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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES

-- Note by United States (FTC) --

17-18 December 2014

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More documents related to this discussion can be found at www.oecd.org/daf/competition/changes-in-competition-institutional-design.htm

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U.S. FEDERAL TRADE COMMISSION

1. The United States is unique among OECD members in that it has two competition agencies with overlapping jurisdiction – the Federal Trade Commission and the Department of Justice Antitrust Division.¹ This submission discusses exclusively the Federal Trade Commission (FTC), focusing on three aspects of its institutional design: its dual competition and consumer protection mission; the organization of the economics function; and its structure as a multi-member, independent body.

1. Dual Competition and Consumer Protection Mission

2. The FTC has formally had responsibility for both consumer protection² and antitrust enforcement since 1938. The FTC has handled such cases for much longer, however, dating almost to its founding as an antitrust agency in 1914. It quickly became evident that firms could distort the proper functioning of markets by deceiving consumers into making choices that did not reflect the competitive merits of products and services just as easily as they could distort them through anticompetitive behavior such as price fixing or monopolization.³

3. It is now generally accepted that the goals of competition and consumer protection are mutually reinforcing.⁴ While competition law and policy creates conditions under which consumers can benefit from

¹ For the historical background for this structure, see Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003), available at <http://www.ftc.gov/sites/default/files/attachments/federal-trade-commission-history/origins.pdf>.

² In this context, the term “consumer protection” refers to ensuring that consumers are not injured by unfair or deceptive practices. Other aspects of consumer protection, such as food and product safety, weights and measures, and individual consumer dispute resolution, are outside of the scope of the FTC’s consumer protection jurisdiction and of this paper.

³ See William Kovacic & Marc Winerman, *Outpost Years for a Start-Up Agency: The FTC from 1921-1925*, 77 ANTITRUST L. J. 145, 193-95 (2010). The FTC originally handled such cases as unfair methods of competition. When the Supreme Court imposed stringent requirements for proof of injury to competition in such cases in *FTC v. Raladam*, 283 U.S. 643 (1931), Congress responded by adding prevention of unfair and deceptive acts and practices to the FTC’s mandate in 1938.

⁴ The FTC has made four submissions to the OECD and UNCTAD on the relationship between competition and consumer protection: http://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/Comp-ConsumerPro%20jnt%20rndtbl_2003%20Oct_US%20paper.pdf; <http://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/US%20FTC%20paper%20on%20identifying%20and%20tackling%20dysfunctional%20markets.pdf>; and <http://www.oecd.org/dataoecd/18/4/39915760.pdf>. http://unctad.org/meetings/en/Contribution/CCPB_IGE2014_RTBenCom_USA_en.pdf. Submissions and speeches on this topic by current and former FTC officials can be found at: http://www.ftc.gov/sites/default/files/documents/public_statements/interface-competition-and-consumer-protection/021031fordham.pdf;

competition among suppliers to produce what consumers want, consumer protection law and policy protects the competitive process from demand side distortions in the form of unfair and deceptive marketing that might undermine consumers' ability to make informed choices based on merit.

4. When an issue comes to the attention of a competition or consumer protection agency, the legal and economic issues involved are not always immediately apparent. The issue may simply reflect consumer, business, or official dissatisfaction with market outcomes – for example, a firm that is able to impose onerous contract terms on consumers, which might initially be seen as a consumer protection issue, may be able to do so because it is shielded from competition and feels no market pressure to respond to consumer demand. Conversely, a collective industry practice of withholding relevant information to consumers, which might be framed as a competition issue, might be more readily solved with an information remedy. Competition and consumer protection enforcers naturally tend to look at issues through their own lenses, so a consumer protection official may not consider the possibility that a lack of competition is behind the consumer problem, and a competition agency official may not recognize that an informational remedy can inject competition into markets. An agency that combines competition and consumer protection can consider all aspects of the problem and select the most appropriate tools to address it.

