/section-5-ftc-act-principles-navigation/131018section5.pdf; Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, *Section 5: Principles of Navigation*, Remarks before the U.S. Chamber of Commerce (July 25, 2013), *available at* http://ftc.gov/speeches/ohlhausen/130725section5speech.pdf.

Enforcement. This is the primary tool used by BC in pursuit of its competition mission. BC pursues its merger and conduct enforcement actions either in federal court or through an internal administrative litigation process.[9]

Competition policy research and development (R&D). Through the use of its unique research tools, including its authority to conduct studies under Section 6(b) of the FTC Act,[10] the FTC advances its competition mission by conducting policy R&D. This is done through information gathering and report writing, holding conferences and workshops on important competition issues, and academic-style research, among other means.[11]

Competition advocacy. The FTC – principally through its Office of Policy Planning – issues advocacy filings to state and federal policymakers, addressing the competition implications of proposed laws and regulations. The agency – through its Office of General Counsel – also files amicus briefs with federal and state courts, addressing various points on the proper implementation of the antitrust laws.[12]

Consumer and business education. BC occasionally produces education materials to help consumers and businesses understand the competition laws and the benefits of competition generally and with respect to specific industries.[13]

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[9] For a discussion of the FTC's enforcement program, see WILLIAM E. KOVACIC, CHAIRMAN, FED. TRADE COMM'N, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY, THE CONTINUING PURSUIT OF BETTER PRACTICES 112-20 (Jan. 2009) [hereinafter FTC AT 100 REPORT], *available at* http://www.ftc.gov/reports/federal-trade-commission-100-our-second-century.

[10] 15 U.S.C. § 46(b).

[11] For a discussion of the FTC's policy R&D program, see FTC AT 100 REPORT, *supra* note 9, at 91-109.

[12] For a discussion of the FTC's competition advocacy program, as well as the benefits of such advocacy more generally, see Maureen K. Ohlhausen, *An Ounce of Antitrust Prevention Is Worth A Pound of Consumer Welfare: The Importance of Competition Advocacy and Premerger Notification*, Remarks at the Fiscalia Nacional Economica's Eleventh Annual Competition Day, at 2-15 (Nov. 5, 2013), *available at* http://www.ftc.gov/public-statements/2013/11/ounce-antitrust-prevention-worth-pound-consumer-welfare-importance-0.

[13] *See, e.g.*, Fed. Trade Comm'n, Competition Counts, *available at* http://www.ftc.gov/tips-advice/competition-guidance/competition-counts.

B. Authority and Tools Utilized in Pursuit of the Consumer Protection Mission

The FTC's consumer protection mission is executed principally by the Bureau of Consumer Protection (BCP), which enforces the "unfair or deceptive acts or practices" prong of Section 5 of the FTC Act.[14] For each of the two types of cases under this prong – unfairness and deception – the FTC has issued a policy statement laying out the factors the agency will consider in bringing consumer protection enforcement actions.[15]

In addition to Section 5, the FTC enforces several federal statutes in the consumer protection area, including, among others, the Truth-in-Lending Act, the Fair Credit Reporting Act, the Do-Not-Call Implementation Act of 2003, the Children's Online Privacy Protection Act, the Fair and Accurate Credit Transactions Act of 2003, and the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003.[16] These laws prohibit specifically defined trade practices and generally specify that violations are to be treated as if they were "unfair or deceptive acts or practices" under Section 5 of the FTC Act.

In pursuing its consumer protection mandate, the FTC largely uses the same tools that it uses on the competition side, including law enforcement, policy research and development, and advocacy. BCP, however, typically relies more heavily on workshops and reports than BC in the policy R&D area.[17] In addition, BCP expends significant efforts in the consumer and business

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[14] Section 5 of the FTC Act provides in relevant part that "unfair or deceptive acts or practices in or affecting commerce[] are hereby declared unlawful." 15 U.S.C. § 45(a)(1).

[15] *See* Fed. Trade Comm'n, Policy Statement on Unfairness, *appended to* Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984) (codified at 15 U.S.C. § 45(n)), *available at* http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness (defining a practice as unfair if it is likely to cause substantial consumer injury that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits); Fed. Trade Comm'n, Policy Statement on Deception, *appended to* Cliffdale Assocs., 103 F.T.C. 110, 174 (1984), *available at* http://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception (defining a practice as deceptive if it is likely to mislead consumers acting reasonably in the circumstances to their material detriment).

[16] A summary of the various statutes enforced by the FTC is available at http://www.ftc.gov/enforcement/statutes.

[17] A list of upcoming and past Commission workshops and other events is available at http://www.ftc.gov/news-events/events-calendar/all.

education areas, regularly creating materials aimed at assisting consumers in protecting themselves from various fraudulent business practices and helping businesses comply with the FTC Act and the several consumer protection statutes enforced by the FTC.[18] Finally, the agency engages in rulemaking under both the FTC Act and several federal consumer protection statutes, issuing and enforcing several trade regulation rules aimed at remedying unfair or deceptive acts or practices on an industry-wide basis.[19]

III. Benefits of Housing Competition and Consumer Protection Missions in a Single Agency

Although the FTC's competition and consumer protection missions focus on different types of conduct, they share the same overall goal: that consumers obtain truthful information about products and services that they can then use to make purchase decisions in a competitive marketplace. That competition and consumer protection are complementary areas is almost a truism at this point.[20]

As former FTC Chairman Timothy Muris has argued, "The policies that we traditionally identify separately as 'antitrust' and 'consumer protection' serve the common aim of improving consumer welfare and naturally complement each other."[21] In other words, "well-conceived

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[18] BCP's consumer education materials are available at http://www.consumer.ftc.gov/, while its business education materials are available at http://business.ftc.gov/.

[19] For a discussion of the FTC's rulemaking on the consumer protection side, see FTC AT 100 REPORT, *supra* note 9, at 124-27.

[20] *See, e.g.*, OECD Policy Roundtable, The Interface between Competition and Consumer Policies, Background Note, at 17 (2008) [hereinafter OECD Policy Roundtable], *available at* http://www.oecd.org/regreform/sectors/40898016.pdf ("That consumer protection policy and competition policy are largely interdependent instruments of economic policy, both aimed at serving a common purpose of enhancing the efficiency with which markets work, has been stated on many occasions and is widely accepted.").

