



United States of America  
**Federal Trade Commission**

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**Competition, Consumer Protection, and *The Right [Approach] to Privacy***

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**I. Introduction**

It is an honor to give the morning address at Premier Cercle's 2013 Brussels Competition Summit. I will speak with you today about online privacy, an issue on everyone's mind lately. Since the emergence of e-commerce in the mid-1990s, the online marketplace has grown with accelerating speed. Low barriers to entry and the technical advantages of Internet protocol communications have allowed unprecedented experimentation in online business models. Ad-supported content or services have become the default models for the online marketplace, providing benefits to consumers, from free access to rich sources of information to the convenience of home shopping. At the same time, the ease with which companies can collect and aggregate information from consumers online has raised questions and concerns about consumer privacy. The Federal Trade Commission has responded to these developments with an

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<sup>1</sup> The views expressed in this speech are solely those of Commissioner Ohlhausen and are not intended to reflect the views of the Commission or any other Commissioner.

almost twenty-year record of active enforcement in this area, as well as extensive policy work and guidance.

Although the FTC's efforts in my opinion provide an effective shield for consumers, we now are in the middle of a critical policy debate that will determine, in large part, the direction of commercial development on the Internet and, in particular, the fate of the business model for supporting free web content through interest-based advertising. This policy debate shines the spotlight on a core tension between our historical normative understanding of an individual's expectation of personal privacy and the use of data to support the Internet economy. It is critical to the continued success of this dynamic medium that policymakers, consumer groups, and industry work together to get these issues right.

Responding to this tension, some commenters have proposed that we expand the competition laws to address possible impacts on individual privacy. They appear concerned primarily about the collection and aggregation of data for use in online behavioral advertising and claim that the potential for misuse of these data should animate an agency's examination of mergers, acquisitions, and other competition-related conduct. So, for instance, they may argue that the FTC or DG Comp should evaluate a merger of Internet firms in part by considering whether combining the companies' customer databases could change the merged companies' incentives to violate consumer privacy. Or, you may hear that perhaps we should allow harms to competition in situations where competitors ostensibly coordinate their activities under the banner of protecting consumer privacy.

I think this would be a mistake for several reasons and could risk weakening our competition regime for almost no meaningful gain. Instead, I believe that the right approach to

privacy recognizes that competition law and consumer protection law are complements, not substitutes, and thus applies them in accord with their different underlying purposes.

## **II. The Proper Relationship between Competition Laws and Consumer Protection Laws: They Are Complements by Design.**

I just spent my Thanksgiving holiday in South Carolina, and we have a saying in the southern United States: if it ain't broke, don't fix it. The same can be said of our current enforcement regime. For nearly 100 years, the FTC has successfully discharged its Congressional duty under Section 5 of the FTC Act to prevent unfair methods of competition and unfair or deceptive acts or practices.<sup>2</sup> The first clause is the source of our competition law authority; the second our consumer protection authority.<sup>3</sup> This dual mandate is no mistake: the competition and consumer protection laws are complements, two different but equally important tools to help ensure fairness in our markets and thereby promote consumer welfare. Each protects consumers in different ways, and each has its limitations. Let me explain this interrelationship more fully.

Henry Ford once said: "It is not the employer who pays the wages. Employers only handle the money. It is the customer who pays the wages." And it is through this mechanism that healthy competition operates as the first line of defense to protect consumers. Sellers facing competition are forced to offer the best prices and quality to consumers able to spend their money elsewhere. Providing quality service includes being honest and forthright about products and giving customers the benefit of their bargain, including about the data they may share. An unhappy customer that feels tricked by a dishonest seller is unlikely to transact further business

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<sup>2</sup> The FTC Act was signed into law in 1914 and included Section 5, which prohibited "unfair methods of competition." In 1938, the Wheeler-Lea Act amended Section 5 to empower the agency to directly enforce against "unfair or deceptive acts or practices." Before this amendment, the FTC had been required to show harm to competitors when pursuing claims for consumer harms like deceptive advertising.

<sup>3</sup> See 15 U.S.C. § 45(a)(1).

with that seller and will be vocal about his dissatisfaction to other consumers. By providing a platform for consumers, particularly unhappy ones, to voice their opinions about their treatment by sellers the Internet has actually magnified this effect. Bad consumer experiences and critical reviews hurt the business's reputation and its fortunes as customers turn to better, more reputable, alternatives. Or it could force the seller to change its ways. As Bill Gates has said, "Your most unhappy customers are your greatest source of learning." A competitive market thus disciplines potential bad actors and should be considered an important ingredient in protecting privacy online.