5. The FTC's extensive policy research efforts support this effort. Its Office of Policy Planning collaborates with the Bureaus of Competition, Economics, and Consumer Protection on workshops and in advocacy interventions directed to regulators and legislators that affect both competition and consumer protection. Through its advocacy work, the FTC encourages regulators and legislators to integrate competition concerns when faced with demands for greater consumer protection. These advocacy interventions often recommend that the regulator evaluate the strength of the evidence that there is a genuine threat to consumers and ask whether the proposed regulatory intervention is no greater than necessary to address legitimate consumer protection concerns. Third-party regulators are commonly advised to balance competition and consumer protection in ways that are informed by the FTC's internal expertise. A recent example is a series of advocacy interventions on taxi regulation, which took into account both competition and data privacy issues.⁵ Competition advocacy often requires finding ways to balance consumer and competition concerns, and an integrated agency is likely to be a more effective and credible advocate of both competition and consumer protection.⁶

6. Encouraging a dialogue between competition and consumer protection enforcers can allow both to achieve better results than either would achieve on its own. Several recent actions illustrate the synergies between competition and consumer protection policy:

http://www.ftc.gov/sites/default/files/documents/public_statements/competition-law-and-consumer-protection-law-two-wings-same-house/041022learyarticle.pdf;
<http://www.ftc.gov/sites/default/files/attachments/key-speeches-presentations/majorasresponsedi.pdf>;
http://www.ftc.gov/sites/default/files/documents/public_statements/future-ftc-jurisdiction-over-antitrust-and-consumer-protection-commentary/121127futureftcjurisdiction.pdf; and
http://www.ftc.gov/system/files/documents/public_statements/596131/141029-1agency2missions.pdf.

⁵ The FTC's efforts in the taxi industry are described in a speech by Chairwoman Edith Ramirez, *The Relationship Between Competition, Productivity, and Economic Growth: The Case of the United States* (Sept. 3, 2013) at p. 6, *available at* http://www.ftc.gov/system/files/documents/public_statements/579931/140902lacfperuspeech.pdf.

⁶ *See* *Advocacy: Mainstreaming competition policy into the overall economic policy and government actions in Latin American and the Caribbean*, Contribution from United States (OECD Latin America Competition Forum, September 2014), *available at* [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2014\)17&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2014)17&docLanguage=En).

- *Patent assertion entities (PAEs)*: PAEs are firms with a business model based primarily on buying patents and attempting to generate revenue by asserting them against businesses that are already practicing the patented technologies. Supporters of the PAE business model say that it facilitates the transfer of patent rights, rewards inventors, and funds research and development. Critics assert that there are adverse effects on competition and innovation, including increased costs and a lack of technology transfer, ultimately taxing consumers and industry. The FTC is currently exploring the competitive effects of PAEs, including through a recent workshop conducted jointly with DOJ.⁷
- However, when one PAE adopted certain practices to extract licensing fees from businesses, the FTC's Consumer Protection Bureau got involved. According to a recent FTC complaint, MPHJ Technology Investments bought patents relating to network computer scanning technology, and then told thousands of small businesses that they were likely infringing the patents and should purchase a license. The firm allegedly falsely represented that many other companies had already agreed to pay thousands of dollars for licenses, and threatened to file patent infringement lawsuits against the recipients if it did not respond. In reality, the complaint alleges, the senders had no intention to do so, and no such lawsuits were ever filed. The FTC challenged the firm's representations on a consumer protection theory, alleging that the threats were deceptive. The firm resolved the allegations by entering into a consent decree with the FTC.⁸
- *Data Protection*: In 2014, Facebook announced its intention to acquire WhatsApp, a popular instant messaging service. The FTC did not challenge the merger as anticompetitive. However, because both firms had made representations to consumers regarding their privacy commitments, the Director of the FTC's Bureau of Consumer Protection notified the companies that the FTC expected them to honor those commitments or face potential action for deceptive acts and practices.⁹
- *Deception as Monopolization*: The FTC's recent case against Intel used both competition and consumer protection remedies to restore competition in the market for central processing unit microchips, in which Intel was alleged to have market power. The FTC alleged that when competitors sought to enter the market, Intel used threats and rewards to coerce manufacturers not to buy chips from rivals. Intel also allegedly designed key software to stunt the performance of rivals' chips. Further, perceiving a threat that graphics processing units could perform the same function as CPUs and thus undermine its alleged monopoly, the FTC claimed that Intel undermined the ability of the leading GPU manufacturer to compete. In addition to alleging that Intel's practices amounted to unlawful monopolization, the FTC alleged that statements that Intel made about the performance of its and its competitors' systems were deceptive.¹⁰ FTC competition and consumer protection staffs worked closely together on this case.

⁷ See Patent Assertion Entity Activities Workshop Materials (Dec. 2012), available at <http://www.ftc.gov/news-events/events-calendar/2012/12/patent-assertion-entity-activities-workshop>; FTC Press Release, FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition (Sept. 27, 2013), available at <http://www.ftc.gov/news-events/press-releases/2013/09/ftc-seeks-examine-patent-assertion-entities-their-impact>.

⁸ *MPHJ Technology Investments, LLC*, File No. 142 3003 (Nov. 26, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/11/ftc-settlement-bars-patent-assertion-entity-using-deceptive>.