[21] Timothy J. Muris, FTC Chairman, *The Interface of Competition and Consumer Protection*, Remarks before the Fordham Corporate Law Institute's Twenty-Ninth Annual Conference on International Antitrust Law and Policy, at 3 (Oct. 31, 2002), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/interface-competition-and-consumer-protection/021031fordham.pdf.

competition policy and consumer protection policy take complementary paths to the destination of promoting consumer welfare."[22]

Another way to think of the relationship between the two missions is that they both deal with market distortions and both can be analyzed in economic terms. As former Commissioner Thomas Leary has explained, antitrust violations distort the supply side because they restrict supply and elevate prices, while consumer protection violations distort the demand side of the market because they create the impression that a product or service is worth more than it really is.[23] In fact, economic analysis ought to play a significant, if not central, role in pursuing both missions.

The complementary nature of these two disciplines inevitably leads to several benefits to housing competition and consumer protection in a single enforcement and policymaking agency.

A. Learning from One Mission Informs and Improves Efforts in the Other

The most significant benefit of maintaining a dual mission is the positive reinforcement of each mission provided by the other. In its submission to the 2008 OECD Policy Roundtable on the interface of competition and consumer protection policies, the FTC explained that it "has found that enforcing both antitrust and consumer protection laws reinforces the consumer welfare orientation that it brings to accomplishing both of its missions."[24] As former Chairman

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[22] *Id.* at 5; *see also* Deborah Platt Majoras, FTC Chairman, *Recent Actions at the Federal Trade Commission*, Remarks before the Dallas Bar Association Antitrust and Trade Regulation Section, at 1 (Jan. 18, 2005), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/recent-actions-federal-trade-commission/050126recentactions.pdf (arguing that the two missions focus, albeit with slightly different sets of tools, on the common goals of promoting efficiency and preventing consumer harm).

[23] *See* Thomas B. Leary, *Competition Law and Consumer Protection Law: Two Wings of the Same House*, 72 ANTITRUST L.J. 1147, 1147-48 (2005). *See also* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 714 (1997) ("[A]ntitrust violations (which impair the menu of options) stem from market failures in the general marketplace *external* to consumers, whereas consumer protection violations (which impair the individual's ability to choose) flow from *internal* market failures that take place, in a sense, 'inside the consumer's head.'").

[24] OECD Policy Roundtable, *supra* note 22, at 231 (Contribution of the United States).

Muris has argued, "Competition theory that excludes consumer policy is not only shortsighted but, given the growing importance of consumer issues, can ultimately be self-defeating. Consumer policy that ignores its impact on competition can result in cures worse than the disease."[25]

"The Commission's capacity to meld expertise in economics, competition, and consumer protection is a conscious element of its institutional design and a major reason for its existence."[26] This melding of expertise informs and improves each of the FTC's missions in several ways. The consumer protection function is improved by using our competition expertise in taking into account the impact of consumer protection enforcement and policy on markets. Conversely, our competition enforcement and competition advocacy are improved by using our consumer protection expertise to assess justifications for business conduct and proposed laws and regulations, respectively, that are grounded in terms of consumer protections.

1. Taking Account of Competition Implications in Consumer Protection Enforcement

First, understanding the dynamics of competitive markets, as well as the various benefits that competition provides, allows for more optimal consumer protection enforcement. On questions of both liability and remedy, competition principles can and do improve our consumer protection efforts. Below I highlight two significant areas of consumer protection enforcement – advertising and privacy – which should be, and typically are, informed and improved by the FTC's efforts in the competition area.

[25] Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 174 (2005).

[26] FTC AT 100 REPORT, *supra* note 9, at v.

a. Theoretical Benefits

The FTC's efforts to stop false and deceptive advertising are an important component of its consumer protection mission. Those efforts, however, can yield outcomes that are even better for consumers and consumer welfare when they reflect a greater understanding of, and appreciation for, competition.

To achieve the goals of both missions – that is, promoting efficiency, preventing consumer harm, and enhancing consumer welfare, without unduly burdening legitimate business conduct – the FTC must encourage and defend truthful, non-misleading commercial speech. We do this by protecting the marketplace and consumers from false commercial speech, but we must also help to foster an environment that provides consumers access to useful commercial information. As the FTC staff observed in a comment to the U.S. Food and Drug Administration (FDA) on certain First Amendment issues, "A flexible approach to commercial speech – one that encourages the dissemination of accurate speech and tailors restrictions to prevent speech that is false or misleading – will result in greater dissemination of valuable information with benefits for both consumers and competition. In contrast, the evidence indicates that broad restrictions on the dissemination of truthful commercial speech, while effectively stopping false or misleading information, can deprive consumers of useful information as well."[27]

Beneficial marketplace information includes more than just pricing data. An FTC staff study on the effects of the dissemination of health information in the ready-to-eat cereal market is a real-world example of the consumer and competitive benefits of health claims for food

[27] FTC Staff Comment before the Department of Health and Human Services, Food and Drug Administration, Docket No. 02N-0209, at 22 (Sept. 2002), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-food-and-drug-administration-concerning-first-amendment-issues/fdatextversion.pdf.

products.[28] In 1984, the Kellogg Company began claiming on labels and in advertising that All Bran cereal was high in fiber and that diets high in fiber could reduce the risk of cancer, claims that the FDA had previously prohibited. In response, competitors soon made similar claims for their own high-fiber cereals, as well as introducing more of these products. Even more importantly, consumers began to make significant changes in their cereal choices, substantially increasing their consumption of high-fiber products. The dissemination of these fiber/cancer claims benefitted consumers by providing important dietary guidance and by expanding the range of high-fiber cereal choices available in the market.

Privacy enforcement, like most issues under the FTC's consumer protection jurisdiction, should also be viewed through a competition lens if we are to reach the best outcome for consumers. The FTC is uniquely positioned among federal agencies to balance consumer protection and competition in its analysis. For example, new privacy restrictions or overly broad enforcement actions may have an adverse effect on competition by favoring entrenched entities that already have consumer information over new entrants who need to obtain such information, or by encouraging industry consolidation for purposes of sharing data. As a competition agency, the FTC can and should be sensitive to these concerns as well.

b. Where the Agency Has Fallen Short in Practice

In some cases, however, the benefits of the FTC's dual mission may not have been fully achieved in practice. In the two areas discussed above, advertising and privacy, recent enforcement actions and policy recommendations have called into question the extent of the learning across our two disciplines.

[28] *See* Pauline M. Ippolito & Alan D. Mathios, Health Claims in Advertising and Labeling: A Study of the Cereal Market (1989), *available at* http://www.ftc.gov/sites/default/files/documents/reports/health-claims-advertising-and-labeling-study-cereal-market/232187.pdf.