I do not mean to suggest, however, that competition alone can fully discipline the market. Former FTC Chairman Tim Muris put it well when he said, "the commercial thief loses no sleep over its standing in the community."<sup>4</sup> For a variety of reasons some companies engage in fraud, dishonesty, unilateral breach of contract, or other conduct that hurts consumers, with little regard for their reputations or the possibility of being put out of business. Because the rigors of a competitive market are insufficient to discipline these behaviors in some circumstances, we also use our consumer protection authority. The FTC, for example, has broad power to stop unfair or deceptive acts and practices under the FTC Act, and we enforce more than 50 other laws directed more narrowly to consumer protection issues like privacy, the handling of sensitive information, and decisions about personal credit, insurance, and housing, among other things.

This evolution of 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

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<sup>4</sup> Timothy J. Muris, *The Interface of Competition and Consumer Protection*, Fordham Corporate Law Institute's Twenty-Ninth Annual Conference on International Antitrust Law and Policy (Oct. 31, 2002).

economic efficiency, whereas its consumer protection goals are and have always been focused on harm to individuals. Former FTC Chairman Robert Pitofsky captured this view about the FTC's competition mandate from Congress when he said: "Oppressive, coercive, bad faith, fraud, and even contrary to good morals. I think that's the kind of roving mandate that will get the Commission in trouble with the Courts and with Congress."<sup>5</sup>

Even if privacy advocates are correct that privacy concerns should trump economic efficiency ones, disrupting Congress's bifurcated design of these laws is a legislative matter. Short of such legislative action, however, an enforcer's job is to apply the law faithfully as written, not to re-write the law to suit other policy goals.

The FTC has actually already faced the question of whether it can use privacy concerns unrelated to competitive concerns as a factor in a competition analysis. In 2007, the Commission reviewed Google's acquisition of DoubleClick and considered whether privacy could be a factor in a merger analysis.<sup>6</sup> Both parties competed in businesses related to online advertising: Google in sponsored search advertising and online ad sales and intermediation, and DoubleClick in third-party ad serving.

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."<sup>7</sup> 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

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<sup>5</sup> Transcript of Fed. Trade Comm'n Workshop, Section 5 of the FTC Act as a Competition Statute at 67 (Oct. 17, 2008) (Robert Pitofsky), available at <http://www.ftc.gov/bc/workshops/section5/transcript.pdf>.

<sup>6</sup> Statement of the Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170 (Dec. 20, 2007), available at <http://ftc.gov/os/caselist/0710170/071220statement.pdf>.

<sup>7</sup> *Id.* at 2.

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.”<sup>8</sup> Thus, the Commission allowed the transaction to pass without challenge.

### **III. Privacy Can Be A Dimension of a Product or Service.**

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. I concur with this sentiment. 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.

One prominent example of privacy as a non-price attribute of competition exists, perhaps not surprisingly, in the online search engine business. DuckDuckGo is a search engine that launched a few years ago in the United States as an alternative to Google. Unlike its larger competitors, DuckDuckGo promises users that it does not retain search history or track users based on search habits. Its marketing slogan is “Search anonymously. Find instantly.”<sup>9</sup> The company was nominated among the top 50 websites by Time Magazine in 2011, has attracted significant investment, and has seen its volume nearly triple in the last year, to over 4 million

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<sup>8</sup> *Id.*

<sup>9</sup> <https://duckduckgo.com/>.

searches per day.<sup>10</sup> It is a runaway success and is compared by many observers to an early Google. Another example is the wide range of privacy and security protection add-ons available for all of the major Internet browsers. One such add-on, Ghostery, helps users easily detect tools that behavioral advertisers often use to track individuals across sites.<sup>11</sup> This type of innovation gives me faith in the market's ability to meet consumer demand for product attributes, including privacy.

