

Competition Law and Consumer Protection

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I address here the thesis: The debate is ending about whether competition law and consumer protection regulation should be integrated. The question is how integration should be achieved. According to Commissioner Kovacic of the U.S. Federal Trade Commission, “consumer protection laws are important complements to competition policy.”¹

Competition law is traditionally conceived as regulation of the marketplace to ensure private conduct does not suppress free trade and competition. It has as its goal the preservation of competition. Competition serves to optimize consumers’ interests. Consumer protection regulation denotes a body of law designed to protect a consumer’s interests at the level of the individual transaction. The two fields share the same ultimate goal. Their approaches to achieving that goal differ. That difference in approaches may provide grounds to quibble with the thesis. It is possible that integration of a scheme designed to regulate markets nation- or world-wide with a scheme designed to regulate atomistic transactions is neither realistic nor desirable. This issue paper explores that question as well.

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¹ William E. Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage*, 25 J. L. & Pol’y 101, 114 (2007).

The integration of competition law and consumer protection has both substantive and systemic components.² The substantive question is whether pursuing the end of consumer welfare optimization through market regulation is consistent with pursuing the same end through regulating transactions. The systemic question is whether an agency constituted to advance competition policy can also serve the purpose of protecting individual consumers.

I address the following doctrinal and theoretical innovations: (1) the common use of deception rationales in consumer protection and competition law enforcement; (2) the application of behavioral economics in both consumer protection and competition law enforcement; (3) market manipulation as a specific example of a hybrid competition/consumer protection theory; and (4) monopoly exploitation as a specific example of a hybrid competition/consumer protection theory. I then raise (5) the topic of enforcement systems, including whether an agency created for competition law enforcement is appropriately situated to engage in consumer protection work and whether private actions are better used in consumer protection than in competition law.

Consumer harm in competition law may differ from consumer harm in the field of consumer protection. In the consumer protection field, harm is comparatively easy to define. It is a failure in the origination, the substance, or the remedy of a consumer transaction, which has the effect of undermining the

² See William E. Kovacic, *Introduction, in* The Federal Trade Commission at 100: Into our 2nd Century 8 (Jan. 2009) (“successful public policy outcomes are the product of good physics and good engineering”, defining “physics” of competition and consumer protection to be doctrinal and policy questions, and “engineering” to be institutional questions).

consumer's optimizing of his or her own welfare. Consumer law targets the failings in individual consumer transactions to grant individual consumers remedies. In that way it fills gaps that market forces leave unfilled.

Defining consumer harm is difficult in competition law. The definition of “consumer antitrust” remains under-theorized – a remarkable reality, given the frequency with which consumer welfare is invoked to justify a particular decision or policy prescription.³ It is often said that competition law should be primarily concerned with consumer welfare. But that dictum is more fully understood to mean competition law seeks to prevent harm to competition, and consumer welfare will be thereby maximized.⁴ Such an approach has the tendency to undermine any direct intervention on behalf of individual consumers. If an individual transaction produces a sub-optimal result, competition law assumes the marketplace will supply the resolution. The incapable or shady merchant will be replaced by one who serves consumers' wishes and does so fairly. Across the mass of consumers, then, welfare may be optimized. The handful left unsatisfied before the loser exited the market are too few to bring down the average. Those few do not reflect “harm to competition.”

1. *The Common Use of Deception Theories*

³ Thoughtful recent work of Professor Lande, Professor Kirkwood and Neil Averitt makes efforts to remedy this limitation. See John B. Kirkwood & Robert Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 Notre Dame L. Rev. 181 (2008); Neil W. Averitt & Robert Lande, *Using the Consumer Choice Approach to Antitrust Law*, 74 Antitrust L.J. 175 (2005).

⁴ See Frank H. Easterbrook, *When is it Worthwhile to use Courts to Search for Exclusionary Conduct?*, 2003 Colum. Bus. L. Rev. 345, 347.

