Federal Trade Commission

Can Consumer Choice Promote Trans-Atlantic Convergence of Competition Law and Policy?

Remarks of J. Thomas Rosch
Commissioner, Federal Trade Commission

before the

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I have been asked to address whether the concept of "consumer choice" can serve as a standard that promotes "convergence" between United States antitrust law and European Union competition law. To my way of thinking, this question calls for a three-part answer. First, we must ask ourselves whether we can ever achieve total convergence between the two jurisdictions—with or without a consumer choice standard—and whether it is even necessary or desirable to do so. Second, if we are to talk about consumer

The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Henry Su, for his invaluable assistance in preparing this paper.

choice as a standard for moving the two jurisdictions towards convergence, then we must have a working definition of consumer choice on which we can all agree, because even our views on this concept may differ as between the U.S. and the EU. Third, assuming we have arrived at a mutually agreeable, working definition of consumer choice, we need to understand how behavioral economics may affect the robustness of consumer choice as a standard for antitrust and competition law.

I.

I understand that many of our colleagues in the antitrust and competition bar would like to see "convergence" in the law enforcement approaches of the United States and European Commission competition agencies.[1] While that may be a worthy aspiration for antitrust enforcers, regulators, and policymakers, my own view has long been that total convergence is not possible for several reasons.

A.

First, we start off with the fact that the operative statutes are differently worded. For example, Section 1 of the Sherman Act outlaws "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[3] Although U.S. case law has made clear that Section 1 forbids only *unreasonable* restraints of trade,[4] the standard for determining unreasonableness has been left to the appellate courts to develop over time. And there are 13 of those courts, including the Supreme Court.[5]

By contrast, Article 101 of the Treaty on the Functioning of the European Union (TFEU) is more specific in both its proscription and its exceptions. The article outlaws "all agreements between undertakings,

Convergence, Comity, and Coordination, Remarks Before the 14th Annual International Competition Law Forum, St. Gallen University, Switzerland 2 (May 10, 2007), http://www.ftc.gov/speeches/rosch/070510stgallen.pdf [hereinafter Three Cs]. *See also* Phillip Lowe, Dir. Gen. for Competition, Eur. Comm'n, Remarks on Unilateral Conduct Presented at the Federal Trade Commission and U.S. Department of Justice Joint Hearings on Section 2 of the Sherman Act 8 (Sept. 11, 2006), http://ec.europa.eu/competition/speeches/text/sp2006_019_en.pdf ("We are all in search for the right policy. Let there not only be global competition for the best practices, but also global cooperation and discussion to improve our rules. In the end I don't think we should expect too much divergence in view of the broad consensus on many basic principles. However, we should probably not expect total convergence either.").

[3] 15 U.S.C. § 1 (2010).

[4] *See, e.g.,* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 98 & n.17 (1984) ("[A]s we have repeatedly recognized, the Sherman Act was intended only to prohibit only unreasonable restraints of trade."); Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

[5] I am excluding the United States Court of Appealality ih29nwbr Tw(it)7.3(io)4.4(n(e)4(l0s of 4c.4('01 rhdC.(g)6.2

decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market," and it specifically enumerates five categories of restraints that are viewed as violating its strictures.[6] At the same time, however, Article 101 may be declared inapplicable to agreements, decisions and concerted practices that meet certain specified criteria, which include "contribut[ing] to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit[.]"[7] In contrast to Section 1 of the Sherman Act, Article 101 TFEU thus explicitly recognizes that some restraints of trade may be permissible if they benefit consumers by improving output or promoting innovation.

Section 2 of the Sherman Act likewise differs from Article 102 TFEU in its wording. Whereas Section 2 outlaws monopolization, attempts to monopolize, and conspiracies to monopolize "any part of the trade or commerce among the several States, or with foreign nations,"[8] Article 102 more broadly prohibits "[a]ny abuse of . . . a dominant position within the

potential abuse, which include "limiting production, markets or technical development to the prejudice of consumers[.]"[9]

In a similar fashion to Article 101's consideration whether a challenged restraint may benefit consumers in the form of increased output or innovation, Article 102 explicitly considers whether a challenged conduct or practice will harm consumers in the form of decreased output or innovation—as opposed to simply increasing prices. By contrast, the Sherman Act contains no such language, and instead leaves it up to the 13 appellate courts to develop the relevant legal standards. This distinction between statutory language and a veritable cacophony of judicial decisions,[10] I would submit, may result in a more receptive attitude in Europe than in the U.S. towards arguments about benefits or harms based on consumer choice.