⁹ Letter From Jessica L. Rich, Director of the Federal Trade Commission Bureau of Consumer Protection, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc. (April 10, 2014), available at http://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf.

¹⁰ *Intel Corp.*, Docket No. 9341 (October 16, 2009), available at <http://www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf>.

- *Real Estate*: An earlier example of the synergies between competition and consumer protection enforcement was presented by certain practices in the real estate industry. Most consumers purchase real estate infrequently and many are relatively uninformed about the process, leading most consumers, informed or otherwise, to hire real estate brokers. In recent years, the ability of consumers to perform some real estate services themselves through the Internet has enabled some real estate brokers to offer fewer services in exchange for a rate lower than that of traditional full-service brokers. However, as alternative forms of lower-cost real estate brokerage emerged, some traditional brokers have sought collectively to exclude lower cost brokerage options by imposing requirements that effectively excluded them from using the Multiple Listing Service to sell properties. Given the importance of the MLS as a tool for buying and selling real estate, these requirements threaten consumers' access to low-cost brokerage options.

The U.S. antitrust agencies have challenged several of these MLS operators on the grounds that such requirements constituted anticompetitive agreements among competing brokers.¹¹ A recent FTC case forbade the MLS operator from discriminating against discount brokers in, among other things, determining what listings it transmits to public websites or setting its default search criteria.¹² The agencies have advocated in support of legislation and regulation that would permit innovative and reduced price real estate services to be made available to consumers who believe they would better meet their needs.¹³ These interventions, in combination with consumer protection interventions aimed at facilitating comparison of competing real estate financing offers, enforcing against deceptive offers of credit, and consumer education,¹⁴ help bring down the cost of homeownership to American consumers.

- *Environmental Marketing*: Consumer protection initiatives can reinforce the competitive process. In 2012, for example, the FTC issued a revised version of its guides for environmental marketing, popularly known as the "Green Guides."¹⁵ The FTC originally issued the Green Guides to help firms avoid making misleading representations regarding the environmental attributes of their products. The guides focus on how consumers understand certain claims and what qualifications

¹¹ A more detailed discussion is contained in the U.S. Submission to the 2008 Global Forum on Competition session on the linkages between competition and consumer protection at <http://www.oecd.org/dataoecd/18/4/39915760.pdf>.

¹² *Realcomp II, Ltd.*, FTC Docket 9320 (2009), available at <http://www.ftc.gov/sites/default/files/documents/cases/2009/11/091102realcompopinion.pdf>. The U.S. Court of Appeals for the Sixth Circuit ultimately upheld a Commission decision that found that Realcomp II had violated federal law by restricting the ability of member real estate agents to offer consumers lower-priced alternatives to traditional real estate services by refusing to transmit discount real estate listings to its own and other publicly available websites and excluded such listings from the default searches within its own database. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/04/110408realcompopinion.pdf>.

¹³ E.g., FTC and Department of Justice Comment to Governor Jennifer M. Granholm Concerning Michigan H.B. 4416 to Impose Certain Minimum Service Requirements on Real Estate Brokers (2007), available at http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-governor-jennifer-m.granholm-concerning-michigan-h.b.4416-impose-certain-minimum-service-requirements-real-estate-brokers/v050021.pdf; FTC and Department of Justice Comments to The Honorable Alan Sanborn Concerning Michigan H.B. 4849, Which Would Impose Minimum Service Requirements on Real Estate Brokers (2005), available at http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comments-honorable-alan-sanborn-concerning-michigan-h.b.4849-which-would-impose-minimum-service-requirements-real-estate-brokers/051020commmihousebill4849.pdf.

¹⁴ See U.S. Submission to the 2008 Global Forum on Competition, *supra* note 11, at ¶¶15-18.

are necessary to avoid deception when the substantiation a firm possesses does not align with consumer expectations engendered by a marketer's claim. By helping marketers avoid misleading claims, the Guides provide a fair playing field so that marketers do not have to compete with others using false claims. In this manner, the Green Guides encourage competition based on advertising of truthful attributes and eliminate a barrier to investing in research to make products more environmentally friendly.

