

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

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 advocac

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 P

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,

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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

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

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