B.

Another potential obstacle to achieving total convergence is the fact that the U.S. and Europe have different economic and political histories and cultures. In particular, there are two schools of thought that have influenced and

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[9] Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Sept. 5, 2008, 2008 O.J. (C 115) 89 [hereinafter TFEU], *available* at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E102:EN:HTML.

[10] I have commented on the judicial cacophony before. *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Does the EU Need a System of Private Competition Remedies to Supplement Public Law Enforcement?, Remarks Before the 2011 LIDC Congress 19 (Sept. 23, 2011),

shaped European competition law and policy in ways unlike what we have experienced here in the U.S.

First, there is the ordoliberal thought of the Freiburg School, which emerged in Germany after the Second World War. According to historian David Gerber, ordoliberalism, like classic liberalism, believes "that competition is necessary for economic well-being and that economic freedom is an essential concomitant of political freedom[,]" and the flow of economic resources should be directed by private decision-making rather than by government decision-making.[11] But ordoliberalism goes one step further than classic liberalism with its view that excessive governmental power is not the only threat to individual economic and political freedom; powerful economic institutions can also misuse their private economic power to trample over individual freedom.[12]

Accordingly, ordoliberalists envision a European state in which the structure and characteristics of the economic system would be constitutionally intertwined with its political and legal systems.[13]

market."[14] In other words, competition law broadly views private economic power as inherently the enemy of the competitive process.[15] This perspective is markedly different from U.S. antitrust law, which has tended to view the potential harm wrought by economic power more narrowly, in neoclassical, microeconomic terms of static, short-term effects on price and output.[16]

Second, there is the neo-mercantilist thought that has evolved from the history and culture of mercantilism among many Member States.[17] As a

controls, all of which are aimed at government organization and planning of specific industries and economic sectors.[20]

Like ordoliberalism, neo-mercantilism

efficiency, and price theory,[23] to a degree that the EU has not. Notably, Chicago School economics gained acceptance in the U.S. courts and antitrust enforcement agencies far earlier (in the 1970s)[24] than it did in the corresponding institutions of the EU (in the late 1990s).[25] So, if nothing else, there is the difference that a couple decades can make in how much a school of thought becomes entrenched in enforcement policy. Also, in the EU, Chicago School economics has had to compete with other strands of neoliberal economic thought (for example, ordoliberalism and Austrian school ultraliberalism) for ascendance.

One might ask whether—despite the relative lateness with which Chicago School economics has come to influence the thinking of competition authorities within the EU—convergence has now been made more likely as a result. On that question, Lars-Hendrik Röller, a former Chief Economist with DG Comp, has expressed the view that even with the use of economics, total convergence (i.e., identical enforcement outcomes) is probably still not

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possible.[26] Importantly, the EU and the U.S. have different legal systems (administrative vs. judicial), different markets, differences in prior beliefs about matters like market dynamics and the benefits of competition, and different political environments.[27]

I tend to agree. To be sure, economics can promote what we call "soft" convergence, that is, the adoption of common procedures and methodologies for conducting antitrust analysis.[28] But economists are human too, and they therefore approach antitrust analysis with their own preconceptions, biases, and belief systems. So it may be unrealistic for us to expect "hard" convergence, that is, congruence in our enforcement decisions and outcomes.

In summary, I have my doubts as to whether a consumer choice standard can bring the two jurisdictions into closer alignment and harmony with respect to doctrine and policy than we already are. For example, I have noted the extent to which there seems to have been *some* trans-Atlantic convergence on (1) the basic theoretical principle underlying the analysis of single-firm or unilateral conduct—that the goal of outlawing monopolization or abuse of dominance is to promote "consumer welfare," and (2) on the analytical vocabulary of predation and exclusion—for example, the concept of

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[26] Lars-Hendrik Röller, Chief Economist, Dir. Gen. Competition, Eur. Comm'n, Antitrust Economics – Catalyst for Convergence?, Presentation at the George Mason Law Review Symposium on "Hot Topics in EU Antitrust Law" 10 (slide presentation), (Sept. 20, 2005), http://ec.europa.eu/competition/speeches/text/sp2005_017_en.pdf.