- *Consumer Protection Applied to Permit Innovation:* An older example illustrates how sound consumer policy can support competition in a way that promotes innovation and the development of consumer choice. As consumers became more interested in good nutrition, firms responded by making health claims for their food offerings in advertising. While these claims can provide valuable information for consumers, there have been cases in which the manufacturers have made health claims without having adequate substantiation for the claim. Instead of banning all types of health claims, the FTC promotes policies that permit health claims for food in advertising when there is adequate scientific substantiation for those claims while prohibiting only those that are false, deceptive, or not adequately substantiated.¹⁶ The FTC's approach recognizes that if a product attribute cannot be promoted, firms would have insufficient incentive to invest in the research and development necessary to bring products with those attributes to market. The FTC's policy enabled consumers to obtain more information and increased demand for healthier products, leading competitors to make and market a broader array of products.

7. While some agencies have experimented with having the same staff handle competition and consumer protection matters, the FTC has not tried this approach. The tools and techniques of competition and consumer protection investigators are generally different. Consequently, separate staffs typically handle each type of case.¹⁷ Nonetheless, opportunities exist at the staff level to share information about how markets operate, especially in the high-tech sector.

8. A key benefit of combining competition and consumer protection in the same agency is ensuring, through high level oversight, that the two functions share a common view of how markets ought to operate, informed in both cases by economic analysis. An agency that values competition will be unlikely to impose unnecessary barriers to entry in the name of protecting consumers. An agency with responsibility for consumer protection is unlikely to pursue a competition remedy based on an unrealistic understanding of consumer behavior. At the FTC, this high level policy synergy is achieved through having all of the Commissioners responsible for both competition and consumer protection cases and policy. The Bureau of Economics, which participates in both competition and consumer protection matters, and has an equal voice with the Bureau of Competition or Consumer Protection before the Commission, provides additional valuable analytical expertise to inform the agency's work. The Bureau of Economics is staffed by Ph.D. economists who typically specialize in industrial organization. The analysis of costs and benefits of conduct and remedies is similar in both types of cases.

2. Integrating Economic Analysis into the Commission's Work

9. As the foregoing indicates, economic analysis is critical to the work of both the competition and consumer protection missions of the FTC, and the agency's institutional structure is designed to ensure that sound economics informs every law enforcement decision the FTC takes as well as its research and advocacy.

¹⁶ E.g., FTC Staff Comment Before the Department of Health and Human Services, Food and Drug Administration In the Matter of Request for Comments on Nutrient Content Claims Concerning Nutrient Claims (July 2004), available at <http://www.ftc.gov/be/V040020.pdf>.

¹⁷ The one exception is that staff in three FTC regional offices handle both competition and consumer matters.

10. Competition investigations are staffed by several FTC attorneys from the Bureau of Competition and at least one economist from the Bureau of Economics who work together as a case team. While concentrating on their areas of expertise, the attorneys and the economists jointly evaluate theories of harm, analyze data and other information, and assess evidence provided by the subjects of the investigation as well as third parties. Throughout the investigation, attorneys and economists work together to bring into focus the essential elements of the matter.

11. This does not mean that the attorneys and economists always agree, but the agency is structured to ensure that both disciplines inform the ultimate decision. At all critical points of a competition investigation, including the decision to issue compulsory process, to begin adjudicative procedures, or to accept a consent decree, the lawyers and economists write separate recommendation memoranda and submit them to the decision-makers through their own Bureau management. When appropriate, Bureau of Economics and Competition managers write memoranda presenting their own views. Before the matter reaches the Commission for decision, the Director of the Bureau of Competition convenes a meeting to evaluate the matter in which the staff economists and managers from both Bureaus participate. Both sets of memoranda are provided to the Commission and representatives of both Bureaus present their views at Commission meetings.

12. A key benefit of this approach is that it creates strong incentives for attorneys and economists to take each other's views into account. Knowing that economists' arguments will be presented to the Commission, attorneys from the Bureau of Competition must consider and address those arguments in their own recommendations. Similarly, economists have to address arguments that legal weaknesses in their economic theories may undermine the viability of a particular course of action. Thus, the Commission obtains the benefit of both, resulting in better informed decisions. As one might suspect, the result of this highly incentivized collaboration is that disagreements are relatively infrequent.¹⁸

13. Similarly, the Bureau of Economics assigns economists to work with attorneys in the Bureau of Consumer Protection on consumer protection investigations in which economic analysis is required to understand the injury to consumers and competition caused by the practice, the countervailing consumer and competitive benefits the practice may have, and to better understand the impact that any remedy will have on the functioning of markets. Information remedies often involve cost-benefit analyses in that consumer disclosures often impose costs that will be passed on to consumers or that will limit the type of information that is provided. Economists are particularly well suited to helping assess those tradeoffs.

