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Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law

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FEATURE ARTICLES

Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law

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This article is about the relationship between antitrust and consumer protection law. Its purpose is to define each area of law, to delineate the boundary between them, to show how they interact with each other, and to show how they ultimately support one another as the two components of a single overarching unity. That overarching unity is consumer choice. Antitrust and consumer protection law share a common purpose in that both are intended to facilitate the exercise of consumer sovereignty or effective consumer choice. Such consumer choice exists when two fundamental conditions are present: (1) there must be a range of consumer options made possible through competition; and (2) consumers must be able to select freely among these options.

The boundary between antitrust and consumer protection is best defined by reference to these two elements of consumer choice. The antitrust laws are intended to ensure that the marketplace remains competitive, so that a meaningful range of options is made available to consumers, unimpaired by practices such as price fixing or anticompetitive mergers.[1] The consumer protection laws are intended to ensure that consumers can select effectively from among those options with their critical faculties unimpaired by such violations as

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Both authors have practiced in the area of trade regulation law for twenty years and have made a specialty of Federal Trade Commission law. They have made a particular study of the relationship between the FTC's competition and consumer protection missions, believing that, if this relationship was better understood, it would lead to more rigorous legal principles and stronger public support for each mission. The authors have explored aspects of this thesis in a number of forums over the years, including presentations to international conferences and consultations with overseas national law-revision committees. The present article is a condensation, adaptation, and update of Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrist and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997). Portions of that article are incorporated with the permission of the American Bar Association. The opinions expressed in this article are solely the authors' own, and do not necessarily reflect the views of their colleagues, the Bureau of Competition, the Federal Trade Commission, or any individual Commissioner.

deception or the withholding of material information. Protection by both the antitrust and consumer protection laws is needed to ensure that a market economy can continue to operate effectively.

This protection is needed when "market failures" arise, which may create or permit competition or consumer protection problems. This article will demonstrate that antitrust violations (which impair the menu of options) stem from market failures in the general marketplace *external* to consumers, whereas consumer protection violations (which impair the individual's ability to select) flow from *internal* market failures that take place, in a sense, "inside the consumer's head."[2] While this formula appears on its face to be of Doric simplicity, it provides a coherent theoretical framework from which antitrust and consumer protection law may be better understood and applied.

This framework has not only theoretical interest, but also at least four significant practical consequences. First, a unified theory of antitrust and consumer protection law will assist the enforcement authorities in determining when particular conduct or transactions should be pursued on antitrust as opposed to consumer protection grounds. Many concrete aspects and effects of a litigation vary according to whether it is classified as an antitrust or a consumer protection matter. For example, only antitrust violations give rise to criminal sanctions and automatic treble damages, and only in consumer protection cases is the Federal Trade Commission ("FTC" or "Commission") required to use certain rule making and investigatory procedures. A unified theory will make clear when antitrust or consumer protection laws should be utilized. Second, the importance of marketplace options in consumer choice suggests that antitrust should devote more attention than it now does to the role of non-price competition. In certain sectors of the economy, such as high-tech or media-related industries, diversity of options may be far more important to consumers than price competition. Third, because consumer choice is important, consumer protection actions should be limited to conduct that has a reasonably clear effect on consumers' ability to select, and such actions should not be brought against conduct that is objectionable on less clearly defined moral or equitable grounds. Finally, our framework should be useful to those countries that are establishing or reorganizing trade regulation programs for the first time.

The discussion of our proposed unified theory will be divided into four principal sections. The first section introduces and defines the concept of effective consumer choice, which requires both the existence of consumer options and the ability to select among these options. The second section reviews antitrust and consumer protection case law and shows that this law is consistent with (and explicable by) an option-oriented model of consumer choice. The third section identifies and discusses the economic market failures that may tend to impede the exercise of consumer choice by restricting either the menu of options or consumers' ability to select among them. Finally, the fourth section explores the practical implications and consequences of our proposed framework. Among these consequences, the framework suggests that antitrust law should be construed somewhat more broadly than in the past, and consumer protection law somewhat more narrowly.

I. An Option-Oriented Concept of Consumer Choice

Simply put, consumer choice or consumer sovereignty is the state of affairs that prevails or should prevail in a modern free-market economy. It is the set of societal arrangements that cause that economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses. It is the state of affairs in which the consumer is truly "sovereign," in the sense of having the power to define his or her own wants and the ability to satisfy those wants at prices not greatly in excess of the costs borne by the providers of the relevant goods and services.[3] The concept of consumer sovereignty goes so far as to embody at least some implicit notions about the proper relationship between the individual and the state; it is part of the Western world's answer to the prescriptions of Marxism.

The essence of consumer sovereignty is the exercise of *choice*. By choosing some goods or some options over others, consumers satisfy their own wants and send signals to the economy. It is, therefore, critical that the exercise of consumer choice be protected.