Some have articulated theories of competition law enforcement turning on deceptive conduct. Professor Stucke’s work in dominant firm deception is a recent example. Deception is the quintessential consumer harm.⁵ Deception operates at the origination phase of a consumer transaction. It limits consumers’ abilities fully and fairly to negotiate the terms of the transaction. Deception thus strikes at the foundation of the freedom of contract and welfare optimization through free choice. Harm exists even where the transaction is otherwise “fair” to the consumer.

It is not difficult to see how, in theory, deception can harm the marketplace as well as the individual consumer. Market forces operate on the basis of consumers’ revealed preferences. Where consumer decisions are made on the basis of material misinformation, consumer contracting decisions do not reveal consumer preferences in any real sense. Nonetheless, recent mainstream antitrust thinking in the United States has tended to assume deception cannot have real market effects.⁶ It appears that the EC shares this general view in its enforcement of Article 82 of the EC Treaty. In the September 2, 2009, Guidance paper on enforcement priorities, deception by a dominant firm was not discussed as a specific form of abusive conduct.⁷ The Canadian Competition Bureau’s draft updated enforcement guidelines for abuse of dominance, interpreting Sections 78 and 79 of

⁵ Cf. Michael M. Greenfield, *Consumer Transactions* 1 (5th ed. 2009) (describing early consumer law as a reaction to failings in a system based on freedom of contract and caveat emptor).

⁶ See IIB Hovenkamp, *Antitrust Law*, ¶ 782d (2006) (deceptive disparagement of a rival has a *de minimis* competitive impact).

⁷ Communication from the Commission, *Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* 13-26 (Sept. 2, 2009). However, the Guidance paper does not purport to address all the circumstances in which Article 82 may be applied. See *id.* at 5 (noting that exploitation of monopoly power, “for example charging excessively high prices,” may infringe Article 82, but is not discussed in the Guidance paper).

the Competition Act, likewise fail to mention deception as impermissible conduct.⁸ However, “misleading advertising” is a violation of Canada’s Competition Act punishable by up to \$15 million fines, suggesting that deception theories have some validity in Canada.⁹

According to Professor Stucke, circumstances may exist in which deception also is competitive harm.¹⁰ He argues that profit-maximizing firms would only engage in deception if the expected benefits, in the form of monopoly profits, outweighed the expected costs, which include the costs of the deceitful advertising, the criminal and civil liability that may attend, and the “potential loss of sales, goodwill, and competitive advantage if the deceit is uncovered”.¹¹ He proposes that a prima facie case of a violation of Section Two of the Sherman Act should be established by proof that a monopolist engaged in deceitful conduct which is reasonably capable of creating or maintaining monopoly power.¹²

2. *Behavioral Economics*

⁸ See Draft for Public Consultation, Updated Enforcement Guidelines, The Abuse of Dominance Provisions (Sections 78 and 79 of the *Competition Act*) i (Jan. 2009) (Executive Summary) (available at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf>).

⁹ See Yves Beriault et al., *Government Enacts Significant Changes to Canada’s Competition Laws*, Sept. 17, 2009 (available at <http://www.mondaq.com/article.asp?articleid=85924>).

¹⁰ See Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm’s Deception?*, University of Tennessee College of Law Research Paper No. 57 (2009) (available at ssrn.com/abstract=1397728).

¹¹ Stucke, *supra* n.10, at 13. In support of Stucke’s arguments, the concerns of loss of sales, goodwill and competitive advantage seem small in comparison to the advantages to be gained from fraud and deceit. Importantly, the benefit from deceit is borne entirely by the single deceitful actor. The harm is spread across the entire industry. Cf. Kovacic, *Competition Policy*, *supra* n.1, at 114-15 (“False advertising and deceptive marketing practices can damage the capacity of honest merchants to attract consumers . . .”).

¹² Stucke, *supra* n.10, at 42.

