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Office of Commissioner
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Confining Competition, Consumer-Protection and Privacy Law to Their Domains

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U.S. Federal Trade Commission

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Thank you, Mr. Durocher, for that introduction. And thank you, Chairperson Lee and the Taiwan Fair Trade Commission, for inviting me to participate in this important event. I am honored to join you all, and particularly delighted to join my distinguished panelists. Not only is this my first trip abroad as a Commissioner, this is my first ever visit to Asia. I am so happy that my first visit to Asia is to the dynamic city of Taipei.

Before I begin, I must issue the standard disclaimer. I am here today in my individual capacity to express my own views and not those of the U.S. Federal Trade Commission or any of my fellow Commissioners.

The topic of this panel is the interaction of competition and consumer-protection law. The U.S. FTC enforces the competition, consumer-protection, and privacy laws, so I confront this interaction every day. Unsurprisingly, I think there is sometimes a tendency to allow these sets of laws to drift into each other. In particular, there is an impulse to use competition law to solve problems having little to do with competition. Take our origin story as an example. When Congress created us 110 years ago, it conferred on us authority only to prohibit conduct injurious to competition.[1] Thanks to the indeterminacy of the text of the statute we enforce, however, the Commission began to push theories of competitive harm that had very little to do with "competition." Specifically, it targeted false advertising on the theory that false advertising drove sales and capital toward the false advertiser and away from rivals, thereby injuring competition.[2] But false advertising injures consumers without necessarily injuring competition, and the Commission struggled to shoehorn false advertising into competition claims. Congress responded by granting us authority to protect consumers directly, rather than merely indirectly by protecting competition.[3]

* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.
[1] Fed. Trade Comm'n Act, ch. 311, § 5, 38 Stat. 719 (1914).
[2] See , 283 U.S. 643, 644–46, 652–53 (1931).
[3] Wheeler-Lea Act of 1938, Pub. L. No. 75-447, 52 Stat. 111.

The tendency of competition law to drift makes some sense. The end goal of a good society is human flourishing. Free and fair markets contribute to that end. Competition law plays a critical role in keeping markets free. But competitive pressures do not necessarily make markets fair. Competitive markets can reward unfair and unscrupulous behavior. As was the case early on at the FTC, enforcers may stretch competition law to regulate unfair behavior that isn't necessarily anticompetitive. Some other body of law must address those concerns. And that is where consumer-protection and privacy laws step in.

I think it is important that competition law resist this drift—mission creep, as it's called in other contexts. Competition laws should address competition problems, and competition enforcers should enforce those laws. Other important social policies should be left to other bodies of law that better balance the tradeoffs and dueling interests—like consumer-protection and privacy laws—rather than bending our competition laws to embrace concerns outside of the domain of traditional competition objectives.

The pressure to use competition law to achieve non-competition objectives is high right now. In the United States, prominent antitrust enforcers and academics have urged the use of competition laws to promote, for example, racial equity and labor organization. These are not traditional objectives of competition law. They are the objectives of different bodies of law that reflect a careful balancing of competing interests to promote important social policies wholly apart from market competition—indeed, sometimes inconsistently with it.

In the United States, some have urged competition enforcers to implement non-legislative measures to promote sustainability and environmental policies. I know this was the topic of the previous panel, but I think there is an important point to be made about the interaction of competition law and other laws. Obviously, the deliberate conservation of our natural environment is a laudable objective and a necessary ingredient for human flourishing. But conservation is not a traditional end of competition law. In the United States, for example, we have reams of state and federal laws aimed at promoting conservation and reducing carbon emissions.[4] Competition law, by contrast, is agnostic about conservation as an objective. Market competition may in some cases promote conservation, especially when consumers demand that firms behave sustainably. But competition does not promote conservation . Competition law should promote market competition alone. We should leave intentional conservation and sustainability to the bodies of law and agencies specially designed to pursue those objectives.

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[4] See, e.g., Clean Air Act, 42 U.S.C.§7401, et seq.; Clean Water Act, 33 U.S.C. §1251, et seq.; Endangered Species Act, 16 U.S.C. §1531 et seq.; National Environmental Policy A

Consider one example from my country. A recent report from the U.S. Congress revealed that some asset-management firms may have been colluding to reduce output in energy markets and drive up the price of fossil fuels to achieve carbon-emissions goals set by the colluding firms.[5] There are not many bright-line rules in competition law, but the prohibition on horizontal agreements between competitors to drive down output or drive up prices is one of them.[6]

I am concerned about competition-law enforcers creating exceptions for horizontal conduct with a sustainability goal for two reasons. First is the issue of competence. Competition enforcers are good at promoting competition, and at sniffing out anticompetitive behavior and conditions. But creating enforcement exceptions for putatively pro-conservation, anti-competitive conduct would require weighing the incommensurate values of competitive injury against conservation benefit. I do not think competition enforcers would be particularly well suited at this complicated form of balancing. This is too big a question, and involves too many dimensions, to leave it to bureaucrats. Second, I fear that competitors will not limit their collusion to environmental issues. Adam Smith—rarely invoked in defense of robust antitrust enforcement—famously warned that "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[7] Exemptions for environmental collusion may lead to collusion on other topics, and the exemption for the former will make the prohibition against the latter more difficult to enforce.

The principle I'm advocating for is not limited to environmental issues. I am arguing more broadly about the importance of confining competition law to its traditional domain and relying on other laws to pursue other values we care about.

Consumer-protection and privacy law is a great example of a body of law that vindicates important social policies that competition law cannot. That is particularly true for one of the most pressing questions we confront today—what to do about data privacy. Try as some might, we cannot collapse privacy into competition law. Competition law will not get us the privacy standards we seek, nor is it intended to.

Of course, we hope that market competition by itself creates a sufficient incentive for companies to treat consumers well. But that is not always the case.

Sometimes, there simply is not enough competition. Some markets are naturally concentrated. Other markets may have become concentrated thanks to enforcement failures. With

[5] Interim Staff Report of the Committee on the Judiciary, U.S. House of Representatives, Climate Control: Exposing The Decarbonization Collusion in Environmental, Social, and Governance (ESG) Investing (June 11, 2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-06-11%20Climate%20Control%20-%20Exposing%20the%20Decarbonization%20Collusion%20in%20Environmental%2C%20Social%2C%20and%20Governance%20(ESG)%20Investing.pdf.

[6] See , 467 U.S. 752, 768 (1984) ("Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused.").

[7] Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, Book 1, chapter 10 (1776).

low competitive pressure, companies in these markets will have lower dependence on consumer goodwill and greater incentive to profiteer from harmful conduct that consumers cannot avoid. A concentrated market undermines incentives to deal honestly with consumers. And U.S. regulators cannot break up a company merely because a market is concentrated.

Even with vibrant competition, unfair business practices can still proliferate in a market. There are some harmful practices consumers cannot avoid, especially in a modern economy where consumers must regularly do business with far-away strangers whose reputations they cannot