We have already seen that effective consumer choice requires two things: options in the marketplace and the ability to select freely among them. To turn this conceptual paradigm into operational policy, at least some rough degree of quantification is required. Just how many options must be present in the market? Just how free from external influences must consumers be? In an imperfect world, of course, the answers to these questions must be standards of sufficiency rather than standards of perfection. In other words, we look for enough options and enough freedom to ensure that the choices are right (i.e., welfare-maximizing) most of the time. That approach does not prevent unsatisfactory outcomes in some individual cases, but it should ensure that unsatisfactory options are weeded out fairly quickly.

Thus, we do not simply require the maximum number of options. Antitrust law does not prevent all conduct or transactions that have the effect of reducing the number of options available to consumers. Nor does the law affirmatively require the creation of options. Rather, it prevents business conduct that artificially limits the natural range of options in the marketplace.[4] Indeed, the law permits even some artificial reductions, such as some mergers, if the benefits of the action appear to outweigh the costs. Through these means, the antitrust laws aim to preserve a sufficient, although not a perfect, array of options for consumers to choose among.

Consumer protection laws are similar in the sense that they seek to protect the ability of consumers to make rational choices among competing options but do not necessarily strive to ensure that consumers have perfect information.[5] Probably no consumer is a perfect reasoning machine, existentially free from all the extraneous influences of early upbringing, cultural values, or half-remembered advertising campaigns from years ago. What we ask of consumer protection law is therefore something relatively modest. We ask that consumers be enabled to make rational choices to the extent that they wish to concentrate on doing so. Consumer protection law ensures that buyers are protected from coercion, deception, and other influences that are difficult to evade or to guard against, but it does not protect buyers from the milder, knowable influences of things like "image" advertising, which they could set aside if they desired.

As protected by these two principles, the exercise of consumer choice should be beneficial to consumers in a number of concrete ways. It will support and lead to an efficient economic market.[6] That, in turn, will tend to produce an environment offering the lowest prices, the best product quality and variety, the highest degree of consumer surplus, optimal levels of innovation, and all the other benefits of a competitive economy.[7]

II. Case Law Embodies This Option-Oriented Approach to Consumer Choice

Antitrust and consumer protection case law generally follows the pattern that a consumer-choice model would suggest. The antitrust case law can be explained in terms of protecting the supply of options in the market, and the consumer protection case law can be explained in terms of protecting the ability to select among the available options. The model that we are presenting thus becomes a means of explaining, interpreting, and applying a long line of legal precedents.

We demonstrate this thesis under two headings. The first discusses the law of antitrust by first identifying the main functional areas of antitrust such as collusion, mergers, and vertical restraints. It then shows that the law in each of these areas addresses a reduction in marketplace options. Under the second heading, we conduct a similar assessment of consumer protection law. We identify the basic substantive topics in this area of the law, such as deception or failure to disclose material information, and then show how these topics all address conduct that affects the ability to select among options.

For most practices that violate the antitrust or consumer protection laws, the dichotomy this article identifies will neatly separate and distinguish the two fields of antitrust and consumer protection law. Predatory pricing and price fixing, for example, overwhelmingly affect the supply of options rather than choice among them. They are, therefore, antitrust violations. Fraud and deception, on the other hand, do not directly affect the supply of options, but rather the ability to choose among them. They are therefore consumer protection violations. Most cases are relatively easy to classify in this way.[8]

A. Antitrust Violations Reduce Consumers' Options

Traditional antitrust violations — such as price fixing and related horizontal restraints, anticompetitive mergers, unreasonable vertical restraints, and predatory pricing — fit well into our model of consumer choice. Those violations can distort the supply of options by imposing restrictions on the variety of prices and products that the free market would offer. The antitrust laws have banned that restrictive conduct.

Price fixing and other illegal horizontal restraints[9] artificially restrict the array of price options the competitive market would otherwise provide.[10] Price fixing prevents consumers from choosing the best price (or best quality- or variety-adjusted price) that would otherwise have been available.[11]

Mergers are another traditional antitrust violation that has effects on the range of options available to consumers, both directly in the short term, and indirectly in the long term. An anticompetitive horizontal merger can directly eliminate significant competition by diminishing options with respect to price, product quality, or product variety. It can also have the long-run or indirect effect of making industry-wide collusion easier or more probable,[12] thus leading to the elimination of still more options that consumers might prefer.

Resale price maintenance ("RPM") and other vertical restraints can also have the effect of limiting consumer options. RPM directly restricts the price options open to consumers, limiting them to the manufacturer's preferred price.[13] Non-price restraints, such as exclusive dealing and exclusive territories, have similar effects, often significantly restricting downstream firms in the choices that they can offer to consumers.[14]

Predatory pricing similarly interferes with the array of options that a competitive market would present.[15] Predatory pricing occurs when a firm prices goods below cost in hopes of driving rivals out of the market, discouraging entry of new firms and/or extending the firm's monopoly power. Predatorily low prices are good for consumers only in the short run. In the long run,[16] such prices threaten to eliminate firms that are providing alternatives that consumers would actually prefer.