First, in advertising substantiation, I have seen the beginning of a problematic retreat from our historical enforcement policy in this area. The FTC's Advertising Substantiation Policy Statement[29] dates back to 1984, and follows the doctrine first announced in the Commission's 1972 decision in *Pfizer, Inc.*[30] The statement sets forth the requirement that advertisers must have a reasonable basis for making objective claims before the claims are disseminated.[31] Additionally, advertisers must possess at least the level of substantiation expressly or impliedly claimed in the ad; thus, if an ad makes an express claim, such as "tests prove," "doctors recommend," or "studies show," the substantiation must, at a minimum, reflect that standard.[32] This policy statement has stood the test of time and proved to be an invaluable tool to the agency in assessing advertising claims. Equally important, it has provided guidance to industry on the types of truthful, non-deceptive claims that can be made for products or services.

One of the goals of the *Pfizer* analysis is to balance the value of greater certainty of information about a product's claimed attributes with the risks of both the product itself and the suppression of potentially useful information about it.[33] Under such an analysis, the burden for substantiation for health- or disease-related claims involving a safe product, such as a food, for example, should be lower because the risks to consumers from using the product are typically lower.

Recent Commission orders, however, seem to have adopted two random controlled trials (RCTs) as a standard requirement for health- and disease-related claims for a wide array of

[29] Thompson Med. Co., Inc., 104 F.T.C. 648 appx. (1984) (FTC policy statement regarding advertising substantiation).

[30] Pfizer, Inc., 81 F.T.C. 23 (1972).

[31] *Thompson Med. Co.*, 104 F.T.C. at 839.

[32] *Id.*

[33] *See id.*

products. For example, in *POM Wonderful LLC*, the majority determined that claims that the product purports to "treat, prevent or reduce the risk of heart disease, prostate cancer, and [erectile dysfunction] must be substantiated with [at least two] RCTs."[34] The majority's intent is for these studies to be a proxy for proof of causation; that is, they indicate that the product actually treats the disease.[35] Further, in a number of recent settlements, the FTC has included the requirement of two RCTs in its consent orders.[36]

Requiring two RCTs may be appropriate in some circumstances where use of a product carries some significant risk, or where the costs of conducting RCTs may be relatively low, such as for weight loss or for other conditions whose development or amelioration can be observed over a short time period. My concern is that, given the expectation created by this series of orders that two RCTs will be required to substantiate any health- or disease-related claims for many relatively-safe products, it seems likely that producers may forgo making such claims about products, even if they may otherwise be adequately supported by non-RCT evidence. For example, millions of consumers follow the advice that potassium is especially important for pregnant women, and that eating a high-fiber, whole-grain diet is good for you. That is very helpful information, but it has not been proven at the two-RCT level of substantiation. If the

[34] POM Wonderful LLC, Docket. No. 9344, 2013 WL 268926, at *35, 51 (F.T.C. Jan. 16, 2013).

[35] *Id.* at *35-36 ("disease claims require proof of causation . . . and as demonstrated by the weight of expert testimony in this case, proof of causation requires RCTs").

[36] *See, e.g.*, GeneLink, Inc., FTC File No. 112-3095, Decision and Order, at 4 (Jan. 15, 2014), *available at* http://www.ftc.gov/sites/default/files/documents/cases/140107genelinkorder.pdf (agreement containing consent order) (where respondent claimed its nutritional supplements treated or mitigated diabetes, heart disease, arthritis, and insomnia, the Commission required "at least two adequate and well-controlled human clinical studies . . . conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true" for respondent to claim its products were effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease); L'Occitane, Inc., FTC File No. 122-3115, Decision and Order, at 3 (Jan. 7, 2014), *available at* http://www.ftc.gov/sites/default/files/documents/cases/140107loccitaneorder.pdf (agreement containing consent order) (requiring two RCTs, but limiting the requirement to weight-loss claims).

Commission demands too high a level of substantiation in pursuit of certainty, it risks losing the benefits to consumers of having access to information about emerging areas of science and the corresponding pressure on firms to compete on the health features of their products.

A second area of concern is the competitive implications of recent policy proposals in the privacy area. In the FTC's 2012 Privacy Report, released shortly before I joined the Commission, some of my fellow Commissioners called for a new privacy law that would go beyond Section 5 of the FTC Act, but did not specify what such new legislation should look like.[37] Nor did the Report identify any substantial harms that are occurring now that Section 5 cannot already reach.

The Commission has consistently recognized the crucial role that truthful, non-misleading advertising plays in fostering competition between current participants in the market and lowering entry barriers for new competitors. However, in its Privacy Report, the Commission did not address the possible competitive effects of its recommendations, including potentially reducing the flow of information in the marketplace (and services and products that depend on accessibility and use of such data), which may be an unintended (or intended, depending on the type of data) effect caused by compliance with new requirements.

Notably, the American Bar Association Section of Antitrust Law filed comments on the FTC's Preliminary Privacy Report that highlighted the need to weigh carefully the benefits and costs associated with proposals to enhance privacy.[38] The comments pointed out that although the Report emphasized that, to make meaningful choices, consumers need more information about how their data will be used, it did not assess the value consumers may reap from additional

[37] *See* FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS (2012), *available at* http://www.ftc.gov/os/2012/03/120326privacyreport.pdf.

[38] *See* ABA Section of Antitrust Law, Comment on FTC's Preliminary Privacy Report (Feb. 1, 2011), *available at* http://www.ftc.gov/policy/public-comments/comment-00272-0.

uses of their information that facilitate competition. For example, consumers who choose not to allow the collection or sharing of broad categories of information may no longer be exposed to offers by competitors selling products or services that provide better value, pricing, or quality. In turn, these changes could have negative consequences not just for individual consumers exercising their choice over how their information is used following a particular transaction, but also on the market more generally.

Before seeking new privacy legislation, it is important to identify a gap in statutory authority or to identify a case of substantial consumer harm that the agency would like to address, but cannot, with our existing authority, especially given the array of financial, medical, and health and safety harms already reachable under our current FTC authority or other laws. Similarly, in evaluating a contemplated enforcement action in the privacy area, we ought to be fully cognizant of the competitive implications of such action. Otherwise, it is difficult to tell whether the additional privacy protection or enforcement action is necessary or will, on balance, make consumers worse off. Information sharing has benefits for consumers such as reducing online fraud, improving products and services, and increasing competition in the market overall. A policy that limits the ability of advertisers to access and use information (whether collected directly from consumers, or indirectly through affiliates, different brands within the company, or from third parties) to reach target audiences may have unintended effects on consumers and the marketplace that any policymaker, particularly one with responsibility for consumer protection and competition, must carefully consider.[39]

[39] *See also* Jodie Z. Bernstein & David A. Zetoony, *A "Golden" Example of How an Agency with Two Missions Can Work at Odds with Itself*, 12 J. CONSUMER & COM. L. 170, 172-73 (2009) (arguing that the FTC's guidance on the marketing of gold jewelry has resulted in a mistaken belief that manufacturers cannot truthfully and accurately market certain gold products, thus distorting the market for such products).