14. This arises frequently in deceptive advertising cases, especially those in which the degree of substantiation required is in question and those that require analysis of scientific substantiation. It is also important in cases in which firms mislead consumers about the privacy protections they afford consumers. By contrast, hard-core fraud cases require less economic analysis, just as hard-core cartels require little economic analysis in competition cases. In addition to its staff participating on substantive teams, the Bureau of Economics reviews all recommendations, however, and participates in Commission meetings in the same manner as with competition cases.

15. Furthermore, economists play an important role in fulfilling the Commission's commitment to furthering our understanding of markets, both alone and in conjunction with attorneys from the Bureaus of Competition and Consumer Protection, the Office of Policy Planning, and the Office of the General Counsel. For instance, consumer protection economists have studied the incidence of fraud, the impact of the use of credit scores in the pricing of insurance, the accuracy of credit scores, and the effect of information disclosures on consumer comprehension. Competition economists have studied the market

¹⁸ See generally, Luke Froeb, Paul A. Pautler, and Lars-Hendrik Röller, *The Economics of Organizing Economists* (July 3, 2008), Vanderbilt Law and Economics Research Paper No. 08-18, available at SSRN: <http://ssrn.com/abstract=1155237> or <http://dx.doi.org/10.2139/ssrn.1155237>.

impact of consummated mergers in hospitals, gasoline retailing, supermarkets, and appliances, to name a few, evaluated the performance of analytical methods used in antitrust investigations, and analyzed the competitive impact of regulations in many sectors. The output from these research projects can be reports to Congress, Commission Reports, Bureau working papers, or articles in academic journals.

3. Taking Advantage of a Collegial Decision-Making Structure

16. Like many competition agencies, the FTC is headed by a group of Commissioners. The Chair directs the work of the staff and appoints the heads of the major operating units, and therefore has significant influence in setting priorities and the case selection process. The full Commission, however, must vote to approve the use of compulsory process, to initiate a law enforcement proceeding, to approve negotiated settlements, and adjudicates appeals of decisions by the Commission's administrative law judges.

17. Multi-member agencies have advantages and disadvantages, and care must be taken in structuring such an agency to guarantee both procedural fairness and to ensure that the benefits of a multi-member body are realized.¹⁹ The FTC consists of five Commissioners, each of whom is appointed by the President and confirmed by the Senate. Commissioners serve seven-year terms, which are staggered to ensure continuity – as the President is elected for a four year term, Commissioners terms extend across Presidential terms. No more than three Commissioners may be from the same political party. While the President may appoint a Commissioner, the President cannot remove a Commissioner except for serious cause, which has never happened.²⁰ The President designates the Chair from among the Commissioners; if the President changes the Chair, the previous Chair can continue to serve his or her term as a Commissioner.²¹ These arrangements provide accountability by enabling the President to choose the Chair, and by extension the senior leadership of the agency to implement the Chair's policies. At the same time, it provides for significant continuity in the Commission's composition and thus its jurisprudence.

18. In addition to ensuring that the Commission's decisions reflect the best legal and economic learning, as described above, the FTC is also designed to provide due process and procedural fairness for litigants. The Commission embodies the dual functions of deciding whether to initiate a law enforcement proceeding and, if the Commission staff or the party appeals the administrative law judge's decision, adjudicating the matter. This system creates the risk of at least a perception of unfairness to parties. To address these concerns, the FTC rules provide for a clear separation between the Commission's investigative and adjudicative functions. The legal standard for the Commission to initiate a law enforcement action is a "reason to believe" that the law has been violated and that a law enforcement action would be in the public interest. Ultimate liability, however, is based on the higher standard of a preponderance of the evidence. In some ways, the decision is analogous to that of a judge who determines that there is "probable cause" to hold a defendant for trial, a lower threshold than that for a determination of guilt.

19. Once the Commission initiates a law enforcement action by issuing a complaint, FTC rules prohibit any *ex parte* communication between those responsible for investigation and prosecution – the Bureaus of Competition, Consumer Protection, and Economics -- and those responsible for adjudication – the Administrative Law Judges and the Commissioners to whom the Administrative Law Judge's decisions may ultimately be appealed. This "wall" of separation is strictly observed.

¹⁹ See William Kovacic, Competition Agencies, Independence, and the Political Process, DAF/COMP/WD(2014)86 (Competition Committee (2014)).

²⁰ President Franklin Roosevelt sought to remove a Commissioner in the 1930s. He was rebuffed by the U.S. Supreme Court, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and no President has tried it since.

²¹ For example, in 2009, incoming President Obama designated Commissioner Jon Leibowitz to serve as Chairman in place of Chairman William Kovacic, who had been so designated by President George W. Bush. Kovacic continued to serve as a Commissioner thereafter.