A focus on options also explains why certain practices that raise rivals' costs are undesirable.[17] The rivals' higher costs force the victims to raise their prices (or reduce their investment in product improvement and innovation), which enables the predator to raise its own prices (or reduce option-enhancing investment in research and innovation).[18] The consumers thus lose the option of purchasing better or more competitively priced products.

Depending on the specific antitrust principle involved, improper restrictions on consumer options may occur either directly as a result of firms' actions vis-à-vis their customers, or indirectly as a result of firms' actions vis-à-vis their competitors. For example, if a firm with market power over a product will sell it only when packaged with a second product, consumers' options are directly reduced and distorted. The firm's action vis-à-vis its customers may be condemned as an illegal tying arrangement. Alternatively, suppose that a firm merges with all of its competitors and then raises prices to a monopoly level. While monopoly pricing and the production of only a single brand is not illegal, the process by which the firm acquired this power to constrain options certainly might be. The firm's actions vis-à-vis its competitors may then be condemned as involving anticompetitive mergers.

In short, antitrust law can best be understood as a way of protecting the variety of consumer options in the marketplace.

B. Consumer Protection Violations Impair Consumers' Ability to Select Among Options

Consumer protection cases are similarly explicable as a means of safeguarding the ability of consumers[19] to select among the options that the market provides. Thus, for example, the FTC has found that false or misleading statements about objective product characteristics are impermissible. It has acted to prevent such misrepresentation in claims involving the materials from which a product is made,[20] the functions that it can perform,[21] or the effectiveness with which it can perform them.[22] The FTC has been emphatic about this choice-oriented approach: "The Commission does not ordinarily seek to mandate specific conduct or specific social outcomes, but rather seeks to ensure simply that markets operate freely, so that consumers can make their own decisions."[23] Misinformation on any of these basic points will, of course, tend to prevent a customer from making the most appropriate choice from among the options in the marketplace.

The importance of choice in consumer protection matters is particularly well illustrated by one special class of cases, which involve misrepresentations regarding the collateral, social, or business attributes of a firm. Some cases of this sort may involve false or misleading claims that a particular product is environmentally benign or was produced in an environmentally friendly manner.[24] Other cases involve the improper use of the "Made in U.S.A." designation. Information on these points is psychologically important to many consumers, even though it does not bear directly on operational product characteristics. For example, while some consumers regard the fact that a product was domestically manufactured as an indirect indication of product quality, many other consumers may prefer to purchase domestic products with only the patriotic goal of supporting the American economy. By determining that misrepresentations on these subjects are improper, the FTC has made it clear that the impairment of the ability to choose among options is a harm in itself, and that no more concrete economic harm needs to be shown.

The consumer protection case law thus can be understood as addressing concern over the impairment of the buyer's ability to select from among the market's options provided.[25] The centrality of this element is underscored by the FTC's Policy Statement on Deception,[26] which states that one prerequisite to liability for deception is that the alleged misrepresentation is "material," meaning that it "is likely to affect a consumer's choice of, or conduct regarding, a product."[27]

III. Market Failures Can Threaten Consumer Choice

Consumer sovereignty is the state of affairs in which consumers have an unimpaired ability to make decisions in their individual interests, and markets operate efficiently in responding to the collective effect of those decisions. These market mechanisms can fail for a variety of reasons, however, leading to an impairment of consumer choice. Some of these market failures are external to the consumer, or "outside the head," leading to an inability of the market to provide sufficient options. Other failures are internal to the consumer, or "inside the head," in the sense that they make the consumer unable to effectively select among the available options.

Antitrust and consumer protection law may be viewed, in economic terms, as intended to identify and compensate for these two types of market failures.[28] By so doing, they are again seen, this time through the lens of economics, as helping to attain the ultimate goal of consumer choice.

In the discussion that follows, we will first explain what is meant by a "market failure" generally, and then will discuss the specific market failures that are of concern to antitrust and to consumer protection.

A. Market Failures Defined

It is axiomatic that perfect competition, the perfect functioning of a competitive market, will maximize the welfare of consumers.[29] Markets that diverge significantly from perfect competition may not do so. If a market's characteristics differ dramatically from those required for perfect competition, "market failure" can result. The overall level of consumer welfare may then be far below what it otherwise would be, and wealth that Congress assigned to consumers may be "unfairly" acquired by firms with market power.