[27] *Id.* at 5.

[28] *Id.* at 3, 4 & 9.

“profit sacrifice.” At theficme time, however, the degree of movement towards converge

to have embraced a view of consumer welfare that focuses on the output market (and thus, end-user welfare) instead of Professor Bork's view of consumer welfare,[32] the two jurisdictions still differ in their views in areas such as bundled discounts, loyalty discounts, tying, refusals to deal, exclusive dealing, predatory pricing, and price squeezes.[33]

II.

That does not mean that we should give up on consumer choice as a dimension of competition. It does mean, however, that we should try at most to minimize the differences between the two law enforcement regimes that may expand or contract the concept of consumer choice. In other words, it behooves us to have a common understanding of what we mean when we talk about consumer choice as a standard of antitrust and competition law. Let me describe our recent experience in the U.S. with reference to the cases that the Federal Trade Commission has brought.

A.

For example, in my view, price has never been the be-all and end-all of U.S. competition theory, no matter how much the Chicago School would like to treat it as such. As far back as *Indiana Federation of Dentists*,[35] the Supreme Court said that a reduction in output was an example of an anticompetitive effect that would "obviate the need for an inquiry into market power."[36] In other words, one way to understand consumer choice may be to view it as a strand of consumer welfare that is promoted whenever we enforce the antitrust laws against unreasonable restraints on output.

For me, then, the issue has always has been to determine the ways in which output may be reduced. One of those ways is to reduce the number of

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[35] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986).

[36] *Id.* at 460–61.

rivals in a marketplace. That is why I have suggested that the homily that the U.S. antitrust laws protect competition, not competitors,[37] is too simplistic. As I pointed out in my *Intel* concurrence, sometimes the elimination of competitors is one way to shrink competition; the best example of that is where the relevant market is very highly concentrated,[38] but it may not be the only example.[39]

Specifically, in the Commission's *Intel* case I expressed the concern

competition too.[40] Furthermore, even if the challenged course of conduct does not result in higher prices, antitrust law—and in particular, Section 5 of the Federal Trade Commission Act—still has application because a price increase is not the only cognizable form of consumer injury, even thou1(ly E4,it may b)61.1e

their rivals.[44] But whereas the EC might be concerned more broadly with any distortions of competition in the internal market, the U.S. agencies are probably going to be focused on agreement or conduct that is likely to eliminate or foreclose a rival from the market.[45] So there still might not be total convergence, even under a consumer choice standard.

B.

Another way to expand consumer choice may be to eliminate rules of per se illegality that basically leave consumers with only one choice, as our Supreme Court did in *Leegin* by overturning *Dr. Miles*.[46] By getting rid of *Dr. Miles*, the Court not only let consumers buy the lowest cost product, but also gave them the choice of doing that, or paying more and obtaining frills such as pre- or after-sale services. For example, some consumers may prefer, when shopping for a product like a wedding dress or a set of golf clubs, to pay more to have point-of-sale services that will custom-fit the product for each customer.[47] Other consumers, however, may not need or care for the point-of-

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[44] *See supra* notes 13–15 and accompanying text.

[45] *See* Article 82 Guidance, *supra*

sale services, and choose instead to shop for dresses or clubs at discount retailers that do not offer such services or fancy showroom displays.

In the *Nine West* case, the Commission agreed in light of *Leegin* to reexamine its 2000 consent decree with Nine West Group that had enforced a ban on the use of RPM.[48] We granted Nine West's petition to reopen and modify the consent order based on changed conditions of law in respect to RPM agreements after *Leegin*.[49] We concluded that Nine West should be permitted to engage in RPM agreements because it lacked market power and was itself the impetus behind the use of RPM.[50] Specifically, Nine West asserted that it wanted to use RPM agreements "to increase the services

offered by RPM 12 280.98 orced a R

presumed to be unlawful under Article 101, first paragraph.[53] The Guidelines consequently place the onus on respondents to plead and prove an efficiency defense under Article 101, third paragraph[54] (that is, demonstrating that the challenged restraint "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit").[55] That approach strikes me as limiting consumer choice because it may deter some businesses from experimenting with RPM, out of a concern that they will not be able to prove its beneficial effects to the EC without a track record of its use.