Behavioral economics has a natural place in consumer protection regulation. According to Professor Greenfield, “behavioral economics teaches that consumers are not necessarily rational actors and that sellers may structure transactions in such a way as to take advantage of this lack of rationality.”¹³ The Bureau of Economics at the U.S. Federal Trade Commission has recognized this reality, holding in 2007 a conference on behavioral economics and consumer policy.¹⁴ At that conference, papers demonstrating consumer irrationalities, and the abilities of merchants to exploit those irrationalities, were presented and critiqued.¹⁵ The agency currently is undertaking “two exploratory studies on consumer susceptibility to fraudulent and deceptive marketing.”¹⁶ The studies will concentrate on “several decision-making biases . . . that can cause inaccurate assessments of the risks, costs, and benefits of various choices.”¹⁷ As of now, however, how exactly to incorporate behavioralist principles into a coherent enforcement regime remains under-studied. Although the Federal Trade Commission has begun to study the theories, it has not so far articulated an approach to consumer protection that protects consumers from their own irrational behavior.¹⁸

¹³ Greenfield, *supra* n.5, at 1.

¹⁴ See <http://www.ftc.gov/be/consumerbehavior/index.shtml>.

¹⁵ See, e.g., Dean Karlan in Session B: Information, Persuasion, and Deception: Marketing Techniques and their Impact on Consumer Choice, Tr. 1-17. Professor Karlan presented a paper demonstrating that non-substantive marketing practices, such as the inclusion of a photograph of an attractive woman in an unsolicited offering of consumer loan products, had enormous impacts on the prices consumers were willing to pay for the products. See *id.*, Tr. at 13-14.

¹⁶ Fed. Reg., Vol. 74, No. 111, at 27794 (June 11, 2009).

¹⁷ *Id.* at 27795; see also Fed. Reg., Vol. 74, No. 111, at 27796, 27797 (June 11, 2009).

¹⁸ The FTC’s consumer education efforts serve this purpose in part. See <http://www.ftc.gov/bcp/consumer/shtm>.

Behavioralist theories are slow to catch on in antitrust analysis. Neither of the U.S. agencies has incorporated behavioralism into their enforcement paradigm.¹⁹ Professor Stucke is one of few who has analyzed the role of behavioral economics in competition policy. According to Stucke, assumptions of rational conduct by firms do not hold across the range of behavior by firms. “It appears anecdotally that corporate behavior is (or is not) occurring that is not readily explainable under antitrust’s rational choice theories.”²⁰ This supply-side behavioral question has the potential to undermine decisions like that of the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*,²¹ which relied on assumptions of rational conduct by firms to conclude that failing to enter into competition after the deregulation of the U.S. telephone markets was most likely based on unilateral decisions rather than conspiracy. In *Money, is that What I Want?*, Stucke questions

¹⁹ In May of this year, in response to a question by this author, Assistant Attorney General Christine Varney punted the question whether behavioralism might play a role in a retooled enforcement methodology. See Christine A. Varney, Question-and-Answer following “Vigorous Antitrust Enforcement in this Challenging Era,” Remarks before the U.S. Chamber of Commerce, May 12, 2009 (remarks available at <http://www.usdoj.gov/atr/public/speeches/245777.htm>). The following day Deputy Assistant Attorney General Carl Shapiro, the agency’s chief economist, affirmatively disavowed behavioral economics as an important investigation and enforcement tool. See Carl Shapiro, *Competition Policy in Distressed Industries*, Remarks at the ABA Antitrust Symposium: Competition as Public Policy, May 13, 2009 (available at <http://www.usdoj.gov/atr/public/speeches/245857.htm>). FTC Commissioner J. Thomas Rosch is more receptive to behavioralist theories, as his remarks and one dissenting opinion suggest. See J. Thomas Rosch, *Antitrust Law Enforcement: What to do About the Current Economics Cacophony?*, Remarks at the Bates White Antitrust Conference 2 (June 1, 2009); cf. *FTC v. Ovation Pharm., Inc.*, FTC File No. 810156 (Concurring Statement of Commissioner Rosch) (arguing that removal of reputational constraints that previously prevented the exercise of monopoly power might implicate Clayton Act Section 7).

²⁰ Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 39 *Loyola U. Chi. L.J.* 513, 517 (2007).