Although economists generally agree on the fundamental concept of perfect competition, there is no universally agreed upon list of factors that define perfect competition or whose absence may lead to market failure. A leading scholar of the subject, Professor Edwin Mansfield, believes that perfect competition requires four conditions: (1) product homogeneity; (2) a relatively small number of buyers and sellers; (3) mobile resources; (4) and perfect information.[30] Professor Jack Hirshleifer has considered the converse situation and found a list of three possible imperfections that can prevent a market from functioning perfectly, including imperfect information, time lags, and transaction costs.[31] Significant problems in any of these areas can cause competition to be suboptimal. Despite disputes over taxonomy,[32] a basic list of factors that can plausibly cause competition to become suboptimal is relatively noncontroversial.[33]

B. Market Failures Subdivided Into Those External and Internal to Consumers

The market failures identified in the previous section in general terms can be divided into two types. The first take place "outside the head" of the ultimate consumer of the product or service at issue and involve imperfections in the external market. These failures can lead to a reduced choice of options and to antitrust problems. The second type of market failures take place "inside the consumer's head." They involve the consumer's imperfect ability to process information and to distinguish the true from the false. These failures can lead to a reduced ability to select among options and to consumer protection problems.

A consumer is affected to different degrees by these two kinds of market failures. The model economic consumer — all- knowing, all-rational, and supremely intelligent — is not vulnerable to consumer protection violations. But even this hypothetical "perfect" consumer could be vulnerable to antitrust violations. No consumer, no matter how astute, experienced, or well-informed, can protect him- or herself against a cartel or illegally acquired monopoly. Except on rare occasions, ultimate consumers have no choice but to deal with a cartel or monopoly (or else to move to a less-desirable substitute); it generally is not cost effective for an individual consumer to build his or her own factory.

By thus subdividing market failures into those taking place "inside" and "outside" the head of ultimate consumers, we make the categories of our economic analysis most nearly congruent with the kinds of consumer choice problems that are of concern to antitrust enforcement agencies.

C. Antitrust Violations Require Market Failures External to Consumers

The market failures that permit antitrust violations all take place in the world external to the consumer. Without such market failures, as this term was broadly defined above, there could be no antitrust violations that significantly harm consumer welfare.

In a perfect, frictionless world, businesses could still meet and fix prices. This would result in a technical violation of the antitrust laws and even in criminal penalties.[34] But, the violation could not substantially harm consumer welfare because perfect information among businesses would allow some to quickly enter the price-fixed markets and compete away supracompetitive margins.

What makes antitrust injury possible in these circumstances is the presence of external market failures. Market imperfections such as search costs, faulty information, time lags, and sunk costs can enable a cartel to keep prices elevated for a significant period.

External market failures may be necessary for the existence of anticompetitively low pricing as well as for anticompetitively high prices.[35] The most straightforward form of predatory pricing — deep-pocket predation — requires that there be a flaw in the capital market, for without such a flaw the victim would be able to secure a loan and ride out the period of below-cost pricing.[36] Indeed, for every possible predation strategy, a counter-strategy could probably be devised by a sufficiently informed and astute competitor or potential victim.[37]

Other antitrust cases involve practices that take advantage of, even if they do not cause or exacerbate, market imperfections. For example, imperfect information led to the anticompetitive use of resale price maintenance in *In re Levi Strauss & Co.*[38] When jeans were a relatively new product for middle-class consumers, Levi Strauss had to use resale price maintenance to guarantee retailer margin and in effect buy shelf space.[39] During this period, consumers' imperfect information concerning this relatively new product led to the procompetitive imposition of resale price maintenance. After the product was well established, however, resale price maintenance was no longer needed, and Levi Strauss anticompetitively kept prices at too high a level.[40] Imperfect information on the part of Levi Strauss caused the company to fail to realize that it should have changed marketing strategies. It maintained a resale price maintenance strategy longer than was optimal for society, or for Levi Strauss.

Some of the market failures discussed above directly impact individuals, and some impact businesses. Regardless of who the ultimate consumers are, however, the failures in all these antitrust cases are external to such consumers.

Market imperfections such as search costs, faulty information, time lags, and sunk costs can enable a cartel to keep prices elevated for a significant period.

D. Consumer Protection Violations Require Market Failures Internal to Consumers

Similarly, consumer protection problems cannot occur absent market failures occurring "inside the head" of ultimate consumers. Hypothetical consumers who are perfectly informed, rational, and intelligent can never be subject to consumer protection abuses. Ordinary consumers, however, can have greater difficulties.

The most common internal market failures revealed by the FTC's experience fall into five categories. (1) Some consumers are subject to coercion and cannot act with free will. (2) Other consumers are members of a vulnerable group (such as children) and are not always able to make rational decisions. Still other consumers will be acting rationally and with free will, but will be vulnerable to exploitation due to any of several types of information problems: (3) information that is wrong, (4) information that is incomplete, or (5) information that is unduly hard to process. Virtually every consumer protection concern can be understood in terms of one or more of these five types of internal market failure.