2. Assessing Consumer Protection Defenses in Competition Enforcement

The learning at the FTC also runs from the consumer protection mission to the competition mission. For example, our consumer protection efforts can be helpful in assessing defenses in competition matters where the justifications for anticompetitive conduct are couched in terms of protecting consumers from various potential harms. There are several historical examples of this benefit, largely concentrated in the health care area. The claimed justifications typically have involved concerns that consumers may be deceived by certain types of advertising or concerns about adverse effects on consumers' health.

In *California Dental Association*,[40] the FTC challenged an allegedly anticompetitive implementation of a dental association's prohibition on "false or misleading" claims about prices or competence. The FTC determined that the association applied its advertising guidelines in a way that actually restricted truthful, non-deceptive advertising.[41] In particular, the guidelines effectively precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts. Drawing on its expertise and experience in the area of deceptive advertising, the Commission rejected the association's claims that its particular implementation of the rules was necessary to prevent deception of consumers.[42] The Commission concluded, among other things, that the association "effectively prohibited

[40] 121 F.T.C. 190, 284 (1996) (Commission opinion). Although the Ninth Circuit upheld the Commission opinion, the Supreme Court vacated the Ninth Circuit decision, finding that the court's quick-look review of the association's advertising rules was too abbreviated under the rule of reason. *See* California Dental Ass'n v. FTC, 526 U.S. 756 (1999).

[41] 121 F.T.C. at 333.

[42] *Id.* at 316-20.

across-the-board discount offers, whether truthful or not. No purported policy of preventing deception can justify that approach."[43]

In *American Medical Association* (AMA),[44] the FTC charged the nation's largest medical association of engaging in unfair methods of competition by enacting and enforcing a code of ethics that prevented its members from soliciting business, by advertising or otherwise, engaging in price competition, and otherwise competing among each other. The AMA cited, among other things, concerns about false and deceptive advertising to justify its ban on physician advertising. While acknowledging such concerns, the Commission found that "the record describes several instances in which a disdain for competition, not false or deceptive advertising, appears to be the sole motivation for suppressing promotional activities."[45] The Commission further disagreed with the AMA's apparent "belief that the best way to interdict false and deceptive advertising and overreaching by physicians is to proscribe practically the full spectrum of advertising and solicitation activities."[46] The AMA's restrictions on advertising and solicitation thus unreasonably impeded competition, according to the Commission.[47]

In *Indiana Federation of Dentists*,[48] the FTC addressed a collective refusal by an association of dentists to provide patient x-rays requested by insurance companies that wanted to

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[43] *Id.* at 317. *See also* K.J. Cseres, *Integrate or Separate: Institutional Design for the Enforcement of Competition Law and Consumer Law*, at 31 (Amsterdam Centre for European Law and Governance Working Paper Series 2013-01, 2013), *available at* http://acelg.uva.nl/publications/working-papers/acelg-working-papers-2013.html ("[R]estriction or ban on advertising in some of the markets for liberal professions remedied consumers' asymmetrical information problems but restricted competition among service providers to the detriment of consumer choice. . . . Being unaware of the complementarities results in overregulation or increased costs of enforcement.").

[44] 94 F.T.C. 701, 980 (1979) (Commission opinion), *enforced as modified sub nom.* AMA v. FTC, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982).

[45] *Id.* at 1007.

[46] *Id.* at 1009.

[47] *Id.* at 1010.

[48] 101 F.T.C. 57, 65 (1983) (Commission opinion). Although the Seventh Circuit vacated the Commission opinion, the Supreme Court ultimately affirmed that opinion. *See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986).

evaluate the necessity of certain dental procedures. In finding a violation of the FTC Act for this concerted action, the Commission assessed but ultimately rejected the federation's proffered justification for its collective refusal to provide x-rays: that it promoted higher quality care and more satisfied patients.[49] More specifically, the federation argued that withholding x-rays from insurance companies would prevent them from reaching erroneous conclusions regarding the least expensive, adequate course of treatment for dental patients. Such erroneous conclusions, the federation argued, would cause insurance companies to deny claims for adequate treatment and thereby pressure patients, through their dentists, to choose less than adequate dental treatment.[50] The FTC rejected this justification, noting that "[n]ot a single instance has been cited where any dentist agreed to provide less-than-adequate treatment because of the fear of an erroneous insurance determination."[51]

Similarly, in *North Carolina State Board of Dental Examiners*,[52] the Commission recently rejected claimed health and safety concerns raised by a state dental board in defense of the collective actions of the board's members to eliminate competition from non-dentists in the provision of teeth-whitening services. As the Commission explained, "Although several Board members identified a number of theoretical risks from non-dentist teeth whitening, none was able to cite to any clinical or empirical evidence validating any of these concerns."[53] The "lack of

[49] 101 F.T.C. at 80.

[50] *Id.*

[51] *Id.*

[52] 2011 WL 6229615, at *30-33 (F.T.C. Dec. 7, 2011) (Commission opinion). The Fourth Circuit upheld the Commission opinion, *see* North Carolina State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359 (4th Cir. 2013), and it is currently on appeal before the U.S. Supreme Court.

[53] 2011 WL 6229615, at *33.

contemporaneous evidence that the challenged conduct was motivated by health or safety concerns" reinforced the Commission's decision to reject the Board's public safety defense.[54]

3. Assessing Consumer Protection Justifications for Proposed Laws or Regulations in our Competition Advocacy

The FTC's consumer protection experience also informs the competition mission in our pursuit of competition advocacy – that is, the program with which the agency comments on the potential for adverse competitive effects that may result from proposed laws or regulations. In many cases, such laws or regulations are justified in terms of consumer protections that their proponents argue are necessary. In our advocacy comments, we routinely argue that, while the policymakers may have legitimate consumer protection concerns, the laws or regulations under consideration sweep much more broadly than necessary to effectuate any legitimate consumer protection measures. Following are examples of such advocacy.