²¹ 550 U.S. 544 (2007).

the assumptions of rational choice on the part of consumers.²² He stops short of prescribing a theory of competitive harm based on behavioral exploitation.

If such a theory were proposed, it might approximate the theory of competitive harm through deception. By exploiting known irrationalities in consumer decision-making, a monopolist can attain, or maintain, monopoly power, just as it does through deceptive conduct. The “behavioral exploitation” theory suffers the same difficulties as does the deception theory. It is difficult to demonstrate the competitive harm, rather than harm to one consumer, flowing from a course of behavioral exploitation. But the same rationale supporting deception as a competitive harm should apply to behavioral exploitation, perhaps even with more force. The market impacts of falsely revealed preferences must produce allocative inefficiencies. Unlike deception, behavioral exploitation is difficult to uncover, and therefore may produce longer-lasting consumer harm.

3. *Market Manipulation*

One recent example of agency law-making in the United States is worth studying as an example of combined competition law and consumer protection theories. On November 4, 2009, a FTC rule dealing with market manipulation in the petroleum industry will become effective. Promulgated under the authority of

²² Maurice E. Stucke, *Money, Is that What I Want? Competition Policy & the Role of Behavioral Economics*, University of Tennessee Legal Studies Research Paper No. 75, available at <http://ssrn.com/abstract=1419751> (article that will be published in Volume 50 of the Santa Clara Law Review (2010)).

the Energy Independence and Security Act of 2007, the rule “prohibits fraudulent or deceptive conduct that could harm wholesale petroleum markets.”²³

Market manipulation as a theory of competitive harm is sufficiently unique in the U.S. system that this approach required the first antitrust rulemaking in U.S. history. The description of the rule and its purposes reads much more like classic consumer protection doctrine. The FTC is concerned with “fraud,” “deceit,” and “omissions of material information.”²⁴ Unlike classic consumer protection doctrine, however, the market manipulation rule is concerned only with harms in the wholesale marketplace. Concerns for harm at wholesale rather than retail are reminiscent of theories of competitive, not consumer, harm.²⁵

4. *Monopoly Exploitation*

The U.S. system has traditionally viewed abuse of properly acquired monopoly power as not presenting an antitrust concern, although it may implicate consumer protection issues if it violates a particular prohibition.²⁶ That view appears to be shared by the Canadian Competition Bureau. In the January 2009 Draft Abuse of Dominance Updates, the Competition Bureau notes that abuse of dominance is a concern where the abuse “has had, is having, or is likely to have the effect of substantially preventing or lessening competition [H]igh prices do not

²³ FTC Press Release, “New FTC Rule Prohibits Petroleum Market Manipulation,” Aug. 6, 2009 (available at <http://www.ftc.gov/opa/2009/08/mmr.shtm>). The rule is available at http://www.ftc.gov/os/2009/08/P082900mmr_finalrule.pdf.

²⁴ *Id.*

²⁵ *Cf. Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (indirect purchasers not entitled to sue under U.S. antitrust laws).

²⁶ *See* Herbert Hovenkamp, *The Antitrust Enterprise* 108-09 (2005) (“Firms . . . determine their own output and set prices None of this behavior is even presumptively suspicious . . .”).

in themselves raise issues under the Act”²⁷ Charging excessively high prices is the most obvious example of such a monopoly abuse. Standard microeconomic theory proposes that charging high prices is what incentivizes new entry, so is likely to bring about the downfall of the monopolists’ position.²⁸

The EC has announced that such “directly exploitative” conduct may infringe Article 82, prompting Commission intervention “in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately assured.”²⁹ An example of this might be found in the investigation of a supplier in the German electricity market.³⁰ E.ON AG was thought to have “abused its dominant market position . . . by strategically withholding production capacity of certain power plants on the wholesale market in order to drive up the price.”³¹

The proper role of exploitative abuse enforcement in a competition law scheme is unclear. Correcting for abuses permitted by asymmetries in bargaining power favoring producers is a natural extension of contract law “overreaching” doctrines, such as duress and unconscionability, and as such may be properly the subject of a consumer protection framework. However, such abuses can be invitations to competitive entry, and correcting for those abuses may entrench the

²⁷ Draft Updates, *supra* n.7, at i (Executive Summary).