The first of the above mentioned market failures involves situations in which an individual cannot exercise free will. This situation can arise most obviously when individuals have been subjected to overt coercion. Such cases are rare but they do exist. One arose when a furnace company adopted the practice of having its salesmen disassemble a homeowner's heating unit for "inspection" and then refuse to reassemble it until the homeowner agreed to buy additional parts or services.[41]

A second type of market failure involves situations in which consumers are members of vulnerable groups, and thus are susceptible to undue influence by sellers. For example, certain lottery techniques for selling candy have been found improper in part because they were aimed at "children, too young to be capable of exercising an intelligent judgment of the transaction. . . ."[42]

By far the most important type of consumer protection market failure involves consumers who are capable of rational decisions, but whose decision making abilities have been impaired by incorrect information. A manufacturer's use of false or misleading information is perhaps the greatest single threat to the free exercise of consumer choice. Therefore, both the FTC Act and other general prohibitions separately and specifically ban unfair consumer practices.[43]

A related type of "inside the head" market failure can arise if sellers withhold particularly important information, not readily available elsewhere, that consumers need in order to make informed comparisons. The FTC has issued several rules addressing such problems. These have required manufacturers to disclose the most basic functional characteristics of their products such as the R-value of insulation and the octane rating of gasoline.[44]

The fifth class of market failures can be thought of as a specialized subset of the fourth. Both Congress and the FTC seek to protect consumers against information disclosures that are in a form too difficult for consumers to process and apply. Credit reporting laws, for example, mandate disclosure that a payment of $100 per month of interest on a certain principal amount for four years really equals a 22% rate of interest. These laws make it easier for consumers of credit to engage in comparison shopping. Like the fourth category, the focus here is on giving the consumer not only accurate information, but also accurate information that is reasonably complete and useable.

All five of these categories are consistent with our consumer sovereignty model of the consumer protection laws. They all tend to address types of market failures that occur "inside the consumer's head" and tend to impede the consumer's ability to choose from among the available options.

IV. Practical Consequences of a Unified Theory

The view of the law outlined in the previous sections of the article is of more than theoretical interest. It also has a number of intensely practical implications. Four of those implications will be discussed in this section. First, a unified theory of consumer sovereignty helps ensure that the litigation in each case will follow the procedures and standards set out in the appropriate part of the statute. Second, a modified theory modestly extends the scope of antitrust law by reminding the legal community of the important role played by non-price competition. Third, it modestly limits the scope of consumer protection law by focusing attention on conduct that impairs the ability to select, rather than on conduct that is "unfair" in some broader sense. Finally, it suggests a conceptual framework to countries that are adopting or organizing fair competition laws for the first time.

A. Jurisdictional Coverage of the Antitrust and Consumer Protection Laws Can Be Clarified

Our dichotomy will make the definitions of antitrust and consumer protection law more rigorous, which in turn will assist government officials in deciding under which theory to pursue a particular problem. This determination is important for three reasons.

First, Sherman Act antitrust violations can lead to criminal penalties,[45] and virtually every antitrust violation can lead to automatic treble damages.[46] In light of these relatively heavy penalties, it only seems fair to articulate more clearly which type of actions are antitrust actions.

Second, the decision on which statute to apply has many practical consequences for the development and conduct of a case. It will affect the procedures the parties will follow, the remedies that are available, and which enforcement staff will have jurisdiction over a case. For example, the FTC has been given special procedures for use in rule making[47] and in consumer redress[48] in consumer protection cases but not for use in antitrust matters. The FTC is similarly required to use civil investigative demands ("CIDs") in most consumer protection cases but not in antitrust matters.[49] Properly assessing the type of case involved will determine which of these procedures should be used.

Third, our dichotomy can help determine whether the main substantive charge in a particular matter has been framed under the proper provision of law. This will help prosecutors ensure that a matter has been brought using the proper terms, and by the right enforcer, and thus may protect against motions to dismiss. Conversely, familiarity with these issues may help members of the defense bar to secure the dismissal of actions that have been brought under an improper legal heading.

B. Non-Price Competition Should Become a Higher Priority for Antitrust Enforcement

A second implication of this article's analysis is that the antitrust laws should focus on protecting consumer options generally, not just low price options in particular. Expressed differently, it suggests that the interpretation of the antitrust laws should be mildly expanded to take a somewhat greater account of non-price competition.

The enforcement agencies have already recognized the importance of preserving non-price options in sufficiently clear circumstances. They have certainly recognized that firms can compete on dimensions other than price. Non-price competition can be extremely important to both commercial and industrial purchasers. Such competition can take place in terms of innovation, scheduling, service, convenience, or product variety. Such factors can be especially important in particular industries.

At certain times in the past, for example, the airlines appeared to compete in large part in terms of scheduling and convenience, and members of the motion picture industry compete in terms of product innovation. Similarly, consents in several recent pharmaceutical merger cases have resolved FTC concerns that mergers might impair competition, not in current business, but rather in the innovation of future products.[50] These concerns may or may not be readily expressed in terms of price, but they definitely involve the range of choice that might become available in the marketplace and thus are most easily comprehended under a formula that focuses on the factor of choice.