More generally, the treatment of vertical restraints may be one arena in which the U.S. and the EU will continue to see things differently, even from the standpoint of consumer choice. Ever since the 1977 *Sylvania* decision,[56]

methods are more efficient or more valuable to consumers, and we have tended not to impose our own judgments—through enforcement decisions—about which methods should be preferred over others. By contrast, the EC, with its concern for creating and preserving a Single Market, may not share the same view.

C.

A third example of expanding consumer choice that we have seen in the U.S. concerns situations in which a trade or profession seeks to prevent consumers from getting access to a lower-cost alternative. Two recent Commission decisions illustrate this fact pattern.

The first decision, *Realcomp II Limited*, involved the so-called multiple listing service (MLS), which has come to be an integral element of the U.S. real estate industry relating to the sale of homes.[57] The MLS is a closed database system that contains detailed information about the homes for sale in a given local, residential real estate market, including the number and types of rooms for each property, its square footage, the identity of the listing broker for that property and the services being provided by that broker, and what the compensation would be for any broker who provides a successful buyer.[58] The full content of the database is accessible only to real estate brokers who are members of the MLS but limited content is made available to

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[57] Realcomp II, Ltd., No. 9320, 2009 FTC LEXIS 250 (F.T.C. Oct. 30, 2009), *petition for*

members of the public through “data feeds” sent to publicly accessible websites such as Realtor.com.[59]

In the U.S., the so-called traditional brokerage model for selling homes involves the seller of a home paying a six-percent commission to his or her broker, who in exchange provides a menu of services to the seller to promote the sale of his or her home. The seller’s broker, however, generally agrees to split the commission with any broker who provides a successful buyer. Some brokers, however, have departed from this traditional model and chosen to discount their fees (for example, a lower percentage commission or even a flat fee), in order to attract home sellers who do not want the full menu of brokerage services.[60]

The Commission’s case concerned Realcomp’s alleged adoption of policies that (1) prohibited discount broker listings from being fed from Realcomp’s MLS to public websites, and (2) limited the exposure of these listings on the closed MLS database.[61] The Commission found that Realcomp’s policies violated the rule of reason by “narrowing consumer choice” or “hindering the competitive process” engendered by the discount brokerage option.[62] We noted that those policies, to be successful, did not have to drive

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[59] *Id.* at *5. As the Commission opinion explains, the type of listing agreement used in the traditional brokerage model is referred to as an “exclusive right to sell” (ERTS) agreement. *Id.* at *12–13.

[60] *Id.* at *6. As the Commission opinion explains, a type of listing agreement that reflects the discount brokerage option is known as an “exclusive agency” (ERTS *Id.*

discount brokers out of the market entirely; rather, they only had to detect and punish enough discounters to bring them back to the traditional brokerage model with its higher fees.[63]

Realcomp petitioned the United States Court of Appeals for the Sixth Circuit to review our decision for error. The Sixth Circuit denied the petition, agreeing with our findings that Realcomp's policies harmed competition, *inter alia*, by severely restricting consumers' access to discount brokerage listings, which were not available on the most popular, public websites.[64] The court of appeals also agreed with us that it was not necessary to show price effects in a case where "Realcomp does not regulate rates of commission, offers of compensation, or other price terms"; instead, it was sufficient to "examine the effect of Realcomp's restrictions on consumer choice, specifically, the reduction in competitive brokerage options available to home sellers."[65] In other words, the harm to competition flowing from Realcomp's policies could be measured as a reduction in output, couched in terms of "the share of [discount brokerage] listings in the Realcomp MLS, the exposure of these listings to consumers, and the relationship of these outcomes to the Realcomp website policy."[66]

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[63] *Id.* at *111 n.43.

[64] Realcomp II, Ltd. v. FTC, 635 F.3d 815, 829 (6th Cir.), *cert. denied*, 132 S. Ct. 400 (2011).