Attorney Advertising. Based on our experience in pursuing unfair or deceptive advertising, the FTC has filed several advocacy comments with state legislators and amicus briefs with state courts addressing the adverse impact on competition for legal services that can result from unnecessary restrictions on the ability of attorneys to advertise their services.[55] In these advocacies, the Commission and its staff have taken the position that, while unfair or deceptive advertising by lawyers should be prohibited, consumers do not benefit from the imposition of overly broad restrictions that prevent the communication of truthful and non-

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[54] *Id.*

[55] *See, e.g.*, FTC Staff Letter to the Supreme Court of Tennessee Concerning Proposed Amendments to the Tennessee Rules of Professional Conduct Relating to Attorney Advertising (Jan. 2013), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-letter-supreme-court-tennessee-concerning-proposed-amendments-tennessee-rules-professional/130125tennesseadvertisingletter.pdf; Brief of the Fed. Trade Comm'n as Amicus Curiae, In the Matter of the Petition for Review of Committee on Attorney Advertising Opinion 39, Docket No. 60,003 (N.J. May 8, 2007), *available at* http://www.ftc.gov/sites/default/files/documents/amicus_briefs/re-petition-review-committee-attorney-advertising-opinion-39/v070003opinion39.pdf.

misleading information that some consumers value. Rather, these restrictions are likely to inhibit competition, frustrate informed consumer choice, and potentially lead to higher prices and decreased scope of, or access to, legal services.

Funeral Caskets. Based on our experience in promulgating and enforcing the Funeral Industry Practices Rule (Funeral Rule)[56] – a consumer protection rule aimed at deterring deceptive or unfair practices – the FTC and its staff have filed several advocacy comments with state legislators and amicus briefs with federal courts as part of our efforts to increase competition in the area of funeral products and services.[57] For example, FTC advocacies have opposed laws that prohibit persons other than licensed funeral directors from selling caskets used in burials on the grounds that competition from independent casket vendors can provide consumers with more choices and lower prices and that such prohibitions are inconsistent with the Funeral Rule's objectives of protecting consumers by facilitating informed consumer choice and promoting competition.[58]

Our competition advocacy is particularly effective when we are able to combine our consumer protection expertise with data and information developed through our unique research tools.

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[56] 47 Fed. Reg. 42260 (1982). Among other things, the Funeral Industry Practices Rule mandates that, at the outset of discussions on funeral arrangements, funeral providers disclose itemized prices for funeral goods and services to provide consumers the information they need to comparison shop for such goods and services.

[57] *See, e.g.*, FTC Staff Comment to the Hon. Joanne C. Benson Concerning Maryland H.B. 795 Regarding Corporate Ownership of Funeral Homes (Apr. 2004), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-joanne-c.benson-concerning-maryland-h.b.795-regarding-corporate-ownership-funeral-homes/0404mdfuneralhomes.pdf.

[58] *See, e.g.*, Amicus Curiae Brief on Behalf of the U.S. Fed. Trade Comm'n at 9-16, St. Joseph Abbey v. Castille, No. 11-30756 (5th Cir. Dec. 16, 2011), *available at* http://www.ftc.gov/sites/default/files/documents/amicus_briefs/st.joseph-abbey-et-al.v.castille-et-al./111216stjosephamicusbrief.pdf.

Optometry. The FTC has vast consumer protection experience in the area of optical goods, where it enforces the so-called Eyeglass Rule[59] and the Contact Lens Rule,[60] which require, among other things, the portability of eyeglass and contact lens prescriptions, respectively. In addition, FTC staff issued a report in 2004 on barriers to e-commerce in the contact lens area.[61] Based on our consumer protection experience and the findings in the 2004 report, the FTC has filed several advocacy comments with state legislators addressing restrictions on the online sale of contact lenses.[62] Those comments have argued, among other things, that the costs of additional licensing and registration restrictions imposed on out-of-state and Internet vendors by some proposed regulations do not appear to be justified by countervailing consumer protection benefits, particularly because existing federal and state regulatory requirements already address the primary health and safety concerns at issue.[63]

Mortgage Disclosures. The FTC, including in particular its Bureau of Economics, also has conducted research in the area of consumer disclosures in the context of home mortgages.[64] This research served as the basis for an advocacy the FTC submitted to another federal agency, the Department of Housing and Urban Development (HUD) in 2008, addressing a proposed rule

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[59] Ophthalmic Practices Rules, 16 C.F.R. § 456.

[60] 16 C.F.R. § 315.

[61] FED. TRADE COMM'N STAFF, POSSIBLE BARRIERS TO E-COMMERCE: CONTACT LENSES (Mar. 2004), *available at* http://www.ftc.gov/policy/policy-actions/advocacy-filings/2004/03/possible-anticompetitive-barriers-e-commerce-contact.

[62] *See, e.g.*, FTC Staff Comment Before the North Carolina State Board of Opticians Concerning Proposed Regulations for Optical Goods and Optical Goods Businesses (Jan. 2011), *available at* http://www.ftc.gov/policy/policy-actions/advocacy-filings/2011/01/ftc-staff-comment-north-carolina-state-board.

[63] *See, e.g.*, *id.* at 15-16.

[64] *See, e.g.*, FTC, BUREAU OF ECONOMICS STAFF REPORT, JAMES M. LACKO & JANIS K. PAPPALARDO, IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE DISCLOSURE FORMS (2007), *available at* http://www.ftc.gov/reports/improving-consumer-mortgage-disclosures-empirical-assessment-current-prototype-disclosure; FTC, BUREAU OF ECONOMICS STAFF REPORT, JAMES M. LACKO & JANIS K. PAPPALARDO, THE EFFECT OF MORTGAGE BROKER COMPENSATION DISCLOSURES ON CONSUMERS AND COMPETITION: A CONTROLLED EXPERIMENT (2004), *available at* http://www.ftc.gov/reports/effect-mortgage-broker-compensation-disclosures-consumers-competition-controlled-experiment.

involving mortgage settlement disclosures.[65] Although the advocacy expressed support for HUD's goals of improving consumer understanding of the cost and terms of mortgage loans and making mortgage shopping easier, it also expressed concerns that requiring the disclosure of compensation received by certain loan originators (but not others) may have adverse effects on market efficiency and competition. In other words, focusing the consumers' attention on the compensation received by mortgage originators, rather than on the actual costs paid by consumers, might distort consumer choice away from providers that often charge the lowest prices, leading to less efficient, rather than more efficient, market outcomes.[66]

B. Other Potential Benefits Flowing from a Dual Mission

In addition to the benefits discussed above, a dual mission is likely to yield several additional gains in agency performance. First, with a dual mission, an agency may benefit from exposure to specific markets and industries in one mission that the agency subsequently faces in the other mission.[67] That market-specific learning can be beneficial in assessing dynamics such as the operation of anticompetitive effects or consumer reactions to information asymmetries in the marketplace.

Second, having a dual mission may provide an agency with the ability to more effectively address industry-wide issues that implicate both competition and consumer protection

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[65] *See* Comments of the Staff of the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Policy Planning of the Federal Trade Commission before the U.S. Department of Housing and Urban Development, in the Matter of Request for Comment on Proposed Amendments to the Regulations Implementing the Real Estate Settlement Procedures Act, Docket NO. FR-5180-P-01 (June 11, 2008), *available at* http://www.ftc.gov/policy/policy-actions/advocacy-filings/2008/06/ftc-staff-comment-department-housing-and-urban.