Indeed, in some products, quality competition may be the most important dimension to consumers. In the market for bulletproof vests, for example, buyers certainly care much more about product reliability than about product price. For this reason, the FTC was concerned when an association of bulletproof vest manufacturers adopted a rule restricting comparative advertising. The association's rule had declared that it was unethical for any member to represent that another member's vests had failed certification testing even if the advertising claim was true. The FTC sought and accepted a consent agreement against this practice because elimination of the advertising ban would tend to foster useful quality competition.[51]

In more ordinary antitrust cases, however, where the elimination of non-price competition is not so obviously central to the violation, the enforcement agencies have sometimes tended to de-emphasize this factor. For example, the conventional antitrust analysis under Section 7 of the Clayton Act concentrates almost exclusively on the price effects of a merger, concluding that the merger is to be condemned if it is likely to lead to higher prices. Even if the merger has no significant effect on price, however, an anticompetitive merger might adversely affect consumers with respect to other forms of competition. A focus on consumer choice as a goal will make it easier for enforcement agencies to consider the merger's effects in these areas. Moreover, given that competition in these dimensions might be affected at concentration levels different from those most relevant for pure price considerations, attention to consumer choice may sometimes suggest challenges to mergers that would not otherwise be illegal.

This would represent a change of emphasis from traditional merger analysis. Although merger analysis makes *pro forma* bows toward other dimensions of competition, the analysis promptly returns to price. The *Horizontal Merger Guidelines,* for example, have a section entitled "Purpose and Underlying Policy Assumptions of the Guidelines, [52] which contains roughly a dozen references in the text to "price," the "transfer of wealth from buyers to sellers," and similar monetary concepts.[53] Only a single footnote in the guidelines suggests that merger policy includes non-monetary concerns.[54] The *National Association of Attorneys' General ("NAAG") State Merger Guidelines* reflect a similar emphasis.[55] Both the federal and NAAG Merger Guidelines therefore permit consideration of non-price elements of competition, but both are structured in such a way as not to particularly encourage use of that consideration.

Some elements of non-price competition might be captured through use of the concept of "quality-adjusted price." Again, however, neither Guideline is structured to particularly encourage that approach. Moreover, "quality-adjusted price" may be a difficult concept to apply in concrete situations where the non-price components of competition are particularly important or where they take subtle or complex forms.

Consider, for example, an industry making men's neckties. If this industry was to consolidate through merger to a non-competitive number of firms, the price might not rise. The firms might instead hold prices steady but invest less money in high-quality materials or in staying abreast of fashion.[56] In theory, one could say that the quality-adjusted price of a tie would have risen since a less-desirable product would then be offered at the same price as before.[57] This formulation is not particularly useful, however, since, in the absence of market prices for the (nonexistent) high-quality ties, antitrust enforcers cannot know the quantitative extent of the implicit price rise that has occurred. (What is the value of fashion?) Rather than trying to force the analysis into price terms for which we lack the necessary data, therefore, it will sometimes be simpler and more effective to frame the analysis directly in terms of quality, diversity, and choice.[58]

This issue must be approached with caution, however, because, where price competition still exists, it will often serve as a reasonably good proxy for non-price competition. Once a particular market is price-competitive, in other words, it may often offer self-equilibrating levels of competition in other dimensions as well. Consider, for example, a post-merger market that is price-competitive but that, as the result of a merger, no longer produces the optimum level of product variety. If consumers truly want more variety, and if the firms are truly competitive, then they will soon begin to extend their product lines by introducing a greater number of models and variants to the market.

Sometimes, however, price competition alone may provide consumers insufficient protection.[59] This problem is most likely to arise with respect to certain kinds of intellectual property, some of which can play a competitive role only in an environment of organizational independence.

The most important option of this sort may be the independent editorial programming of a communications medium. If one communications medium were to buy another of the same kind, the acquisition might not concentrate the market sufficiently to threaten price competition. Being competitive, the market might also soon produce the product menu that consumers desire in terms of types and formats of shows. But the market will have inevitably sustained a loss of editorial diversity, and this cannot be recreated through the normal mechanism of non-price competition among the surviving firms; the new products would necessarily bear the editorial stamp of their common owner. This suggests that media mergers should be carefully scrutinized for loss of non-price competition along the dimension of diversity in programming and, where that loss is sufficiently severe,[60] that they be challenged under the Clayton Act, even if there has been no showing of harm to price competition.