[65] *Id.*

[66] *Id.*

The second Commission decision, *North Carolina Board of Dental Examiners*, involved the provision of teeth whitening services to the public.[67] In that case, the North Carolina Board of Dental Examiners sought to prevent non-dentists from offering teeth whitening services at locations such as mall kiosks, spas, retail stores, and salons, for a fraction of the price charged by dentists and often with greater convenience.[68] Threatened by the new competition, some dentists complained to the State Board under the guise that non-dentists failed to mention to consumers any public health and safety concerns associated with thei

available at dentist offices unless they offered walk-in service.[71] We rejected the State Board's health-and-safety rationale for excluding non-dentists, consistent with the holdings of our Supreme Court in *Indiana Federation of Dentists*[72] and *National Society of Professional Engineers*.[73]

Realcomp and *North Carolina Dental* can be distinguished from *Intel*, discussed in Section II.A *supra*, as attempts by an incumbent firm, or group of firms, to hinder or even quash nascent, albeit unproven, competition.[74] Put another way, expanding consumer choice is not just about ensuring that rivals who are already offering consumers an alternative in the market do not become the target of exclusionary conduct, but also about ensuring that new entrants have a fair chance to present their alternatives to consumers. In the latter situation, U.S. antitrust case law has relaxed the quantum of proof of anticompetitive effects because those effects may be difficult to quantify and, in any event, small in magnitude.

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[71] *Id.* at *89–90.

[72] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 463 (1986) (rejecting the argument "that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices").

[73] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1977) (holding that "petitioner's attempt to [justify its restraint under the Rule of Reason] on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act"). The EC has taken basically the same approach. *See* Article 82 Guidance, *supra* note 29, at 12, ¶ 29 ("It is not the task of a dominant undertaking to take steps on its own initiative to exclude products which it regards, rightly or wrongly, as dangerous or inferior to its own product.") (footnote omitted).

[74] *See N.C. Dental*, 2011 FTC LEXIS 290, at *89 (citing United States v. Microsoft Corp.,

III.

I have now described three recent examples from the Commission's enforcement work in which we have viewed the reduction of consumer choice as a type of harm to competition. If we are truly to expand consumer choice, however, any remedy that we fashion as antitrust enforcers should take into account how consumers actually make choices. This means that we should not ignore the recent contributions of behavioral economics (BE) to understanding how consumer decisions actually get made. They may account for the "givens" concerning consumer behavior in the European case law that were described earlier (especially since BE development in Europe is light years ahead of BE in the U.S. today). Let me provide three examples from the literature.

A.

My first example from the BE literature has been referred to as "choice overload" or "hyperchoice."[75] This concept relates to the fact that consumers are able to diconomi cept relate4 TJthe fact that c[(developme5ew[(Mv)cons2[(li)]TJ-13.onsum

Laureate Daniel Kahneman calls "cognitive strain," which is our minds' way of telling us that the decision we are being asked to make is requiring extra effort from our processing faculties.[76] For example, the choices presented may involve too many variables to compare and contrast, as in the case of products that have different options, add-ons, and accessories. Consumers may well throw up their hands and simply pick the product that is the best known or the most popular.

In my enforcement examples, I do not think we were looking at a potential problem of choice overload.

whether that program will be just as compatible with the operating system and will perform just as well. A consumer may not want to take the risk.

In this regard, the EU's acceptance of a browser choice remedy from Microsoft in December 2009 provides fodder for discussion.[81] The browser choice screen,[82] which places Microsoft's Internet Explorer alongside eleven other, competing browsers—including Google's Chrome, Apple's Safari, Mozilla's Firefox, and Opera, is intended to give PC users "an effective and unbiased choice between Internet Explorer and competing web browsers."[83]

horizontal menu with eleven other, competing browsers,[85] I wonder whether it effectively addresses the default bias that arises from the fact that Internet Explorer has still been pre-installed as the default browser. Will consumers take the time to evaluate all of the competing browsers and make an intelligent switch?[86] Or might it be more effective from the standpoint of competition—as the commitments also provide—for original equipment manufacturers (OEMs) to pre-install a different browser on their products as the default option?[87]

The power of default bias cannot be underestimated, particularly if it is implemented by a firm with a dominant or near-dominant share of the relevant market. Just last week, Microsoft announced that version 10 of its Internet Explorer, which will launch as part of Windows 8, would feature the option of sending a "Do Not Track" signal to websites as the default setting.[88]

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[85] This refers to the tendency of consumers to choose the product that has been placed first on the list. Bennett et al., *supra* note 75, at 112 n.4.