[66] *Id.* at 19-20.

[67] *See, e.g.*, OECD Policy Roundtable, *supra* note 22, at 31-32.

concerns.[68] This can be useful in both determining liability for a competition or consumer protection violation and fashioning an appropriate and effective remedy.

Third, for a dual-mission agency, there may be synergies in gaining political support and buy-in from other stakeholders for each mission. That is, having both missions in a single agency may improve public accountability and support for both missions.[69]

Fourth, a dual mission likely yields administrative efficiency, including economies of scope in the monitoring, developing, and sharing of expertise across the two disciplines,[70] as well as savings from the shared use of back-office and other functions, such as the general counsel's office, human resources, and other agency-wide support departments.

IV. Limits to Integration of Competition and Consumer Protection Missions

Notwithstanding the many benefits that can be obtained from integration of the two complementary disciplines of competition and consumer protection, there are limits to such integration. This section discusses both substantive and non-substantive downsides that may result from this type of integration.

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[68] *See, e.g.*, Cseres, *supra* note 42, at 32 (discussing agencies' experiences in reviewing market failures "with a combined policy look"); William E. Kovacic & David A. Hyman, *Competition Agencies with Complex Policy Portfolios: Divide or Conquer?*, at 38 (GW Law Faculty Publications & Other Works, Paper 631, 2013), *available at* http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1779&context=faculty_publications ("A unity of functions might put an agency in a better position to identify the source of market failures more accurately and proscribe superior cures that involve an optimal mix of regulatory strategies.").

[69] *See, e.g.*, Cseres, *supra* note 42, at 35; OECD Policy Roundtable, *supra* note 22, at 33; Spencer Weber Waller, *In Search of Economic Justice: Considering Competition and Consumer Protection Law*, 36 LOY. U. CHI. L.J. 631, 638 (2005) ("[M]ost importantly, the opportunity exists to engage the public and articulate the benefits of both bodies of law in common sense terms to rally support for a more competitive and consumer friendly economy.").

[70] *See, e.g.*, Cseres, *supra* note 42, at 33.

A. Inappropriate Injection of Consumer Protection Considerations into Competition Analysis

A prime example of the hazards of inappropriate integration is reflected in the recent push to take into account privacy considerations in competition analysis. Some have proposed that we expand the competition laws to address possible impacts on individual privacy.[71] For instance, they may argue that the FTC should evaluate a merger of Internet advertising firms in part by considering whether combining the companies' customer databases could change the merged companies' incentives to violate consumer privacy.[72] This would be a mistake for several reasons and could risk weakening our competition regime for almost no meaningful gain. Instead, the right approach to privacy recognizes that competition law and consumer protection law are complements, not substitutes.

The evolution of these two distinct but complementary bodies of law reflects a consensus in the United States about the limits of our competition laws. They are not designed to address conduct that may be unjust or immoral, unless it also happens to harm competition. American competition law enforcement objectives are and for a long time have been primarily focused on economic efficiency, whereas its consumer protection goals are and have always been focused on harm to individuals. Introducing non-competition factors like privacy into competition analysis

[71] *See, e.g.*, Pamela Jones Harbour, Dissenting Statement, Google/DoubleClick, FTC File No. 071-0170, at 10 (2007), *available at* http://www.ftc.gov/public-statements/2007/12/dissenting-statement-commissioner-harbour-matter-googledoubleclick ("I have considered (and continue to consider) various theories that might make privacy 'cognizable' under the antitrust laws, and thus would have enabled the Commission to reach the privacy issues as part of its antitrust analysis of the transaction.").

[72] *See, e.g.*, EPIC, Complaint and Request for Injunction, Google/DoubleClick, at 10 (Apr. 20, 2007), *available at* http://epic.org/privacy/ftc/google/epic_complaint.pdf. ("Google's proposed acquisition of DoubleClick will give one company access to more information about the Internet activities of consumers than any other company in the world. Moreover, Google will operate with virtually no legal obligation to ensure the privacy, security, and accuracy of the personal data that it collects. At this time, there is simply no consumer privacy issue more pressing for the Commission to consider than Google's plan to combine the search histories and web site visit records of Internet users.").

would allow the FTC and other competition enforcers to embark on consideration of social mores and political issues without any meaningful limiting principles.

The FTC has already faced the question of whether it can use privacy concerns unrelated to competitive concerns as a factor in its competition analysis. In 2007, the Commission reviewed Google's acquisition of DoubleClick and considered whether privacy could be a factor in a merger analysis. Several groups submitted comments to the Commission arguing that the transaction should be blocked because "the combination of [the parties'] respective data sets of consumer information could be exploited in a way that threatens consumers' privacy."[73] The Commission noted that, although it takes consumer privacy issues seriously, it would not act on these grounds. The majority statement concluded that "the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition. Not only does the Commission lack legal authority to require conditions to this merger that do not relate to antitrust, regulating the privacy requirements of just one company could pose a serious detriment to competition in this vast and rapidly evolving industry."[74] Thus, the Commission allowed the transaction to proceed without challenge.

This is not to say that privacy and competition can never intersect. In its consideration of the Google/DoubleClick merger, the FTC left the door open to examine privacy to the extent that it is a non-price attribute of competition. Where privacy, or the treatment of consumer data, represents a means of competition, it should be included in a competition analysis. While there appeared to be no evidence of a privacy dimension of competition in the Google/DoubleClick transaction, we are seeing more examples of that type of competition in the market today.

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[73] Statement of the Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170, at 2 (Dec. 20, 2007), *available at* http://www.ftc.gov/public-statements/2007/12/statement-federal-trade-commission-concerning-googledoubleclick.

[74] *Id.*

B. Blurring the Lines between Competition and Consumer Protection

In some cases, the FTC has blurred the line between competition and consumer protection – with respect to both the alleged violation and the remedy sought by the agency – to the potential detriment of effective and transparent enforcement in both areas. This blurring of the lines, while in some sense an integration of competition and consumer protection principles, is more accurately viewed as an improper and unhelpful muddying of the two disciplines.