²⁸ See Frank H. Easterbrook, *Monopoly, Manipulation and the Regulation of Futures Markets*, 59 *Journal of Business* S103, S105 (1986).

²⁹ Communication from the Commission, *supra* n.7, at 5.

³⁰ European Commission, Report on Competition Policy 2008 ¶¶ 49-50, at 13 (July 23, 2009).

³¹ Although the dominant theoretical basis for antitrust enforcement in the U.S. does not cognize exploitation as grounds for a remedy, there are historical examples of similar theories succeeding. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (manipulating prices in gasoline markets by buying up distress inventory at the “fair going market price” held *per se* illegal).

power of a monopolist, rather than increase competition.³² And Commissioner Kovacic has suggested that “controls on abusive behavior by dominant enterprises” may “inevitably become mechanisms by which frail and politically buffeted competition agencies reestablish the type of state orchestration of the economy that market reforms were designed to eliminate.”³³ Of course, Commissioner Kovacic was not speaking of DG Competition, or any similarly well-established competition authorities, when making that suggestion.

5. *Enforcement Systems*

The systemic question is whether an agency constituted to advance competition policy can also serve the purpose of protecting individual consumers. It is possible consumer protection enforcement is best placed in the hands of private litigants. By contrast, some have questioned the capacity of private litigants to remedy harms felt across the marketplace, rather than in individual transactions. It is logical to question whether public enforcement of consumer protection laws, or consumer-protection-like deception, abuse of dominance, or behavioral exploitation claims under a competition framework, fails the test of comparative advantage. Such enforcement may rely on the particulars of individual consumers’ circumstances in a way that favors private enforcement over public. Likewise, public agencies may possess comparative advantages over private litigants in competition law enforcement. Public agencies charged with remedying market-wide

³² It is all the more a concern that the monopolist whose power is entrenched has proved itself to be an unlikable character.

³³ Kovacic, *Competition Policy*, *supra* n.1, at 103.

competitive harms are less likely to engage in strategic litigation favoring individual results over social welfare.³⁴

A plurality of national competition agencies are combined with their consumer protection watchdogs.³⁵ In the U.S., the Federal Trade Commission,³⁶ is so structured. The Canadian Competition Bureau and Competition Tribunal combine competition law and consumer protection enforcement mandates.³⁷ That is the chosen structure for the U.K. Office of Fair Trading.³⁸ DG Competition has created a “dedicated Consumer Liaison unit.”³⁹ If it is the case that enforcement systems compete just as to participants in the commercial marketplace, the success of the dual-responsibility agency seems apparent.

It is harder to explain why an agency with a divided mission should be preferable to one with a single purpose. Commissioner Kovacic has written: “The Commission’s capacity to meld expertise in economics, competition, and consumer protection is a conscious element of its institutional design and a major reason for its existence.”⁴⁰ But anecdotal hearsay evidence suggests that at the Federal Trade Commission, the Bureaus of Competition and Consumer Protection rarely coordinate enforcement

³⁴ See Remarks of William Page, FTC Workshop on Section 5 of the FTC Act as a Competition Statute, Tr. 99 (Oct. 17, 2008) (attributing to this author the belief that “the FTC is in a different position from the private plaintiff run amuck” who might be analogized “to the herders in the tragedy of the commons story, who damage the public interest by their single-minded pursuit of private gain”).

³⁵ See Federal Trade Commission, Competition and Consumer Protection Authorities Worldwide (available at <http://www.ftc.gov/oia/authorities.shtm>).

³⁶ See *More than Enforcement: The FTC’s Many Tools – A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773, 780-81 (2005) (Former Chairman Robert Pitofsky noting that the FTC’s twin enforcement regimes share the overriding mission of improving consumer welfare.)