[86] With twelve browsers on the menu, one has to wonder whether there might also be a choice overload problem. Granted, European consumers are a more diverse group than U.S. consumers, which explains why it was necessary to select and feature twelve of the most popular browsers.

[87] Press Release, *supra* note 81 ("The commitments also provide that computer manufacturers will be able to install competing web browsers, set those as default and turn Internet Explorer off."). *See also* Press Release, European Commission, Antitrust: Commission Welcomes Microsoft's Roll-Out of Web Browser Choice (2 Mar. 2010), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/216 ("In compliance with the December commitments, computer manufacturers are now able to install competing browsers on Windows PCs instead of, or in addition to, Internet Explorer. Microsoft further committed not to retaliate against PC manufacturers who pre-install a non-Microsoft web browser on the PCs they ship and make it the default web browser.").

[88] *See* Sue Glueck, *More Privacy by Default: Do Not Track in Internet Explorer 10*, MICROSOFT.EU (June 1, 2012), http://www.microsoft.eu/digital-policy/posts/more-privacy-by-default-do-not-track-in-internet-explorer-10.aspx; Dean Hatchamovitch, *Windows Release Preview: The Sixth IE10 Platform Preview*, MSDN BLOG (May 31, 2012, 3:57 PM),

This announcement has angered members of the advertising industry, who feel that Microsoft's unilateral decision "may ultimately narrow the scope of consumer choices, undercut thriving business models, and reduce the availability and diversity of the Internet products and services that millions of American consumers currently enjoy at no charge."[89] Microsoft has responded by asserting that its so-called "privacy-by-default state for online behavioral advertising is the right approach" because consumers will be "empowered to make an informed choice[.]"[90] In my view, at the heart of this brewing controversy is the phenomenon of default bias—will consumers make an informed choice and change the setting on their browsers to reflect their actual preferences for more personalized content, as Microsoft claims, or will they leave their browsers on the default "Do Not Track" setting?

Stay tuned as this saga unfolds.

C.

A third and final example from the BE literature has been referred to as "optimism bias."[91] This term describes the tendency of consumers to be overly

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http://blogs.msdn.com/b/ie/archive/2012/05/31/windows-release-preview-the-sixth-ie10-platform-preview.aspx.

[89] Brendan Sasso, *Advertisers Fume After Microsoft Makes "Do No Track" the Default in Internet Explorer*, HILLICON VALLEY (June 1, 2012, 12:15 PM), http://thehill.com/blogs/hillicon-valley/technology/230469-advertisers-fume-as-internet-explorer-becomes-do-not-track-by-default (quoting Stu Ingis, counsel for the Digital Advertising Alliance).

[90] Brendon Lynch, *Advancing Consumer Trust and Privacy: Internet Explorer in Windows 8*, MICROSOFT ON THE ISSUES (May 31, 2012, 4:00 PM), http://blogs.technet.com/b/microsoft_on_the_issues/archive/2012/05/31/advancing-consumer-trust-and-privacy-internet-explorer-in-windows-8.aspx.

[91] Bennett et al., *supra* note 75, at 112 n.5; Reeves & Stucke, *supra* note 78, at 1557.

optimistic when making various decisions for themselves, including over-estimating how much they will use a good, or underestimating how much it

with its combination of features and costs, is best suited for their needs. Such an outcome would not reflect true competition on the merits.

Like choice overload and default bias, the phenomenon of optimism bias should cause us to examine more closely how competition actually unfolds in the marketplace, even with the presence of “choice,” and whether we can structure a remedy or a set of commitments in such a way as to ensure that the options presented to a consumer are actually given fair and equal consideration. I don’t think we as enforcers ever want to nudge or steer a consumer towards a particular option. But choice is illusory, it seems to me, if consumers in fact ignore the options presented and stick with what is the most popular, the default, or what seems like the cheapest when it may in fact not be.

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Thank you for listening to my remarks. I look forward to a discussion of the points I have raised.