#### **IV. The Competition Laws Are Not Intended to and Should Not Promote Non-economic Goals.**

Having addressed whether the U.S. competition laws currently permit the consideration of privacy issues unrelated to competition, I will now address the normative question of whether they should evaluate non-competition factors, such as privacy. Welcoming non-competition factors like privacy into competition analysis would necessarily erode the focus on calculable economic efficiencies and evidentiary demonstration of harm. Instead, this would allow competition enforcers to embark on consideration of social mores and political issues without any meaningful limiting principles. Our rigorous standards of proof would be called into question as we sought to quantify an “economically optimal” amount of privacy to balance against diversion ratios, efficiencies, and the like. Because a society's understanding of privacy varies from one geographic area to another and even shifts over time it makes it nearly impossible to transform privacy into a meaningful, reliable, and objective metric that can fit within our competition framework. This conjures the disturbing notion of one nation's antitrust agency, which may have no privacy expertise, making decisions to block a deal based on a

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<sup>10</sup> *50 Websites That Make the Web Great*, TIME, available at [http://content.time.com/time/specials/packages/article/0,28804,2087815\\_2088176\\_2088178,00.html](http://content.time.com/time/specials/packages/article/0,28804,2087815_2088176_2088178,00.html) (last visited Dec. 6, 2013); <https://duck.co/help/company/history> (last visited Dec. 6, 2013); <https://duckduckgo.com/traffic.html> (last visited Dec. 6, 2013).

<sup>11</sup> <http://www.ghostery.com/>.

subjective sense that the deal would harm privacy too much while another nation's antitrust enforcer allowed the transaction because of either a different privacy preference or a lack of substantive knowledge about it. This obviously cuts against the trend toward global convergence on standards in antitrust reviews, which has been such an important focus for the FTC and other sophisticated antitrust regimes.<sup>12</sup>

As an example of how far notions of privacy can change, consider the different perception of privacy in Warren and Brandeis's 1890 work, which many people view as the starting point for the consumer privacy laws in the United States. Warren and Brandeis wrote their article, *The Right to Privacy*, because they were alarmed that "[i]nstantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"<sup>13</sup>

These concerns are so far removed from our world of ubiquitous television, Internet, and social media that they seem almost quaint by comparison. Our expectations of privacy have changed significantly. Mark Zuckerberg recently claimed privacy is disappearing as a social norm, although it is open to debate whether he will be proven right. As I will discuss later in my remarks, the FTC's consumer protection authority, which considers the reasonable consumer and evaluates substantial harms, is well suited to adjust to evolving consumer expectations and preferences about privacy. Although varied and changing expectations of privacy may be an appropriate issue for our consumer protection analysis, it simply cannot influence our empirical competition analysis. We cannot discard the scientific consistency we have worked so long to

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<sup>12</sup> See Taking Notes: Observations on the First Five Years of the Chinese Anti-Monopoly Law, Remarks of Commissioner Maureen K. Ohlhausen, Competition Committee Meeting United States Council for International Business, Washington, D.C. (May 9, 2013), available at <http://www.ftc.gov/speeches/ohlhausen/130509uscib.pdf>.

<sup>13</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 5 HARVARD L. REV. 193, 195 (Winter 1890).

develop and that has allowed for a common language of competition policy among us that extends across national boundaries. And, worse still, without meaningful limiting principles, once we open the door to non-competition factors, we are opening it to other policy issues like indigenous innovation, domestic employment effects, industrial policy, or even political considerations. I do not think we want to walk down this path, as doing so would derogate the transparency, predictability, efficiency, and informed decision-making to which we should all aspire in government.

With all these risks in mind, I ask those that may disagree with me to ponder whether, looking back to the age of Warren and Brandeis, we should have blocked newspaper mergers out of concern that their combined file rooms of stories and photographs would somehow allow an invasion of privacy. I think not.

#### **V. Privacy Regulation Should Avoid Unduly Burdening Competition.**

Another area in which competition and consumer protection laws may intersect is evaluating the possible competitive impact of privacy regulations. The FTC has a long history of evaluating the likely effect of regulations on competition using our expertise in competition, consumer protection, and economics, a function we call competition advocacy.<sup>14</sup> Competition advocacy is an area of particular interest to me as, from 2004 to 2008, I was Director of the FTC's Office of Policy Planning, which oversees the agency's competition and consumer advocacy efforts. Through competition advocacy, the Commission attempts to focus policymakers on the following questions regarding a proposed regulation: First, what specific harm to consumers is the proposed regulation seeking to address? Second, is the proposed regulation tailored to address the anticipated harm, or does it unnecessarily burden competition?