In the FTC's complaint against Negotiated Data Solutions LLC (N-Data), filed in connection with the settlement of that matter, the FTC alleged that N-Data had violated both the competition and the consumer protection prongs of Section 5 of the FTC Act by reneging on a commitment to license intellectual property.[75] Then-Commissioner Kovacic dissented from the *N-Data* consent in part due to his concerns that the Commission neither explained why it endorsed separate unfair method of competition and unfair act or practice claims nor integrated these two theories of liability.[76] Kovacic further explained, "More generally, it seems that the Commission's view of unfairness would permit the FTC in the future to plead all of what would have been seen as competition-related infringements as constituting unfair acts or practices."[77]

I raised similar concerns in dissenting from the Commission's consent agreement with Google Inc. and its Motorola Mobility LLC subsidiary settling charges that the respondents violated Section 5 of the FTC Act by pursuing injunctions against allegedly willing licensees of

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[75] *See* Negotiated Data Solutions LLC, FTC File No. 051-0094, Complaint ¶¶ 38-39 (Jan. 23, 2008), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122complaint.pdf.

[76] *See* Negotiated Data Solutions LLC, FTC File No. 051-0094, Dissenting Statement of Commissioner William E. Kovacic, at 2-3 (Jan. 23, 2008), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122kovacic.pdf.

[77] *Id.* at 3. *See also* Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. TELECOMM. & HIGH TECH. L. 19, 65 n.138 (2009) ("The FTC has been occasionally accused of blurring the lines between antitrust and consumer-protection principles to create hybrid, interventionist policies with no solid grounding in either antitrust law or consumer protection norms--a concern now heightened by the FTC's broad construction of its Section 5 authority in the N-Data case.").

standard-essential patents encumbered by commitments to license on reasonable and non-discriminatory terms.[78] In *Google/Motorola Mobility*, the Commission alleged that the respondents' conduct was both an unfair method of competition and an unfair act or practice.[79] One of the several concerns I raised in my dissent was that the inclusion of the unfairness count would "sow[] additional seeds of confusion" as to a finding of liability in the area of standard-essential patents and even the statutory basis of such liability.[80]

A few years earlier, in 2009, the FTC filed a complaint against Intel Corporation alleging unfair methods of competition, unfairness, and deception violations resulting from a course of conduct by Intel that included allegedly anticompetitive discounting arrangements with original equipment manufacturers and certain misrepresentations concerning its products.[81] In addition to raising the same concerns about alleging both competition and consumer protection violations for the same conduct that the *N-Data* case raised,[82] the contemplated relief identified in the *Intel* complaint also potentially blurred the lines between competition and consumer protection remedies. That relief included a requirement that Intel "correct the deceptive and misleading

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[78] *See* Motorola Mobility LLC and Google Inc., FTC File No. 121-0120, Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 1-2, 4 (Jan. 3, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaohlhausenstmt.pdf.

[79] *See* Motorola Mobility LLC and Google Inc., FTC File No. 121-0120, Complaint ¶¶ 31-32 (Jan. 3, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolacmpt.pdf. In finalizing the Decision and Order in this matter, however, the Commission removed the unfair act or practice count from the complaint. *See id.*, Complaint, at 6 (July 24, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolacmpt.pdf.

[80] Ohlhausen, *supra* note 78, at 2.

[81] *See* Intel Corp., FTC Docket No. C-9341, Complaint (Dec. 16, 2009), *available at* http://www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf.

[82] The FTC's complaint in *Intel* included 96 paragraphs describing Intel's alleged conduct and then identified all 96 as constituting unfair methods of competition, as well as unfair acts or practices. *Id.* at 17-18. In addition, the complaint averred that the conduct described in paragraphs 56 through 96 also constituted deceptive acts or practices. *Id.* at 17. *See also* Allan L. Shampine, *The Role of Behavioral Economics in Antitrust Analysis*, 27 ANTITRUST 65, 65-66 (Spring 2013) ("The FTC has recently been in the business of blurring the lines between antitrust and consumer protection. . . . [T]he FTC noted that its 2010 settlement with Intel went beyond previous settlements in a number of ways, including requiring greater disclosure of performance data about its own products and restrictions on deceptive statements about competitors' products.").

statements and omissions it has made in the past."[83] As I explained in an April 2010 article, requiring a company to engage in corrective advertising is a burdensome remedy that the FTC had previously used only sparingly and in unique circumstances, circumstances that did not appear to be found in the *Intel* matter.[84] Although the Commission ultimately settled its case against Intel without imposing a corrective advertising requirement,[85] the initially contemplated relief in this matter presented another example of the pitfalls of conflating competition and consumer protection principles.

C. Other Potential Downsides of Integration

In addition to the substantive concerns I have about the FTC's integration of competition and consumer protection principles in particular cases, commentators have identified several other potential downsides to the integration of these two disciplines in a single agency.[86] One of those downsides is the potential for one mission to dominate the other, to the detriment of the latter.[87] Professor Kovacic provides a potential scenario of particular interest to the FTC – one that involves a sizeable imbalance in resource allocation across the competition and consumer protection missions at the agency. Kovacic asks: "If the FTC moved from a 55/45 split between consumer protection and competition to something like a 65/35 or 70/30 distribution, would the

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[83] *Intel* Complaint, *supra* note 81, at 22.

[84] *See* Maureen K. Ohlhausen, *The FTC Complaint against Intel Corporation: Implications for Consumer Protection*, CPI ANTITRUST J. 3-4 (Apr. 2010).

[85] In addition to blurring the lines between competition and consumer protection, the complaint and the consent in this matter failed to provide meaningful guidance on which alleged conduct violated Section 2 of the Sherman Act and which conduct violated Section 5 of the FTC Act.

[86] Commentators also have identified various practical considerations that may hinder the successful integration of competition and consumer protection into a single agency. *See, e.g.*, Simon Priddis, *"Let Me Not to the Marriage of True Minds Admit Impediments": Competition and Consumer Law in the UK*, 21 ANTITRUST 89, 89 (Summer 2007) ("Notwithstanding the abstract merits of this integrated approach, practical impediments to success remain, not least since competition and consumer protection law arise from sharply contrasting policy perspectives, use different tools to achieve their respective objectives, and historically at least, have measured success in different ways.").

[87] *See, e.g.*, Cseres, *supra* note 42, at 24.

wisdom of retaining a competition competence within the FTC, rather than moving the function entirely to the Antitrust Division of the Justice Department, come into question?"[88] The FTC, or any other dual-mission agency, ought to keep this potential outcome in mind as it allocates resources across its two missions.

Another potential concern regarding the integration of competition and consumer protection raised by commentators is that such integration can lead to a lack of clarity of purpose at the agency, which can result in diminished support for the agency's overall mission and efforts.[89] This concern is greater where the disciplines that are integrated in a single agency are inconsistent in their ultimate goals and more in the nature of substitutes than complements.[90] At the FTC, where competition and consumer protection largely are pursuing the same ultimate goal, this concern should not materialize. The agency, however, should always be mindful of the clarity of its mission and purpose.