Suppose, for example, the country had only five book publishers, and that two of them merged. This might not lead to a loss of price competition or to a narrowing in the range of price options.[61] On the other hand, it might well lead to a quantifiable loss of editorial diversity and thus to a narrowing of the competing marketplace options expressed in terms of the types of titles offered. An antitrust suit might properly challenge this result. This suit would not seek to apply a special standard for the media that is based on First Amendment or diversity considerations.[62] Rather, it would be based on the ordinary, universal standards of Section 7, once that section has been properly construed to recognize the role of options and of non-price competition.

C. Consumer Protection Should Focus More Closely on Conduct that Impairs Choice

If our model of consumer choice suggests that antitrust law should be modestly expanded, it also suggests that the scope of consumer protection should be modestly contracted. The consumer choice model suggests that unfair consumer practices should be limited to those that have a more or less demonstrable effect on consumers' ability to exercise effective selection, and that the concept should not be extended to conduct that is thought to be "unfair" on more general, less predictable moral or equitable grounds.

In this respect, the consumer choice or consumer sovereignty model supports and ratifies a trend that has been underway for the last twenty years. At the beginning of that period, the FTC was following a construction articulated in its "Cigarette Rule," which stated that consumer unfairness was defined by reference to three broad factors: (1) "public policy;" (2) whether the conduct was "immoral, unethical, oppressive, or unscrupulous;" and (3) whether the conduct caused substantial injury to consumers.[63] Since then, the definition of consumer unfairness has progressively narrowed. In a 1980 Policy Statement, the FTC declared that it would no longer rely on the test of immoral or unethical conduct.[64] The FTC believed that this test was merely duplicative of the others and had never supplied an independent basis for action. In 1994, Congress declared that a second element in the Cigarette Rule — established public policies — could likewise no longer be used as independent grounds for finding conduct unfair. This factor would henceforth be used only in conjunction with other evidence and presumably in order to confirm a finding of consumer injury.[65] The grounds established in the Cigarette Rule have thus been narrowed to the single primary factor of injury, and an actionable injury of that sort has increasingly been defined as one that manifests itself through the mechanism of impaired consumer ability to select.[66]

Consumer protection jurisdiction can be more narrowly expressed in this way without concern that the agency will become unable to reach some significant number of meritorious cases. If conduct is truly "oppressive" or "contrary to public policy," then it will almost certainly affect consumer choice. Telemarketing worthless securities to the elderly, for example, while surely oppressive, also involves actionable elements of deception. Conversely, if some conduct cannot be characterized as harmful to choice, then there is a good chance that it is something that the government should not try to control. Consider image advertising that associates use of a particular toothpaste with youth and vitality. This association may lead to purchases that are "irrational" by objective standards, but, if consumers freely elect to place a high value on the intangible attributes of a product, that is a market decision that should be respected.

D. Countries Establishing or Reorganizing Trade Regulation Programs Can Do So in a More Beneficial Manner

Many nations currently are deciding whether to establish or reorganize trade regulation programs and, if so, which legal areas should be the subject of concern and how the different parts of these programs should relate to one another. The framework suggested here should help with this task and may also help these governments explain the programs in a relatively coherent way to their citizens.

A legislature writing on a clean slate might wish to express its trade laws specifically in choice-oriented terms.[67] A statute embodying this approach could be worded as follows:

> It is the national policy to foster an economy in which consumers can make free choices among goods and services in a competitive marketplace. Conduct that unreasonably impairs this goal is hereby declared illegal. It is specifically illegal to engage in: (1) A, B, C, and any other conduct that unreasonably limits the range of competitive options that would otherwise have been present in the market; and (2) X, Y, Z, and any other conduct that unreasonably impairs consumers' ability to select among these options.

A legislature enacting this statute would complete it by filling in the blanks for ABC and XYZ with those specific items that the country was confident it wished to ban in light of its own national experience. If the United States was using this approach, for example, it would include specific bans on such things as monopolization, mergers that may substantially lessen competition, and deception.

A statute along these lines would have several attractive features. The specific prohibitions would give the business community as much notice as the nature of the subject matter permits. At the same time, the general residual clauses, written in terms of options and the ability to select among them, would preserve the flexibility necessary to deal with changing conditions.[68] In this respect, our model statute would be similar to a combination of the Sherman Act and the FTC Act in American law.

The proposed model seems to be an improvement over the present combination in two important respects, however. First, by putting the specific and the general clauses in a single statute, it encourages the enforcers and the judiciary to employ general principles to guide the development and application of the specific prohibitions. The statute itself, in other words, would set out internal, general principles of construction that would provide a context within which the specific provisions will be interpreted in the proper manner. Second, even the general clauses would be framed in a relatively objective way. Conduct would be banned, not on grounds of "unfairness" (the approach used in the FTC Act), which can cause considerable judicial uncertainty, but because of its unreasonable effects on the exercise of consumer choice. The underlying concept of consumer choice will tend to focus the inquiry. Even though the concept of "unreasonable" effects on choice still leaves room for interpretation, this uncertainty would tend to be limited to questions of *degree* — identifying the threshold level of net effect that becomes actionable — rather than leaving the door open to broader uncertainty about what *kinds* of harm are improper.