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<sup>14</sup> See, e.g., Maureen K. Ohlhausen, *Identifying, Challenging, and Assigning Political Responsibility for State Regulation Restricting Competition*, 2 COMPETITION POLICY INT'L 151,152 (2006).

Third, does the consumer harm that the regulation seeks to prevent exceed the loss in consumer welfare resulting from the lessening of competition? In raising these questions, the goal of our advocacies is to convince policymakers to take full account of the adverse impact on competition and consumer welfare that may result from proposed laws and regulations.

Turning to privacy regulation in particular, data collection is central to the Internet's two-sided platform model, just as it is in other platform businesses that handle sensitive personal information like credit cards or financial exchanges. As in those industries, online data collection functions both as an input for inexpensive and efficient creation, delivery, and improvement of content and services, as well as an asset to monetize through targeted, high-value online behavioral advertising.

Privacy regulations may place a burden on these data-hungry online platforms. Regulations that limit the ability of consumers to in effect "pay" web services with personal information could disrupt data collection, increase transaction costs, restrict demand for online services, and may force Internet companies to consolidate and charge consumers in other ways. Regulations that permit sharing consumer information within a single company while prohibiting sales or transfers between companies may favor large online players, particularly those with control of multiple platforms, say webmail and social media. This competitive asymmetry also would encourage consolidation of entities looking to increase their access to data across platforms and increase barriers to entry, since new players would not be able to buy the data needed to compete.

As a policy matter I believe it would benefit consumers to use the analytical framework that the FTC applies in its competition advocacy when developing privacy legislation or regulations. This approach can help to ensure that privacy regulations are carefully drawn to

provide consumers the benefits that a competitive market offers while addressing any identified privacy harms.

## **VI. The FTC Is Already Protecting Privacy Online.**

Finally, not only is policing privacy through competition law a challenging idea – it is unnecessary. Section 5 of the FTC Act empowers the FTC to protect against unfair or deceptive acts or practices in or affecting commerce.<sup>15</sup> The FTC has been very active in enforcing the prohibition against unfair and deceptive trade practices in the areas of privacy and data security and has brought over 100 spam and spyware cases<sup>16</sup> and over 40 data security cases.<sup>17</sup> The Commission uses its deception authority in cases where a company makes a representation to consumers about the collection and/or use of their personal data but it fails to keep that promise. By contrast, the Commission’s unfairness authority does not require a representation to consumers but instead focuses on the consumer harm that an act or practice may cause.

Our Unfairness Statement requires that for the Commission to find an act or practice unfair, the harm it causes must be substantial, it must not be outweighed by any offsetting consumer or competitive benefits, and the consumer could not have reasonably avoided the harm.<sup>18</sup> The Statement specifically identifies financial, health, and safety harms as varieties of harm that the Commission should consider substantial and further states that emotional impact and more subjective types of harm are not intended to make an injury unfair. The Commission’s deception and unfairness standards are effective and flexible and are well suited to adapt to

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<sup>15</sup> 15 U.S.C. § 45.

<sup>16</sup> Press Release, Fed. Trade Comm’n, *FTC Testifies on Protecting Consumers’ Privacy* (July 14, 2011), available at <http://www.ftc.gov/opa/2011/07/privacy.shtm>.

<sup>17</sup> See, e.g., Fed. Trade Comm’n, Bureau of Consumer Protection, *Business Center Legal Resources*, <http://business.ftc.gov/legal-resources/29/35> (describing data security cases).

<sup>18</sup> FED. TRADE COMM’N, *FTC POLICY STATEMENT ON UNFAIRNESS* (1980), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

changing consumer expectations about privacy. Unfairness provides a strong baseline of protection for consumers who suffer a substantial harm from the misuse of their personal information, regardless of whether the entity using the information made a promise to the consumer. Consumers who wish for a higher standard of protection for their information or wish to share less information can seek out businesses that promise a higher standard of care that matches those consumers' preferences. This allows consumers to express their varying preferences and encourages companies to compete on the basis of the privacy protections they offer. If a company does not live up to its promises, the FTC can bring a case on deception grounds.

One of the reasons the FTC is such an effective agency is that it uses all of its tools to address issues within its jurisdiction, and privacy is no exception. Although law enforcement is at the core of the FTC's mission, the Commission augments this work with extensive educational outreach to consumers and businesses, and it regularly undertakes research and study initiatives. By bringing cases, educating businesses on compliance, holding public workshops, releasing reports on best practices, and informing consumers on how to protect themselves, the FTC can maximize its effectiveness and reach.