³⁷ <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home>

³⁸ <http://www.offt.gov.uk/>

³⁹ European Commission, *supra* n.30, ¶ 109, at 27. See http://ec.europa.eu/competition/consumers/liaison_en.html.

⁴⁰ Kovacic, *supra* n.2, at v (Introduction).

efforts. On the other hand, efficiencies do clearly exist in consolidated management, and the Bureau of Economics serves the enforcement efforts of both legal bureaus. And the market manipulation rule (part 3, above) appears to provide an example of cooperative efforts between the competition lawyers and consumer protection lawyers at the agency.

Systems analysis must also consider the role of private enforcement. Private enforcement has been a hallmark of the U.S. antitrust system since its inception, with the powerful incentives to private suit offered by the treble damages remedy and class action device.⁴¹ Private remedies have been available in Canada since 1976.⁴² The European Commission recently clarified the standards under which private damages actions are permissible for breaches of Articles 81 and 82.⁴³ In general, the past decade has seen an increase in the availability of private damages actions worldwide. Meanwhile, since 1977 decisions by federal courts in the U.S. have severely curtailed the availability of private damages actions in antitrust,

⁴¹ See Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement*, 60 SMU L. Rev. 103, 103-04 (2007).

⁴² Competition Act § 36 (permitting private claims for harm suffered (not including punitive damages) with a two-year statute of limitations). See R. Preston McAfee et al., *Private versus Public Antitrust Enforcement: A Strategic Analysis* (2008) (available at http://papers.ssrn.com/abstract_id=775245).

⁴³ See European Commission, *supra* n.30, ¶¶ 15-17, at 5-6. The Commission has “suggest[ed]” representative actions by consumer associations or trade associations and “opt-in collective actions” as possible complements to the damages remedy.

imposing stringent standing limitations⁴⁴ and direct-purchase requirements,⁴⁵ as well as limiting the substantive causes of action.⁴⁶

In contrast with antitrust, where debates rage as to the propriety of a private action,⁴⁷ private enforcement of consumer protection laws seems entirely appropriate. In the U.S. system many consumer protection statutes provide specific incentives in the form of statutory minimum damages and attorney fees for successful plaintiffs.⁴⁸ Private consumer protection enforcement rarely involves concerns for strategic litigation by competitors.⁴⁹ The harm sought to be remedied by the legal scheme is the harm in the individual transaction, so there is a perfect alignment of interests between the consumer plaintiff and the legal scheme. Although anti-regulation zealots might contend market forces obviate the need for consumer protection regulation entirely, where it exists it is difficult to cavil with imposing a private right of action and remedy.

Concluding Thought

This issue paper is written to raise and flesh out some possible lines of discussion in service of the thesis – how should consumer law and competition law

⁴⁴ See *Brunswick Corp. v. Pueblo Bowl-o-Mat*, 429 U.S. 477 (1977).

⁴⁵ See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). By contrast, indirect purchaser suits are expressly permitted in the EU. See European Commission, White Paper on Damages actions for breach of the EC antitrust rules § 2.1, at 4 (April 2, 2008).

⁴⁶ For one of many examples, see *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (predatory pricing claims).

⁴⁷ See, e.g., McAfee et al., *supra* n.42, at 1-2 (noting strategic misuses of antitrust laws in cases such as *Utah Pie Co. v. Continental Baking*, 386 U.S. 85 (1967)). Consumer enforcement presents the differing problems of possible abusive class litigation and incentives improperly aligned with the purposes of antitrust enforcement. See Huffman, *supra* n.41, at 114; Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. Penn. J. Bus. & Emp. L. 627 (2008).

⁴⁸ See, e.g., Truth in Lending Act, 15 U.S.C. § 1640(a) (statutory damages plus attorney fees).

⁴⁹ Consider, however, the circumstance of intellectual property protection, a form of consumer protection regulation traditionally enforced by competitors rather than consumers.

be integrated. It does not answer the question. In fact, some of the discussion might be interpreted to undermine the thesis, and suggest that possibilities for integration are limited.