A third downside of integration identified by commentators is the potential for "destructive rivalry" between the competing missions within an agency for prestige, headcount, and budgetary resources.[91] During my tenure at the FTC, the rivalry between the competition and consumer protection missions is much more accurately characterized as healthy than destructive.

Thus, while the FTC ought to remain vigilant to ensure that these downsides to integration do not materialize within the agency, the FTC's performance in the past twenty-five

[88] Kovacic, *supra* note 68, at 48.

[89] *See, e.g.*, Cseres, *supra* note 42, at 24.

[90] *See, e.g.*, Kovacic, *supra* note 68, at 11, 18.

[91] *See, e.g., id.* at 25.

or so years leads me to believe that it is unlikely to face these adverse consequences in maintaining its dual mission.

V. Recommendations for Optimal Integration of the Two Missions at the FTC

A. Extent of Interaction between the Two Missions

Before making recommendations for a more optimal integration of the competition and consumer protection missions at the FTC, one must ask several questions about the current extent of integration between these missions. Are the competition and consumer protection personnel operating in two wings of the same house or in two distant silos?[92] What mechanisms are in place to bridge the gaps between the Bureaus of Competition and Consumer Protection, other than the Commissioners themselves, who of course do not have the luxury of focusing on just one of the missions?

There are several such mechanisms available at the FTC for meaningful interaction across the missions. The Bureau of Economics and economic analysis more generally can and do serve as a bridge between the two bureaus. Both economics and economists ought to play major roles in the agency's pursuit of each mission. Similarly, the FTC's advocacy program, which is overseen by the Office of Policy Planning and which addresses proposed laws or regulations that implicate both competition and consumer protection issues, provides an opportunity for the two bureaus to work together toward a common goal: promoting sound competition and consumer protection policies. The Office of International Affairs, which integrated two previously separate competition and consumer protection offices and which pursues the important goal of international convergence around substantive norms and best

[92] *See, e.g.*, Paul A. Pautler, *Consumer Protection Policies, Economics, and Interactions with Competition Policy*, 4 COMPETITION POL'Y INT'L 83, 91 n.23 (2008) ("Other than being inanimate, the winged house is not a bad analogy. The wings are largely separate, but they meet in a central area that often involves some form of regulation or legal complication (e.g., occupational regulation, standard-setting organizations, regulated industries, etc).").

practices in each mission, provides another setting for the effective integration of the two missions.

B. Recommendations for Further Integration

To achieve a more optimal integration of competition and consumer protection at the FTC, I respectfully make the following recommendations for the agency to consider:

First, the integration of the missions, as well as the promotion of consumer welfare more generally, would benefit from increased involvement of the Bureau of Economics, and the economic analysis that the bureau provides, in the agency's consumer protection analysis. This recommendation follows and reiterates former FTC Chairman Kovacic's recommendation for the agency to pursue a "[d]eeper integration of economic analysis into the formulation of competition and consumer protection initiatives."[93] Based on what I have seen during my time as a Commissioner, although economic analysis is now firmly rooted in the competition mission, the agency would benefit from a more significant integration of economics into consumer protection matters. To the extent there are resource constraints mitigating such integration, I would recommend making this one of the agency's top budgetary priorities.

Second, the integration of the missions would benefit from increased inter-bureau details, training, and workshops. Although the FTC should be alert to opportunities for the Bureaus of Competition and Consumer Protection to be involved in the same case – that is, in one that raises both competition and consumer protection issues – such cases do not arise very frequently. More importantly, as discussed above, the agency ought to be careful about seeing both sets of issues in a given case when they do not in fact present themselves.[94] Increased exposure to the other

[93] FTC AT 100 REPORT, *supra* note 26, at 179.

[94] *See also* William MacLeod, *The Interface between Competition and Consumer Policies*, Contribution from BIAC, OECD Global Forum on Competition, at 3 (Feb. 13, 2008), *available at*

bureaus' mandate, agenda, and enforcement and policy tools – particularly outside the context of specific cases, with their attendant time constraints – would be beneficial for each of the three bureaus. This type of interaction occurs occasionally, but not as much as it should.

Third, the integration of the missions at the FTC would benefit from increased Bureau of Competition input on proposed consumer protection guides and guidelines, as well as the periodic review of such guidance. To my knowledge, this happens infrequently, if ever. Providing the Bureau of Competition with an opportunity to do a competitive assessment of contemplated consumer protection guidance should be a relatively easy and effective means for avoiding any potential adverse competitive effects from such guidance.[95]

Fourth, the integration of the two missions at the FTC would benefit from increased Bureau of Consumer Protection involvement in preparing consumer and business education materials on the competition side, where such materials are used much less frequently and where the issues are sometimes less intuitive than on the consumer protection side. The Bureau of Consumer Protection, through its Division of Consumer and Business Education, has significant expertise in preparing educational materials for use by consumers to make informed decisions and by businesses to comply with the various consumer protection laws, rules, and regulations. That expertise could be more frequently utilized on the competition side.

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http://www.oecd.org/daf/competition/prosecutionandlawenforcement/40080545.pdf ("Efforts to integrate competition and consumer protection laws and enforcement, however laudable in concept, should not become a pretext for intervention.").

[95] *Cf.* Lydia Parnes & Edward Holman, *The Role of Competition in Analysing a Consumer Protection Remedy: Should Regulators Consider Competition Law in Urging a "Do Not Track" Solution?*, 7 COMPETITION L. INT'L 72, 75 (2011) ("A winning DNT solution should leverage competition by enabling and incentivising companies to compete on privacy, but the type of universal browser-based opt-out system proposed by regulators simply falls short. In the intersection between consumer protection and competition concerns, the well-known benefits of competition to consumer welfare should not be forgotten when formulating effective privacy regulations.").

Finally, the integration of the FTC's two missions would benefit from increased involvement by the Bureau of Consumer Protection in the primary activities pursued by the Office of Policy Planning: competition and consumer protection advocacy. To be sure, there exists already a fair amount of consumer protection involvement in such advocacy. However, the consumer protection mission, as well as the agency as a whole, would benefit from increased participation by the Bureau of Consumer Protection in both individual advocacy efforts and the strategic policy planning that influences the selection of advocacy targets.

VI. Conclusion

As we celebrate the FTC's centennial, we can point to the dual competition-consumer protection mission as one of the defining institutional features of the agency. The benefits obtained from housing both missions within the FTC have been tangible and meaningful for U.S. consumers. Those benefits are not necessarily achieved or maximized in every matter pursued by the agency. Nor is the degree of integration of the two missions necessarily at an optimal level. However, as this article makes clear, there are steps the agency can take to remedy those shortcomings. Looking forward to the FTC's next century, consumers would be best served by an agency that includes in its portfolio both competition and consumer protection mandates.