For almost two decades, the Commission has worked to stay up to date on the online marketplace and the privacy issues it raises for consumers. The FTC has hosted numerous public workshops, issued reports on online data collection practices, monitored industry self-regulatory efforts, and closely followed technological developments affecting consumer privacy. Regarding online behavioral advertising in particular, in 2009 the FTC staff issued "Self-Regulatory Principles for Online Behavioral Advertising," a report prepared in response to comments and

developments in the areas of data collection and privacy practices.<sup>19</sup> Specifically, the principles provide for transparency and consumer control and reasonable security for consumer data. They also call on companies to obtain affirmative express consent from consumers before they use data in a manner that is materially different than was promised at the time of collection and before they collect and use “sensitive” consumer data for behavioral advertising.

In March 2012, just before I started as a Commissioner, the Commission released “Protecting Consumer Privacy in an Era of Rapid Change,”<sup>20</sup> a comprehensive report that included recommendations for companies handling consumer data. Although I do not agree with everything in the report—especially the call for additional, baseline privacy legislation—I do support as best practices many of the recommendations for protecting privacy, including:

- **Privacy by Design** – Companies should build in consumer privacy protections at every stage in developing their products. These protections include reasonable security for consumer data, limited collection and retention of such data, and reasonable procedures to promote data accuracy.
- **Simplified Choice for Businesses and Consumers** – Recognizing that there is no single best way to offer notice and choice in all circumstances, companies should adopt notice and choice options that appropriately reflect the context of the transaction and/or the relationship the company has with the consumer.
- **Greater Transparency** – Companies should disclose details about their collection and use of consumers’ information and provide consumers access to the data collected about them.

The Commission also began a study of the data broker industry recently by sending out formal requests for information to nine large data brokers to learn more about their practices, including how they use, share, and secure consumer data. A good understanding of data brokers is vital to preserving the service and convenience benefits that can come from proper use of data

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<sup>19</sup> FED. TRADE COMM’N, FTC STAFF REPORT: SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING (Feb. 2009), available at [http://www.ftc.gov/os/2009/02/P085400\\_behavadreport.pdf](http://www.ftc.gov/os/2009/02/P085400_behavadreport.pdf).

<sup>20</sup> FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE (Mar. 2012), available at <http://ftc.gov/os/2012/03/120326privacyreport.pdf>.

while minimizing the inappropriate use or insecure maintenance of data that could cause significant harm. The Commission will carefully analyze the submissions from the companies and use the information to supplement its knowledge of the industry and help decide how to proceed in this area.

As you can tell, the FTC is using all its tools to protect consumer privacy online. I know many in Europe are concerned about that and in particular have struggled with whether the Safe Harbor agreement remains viable in light of concerns about enforcement in the United States. I am happy that the agreement, which has been a useful framework for both government and business, will continue. I want to emphasize that the FTC has been and will continue to be a good partner and an aggressive enforcer of Safe Harbor certifications.

## **VII. Conclusion**

Let me close by noting that, unlike in the days of Warren and Brandeis, billions of people use the Internet and at some level understand that their data is both a form of currency to exchange for “free” services like webmail and the means by which they can receive ever-more-customized and robust services online. But while consumers are aware of this trade-off, they remain concerned about personal data being used in unexpected ways or by people they do not know. TRUSTe’s 2013 consumer confidence index reveals that eighty-nine percent of U.S. adults worry about their privacy online, seventy-two percent of smartphone users are more concerned about their privacy than a year ago, and eighty-one percent of smartphone users avoid using apps that they do not believe protect their online privacy.<sup>21</sup> Noting these consumer concerns, some observers may question whether there is enough competition in online markets to provide consumers sufficient choices to reflect their privacy preferences. Others may ask

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<sup>21</sup> See 2013 TRUSTe U.S. Consumer Confidence Index, TRUSTe, <http://www.truste.com/us-consumer-confidence-index-2013/> (last visited Dec. 6, 2013).

whether consumers even know how their information is being collected and used. These are important questions, and I believe the best way for the FTC to continue answering them is to focus its energy and resources on maintaining competitive online markets through antitrust oversight, enforcing the consumer protection laws currently in place, and continuing to invest in education and research regarding online privacy issues.