Perhaps the greatest advantage of a choice-oriented statute is that it would help governments explain to their citizens — particularly those businesses and individuals who are relatively inexperienced at dealing with a market economy — why a system of competitive capitalism is in their best interests.

VI. Conclusion

Trade regulation law is ultimately about choice, and choice is ultimately about options — getting them, keeping them, and selecting among them. The disciplines of antitrust and consumer protection law are best defined in terms of their roles in this process. An antitrust violation may be understood as an activity that unreasonably distorts or restricts the options that otherwise would be available to consumers. A consumer protection violation may be understood as activity that unreasonably interferes with consumer selection among the options provided in the marketplace. These two fields of law, acting together, give consumers the tools they need to effectively exercise consumer sovereignty.

A number of benefits should flow from this unified conception of the trade regulation laws.[69] It should make lawyers practicing in these disciplines more alert to the possibility that a case focusing on one element of consumer choice will also raise issues involving the other element. It also suggests that economists practicing primarily in one field should gain insights from the other. For example, economists have perhaps tended to be most comfortable as a discipline with the hard, "objective" market imperfections involved in antitrust, and to be less comfortable with the more subjective and sociological kinds of "inside the head" failures that mark the typical consumer protection matter. Both types of market failures seem to be of equal importance, so both would seem equally deserving of professional study.

The final purpose of this article has been to help focus the attention of both fields on options — a shift in focus from the current administrative and judicial emphasis on price. Although price competition often is of utmost importance to consumer welfare, so too is the variety, quality, safety, service and innovation of new products. These attributes have sometimes been treated as afterthoughts when they actually should be at the forefront of debate and analysis in this important area of the law.

Endnotes

1. Not every activity that unreasonably distorts or restricts the options that otherwise would be open to consumers is an antitrust violation, however. The activity in question must also violate a specific antitrust statute. Similarly, not everything that unreasonably interferes with consumers' ability to choose among the available options is a consumer protection violation. The activity also must violate a specific consumer protection principle.

2. Not every market failure is or should be illegal. Certain market failures lead to specific activities that society has made illegal, however, including cartels and deceptive advertising.

3. Moreover, each product has a cluster of other attributes, such as quality, safety, and availability of related services. The free market will decide the mix of price, quality, and related attributes that consumers value most.

4. Some products are withdrawn from the market because not enough consumers desire to purchase them; some firms exit the market because they are not as innovative or efficient as rival firms; and some firms disappear through merger because they had not attained a minimum efficient scale. These processes reflect the ordinary workings of the marketplace. What antitrust forbids is conduct that artificially reduces the number of options directly and without the mediating agency of consumer choice.

5. The FTC has the authority to require that certain fundamental information be make available to consumers for such purposes as correcting statements that would otherwise be misleading, or correcting "pure omissions" in circumstances where doing so would deliver a net benefit to consumers. The scope of this authority is limited by several factors, however. There are practical and equitable limits on how much affirmative disclosure firms can made. *See, e.g., In re* International Harvester Co., 104 F.T.C. 949 (1984) (holding that though manufacturer's failure to disclose known safety risks in its tractors was a statutory violation, no remedial action was needed because the tractor design was no longer produced and the manufacturer's voluntary notification program provided as much relief as could be expected.)

6. Both antitrust and consumer protection statutes have the goal of enhancing economic efficiency. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 Hastings L.J. 65, *passim* and especially at 106-26 (1982). The statutes serve other economic goals as well. The primary goal of these statutes is to prevent unfair transfers of wealth from consumers to firms with market power (the antitrust statutes) or to firms unfairly acting against consumer interests (the consumer protection statutes). *See id.* at 108.

7. We should add some refinements and complexities to our basic model of consumer sovereignty. In some cases the "consumers" who need protection from misleading information are actually corporations who may be buying an industrial input for use in their own operations. *See generally* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992) (describing independent service provider's suit against producer of copy machines, which tied replacement parts to service). In other cases, the direction in which market power is exercised may be reversed, and it may be the manufacturers who need help finding a range of marketplace options. For example, a manufacturer may confront a single monopsonist, or confront a cartel of purchasers (or oligopsonists) that have agreed on a common policy to keep prices low. With

appropriate adjustments, our concept of consumer sovereignty can accommodate these different circumstances. For the sake of simplicity, however, in the discussion that follows we will normally speak in terms of the most common situation, which is that of ultimate consumers purchasing from a limited number of manufacturers.

8. Some situations, however, do not fit so neatly into our model. The pure dichotomy only deals with relatively direct effects of the practices in question. In the long run, the effects may interact in more complex ways. Market failures internal to consumers may eventually lead to market failures external to consumers, and vice-versa. Similarly, practices that affect the market's menu of options can also, in time, affect consumers' ability to choose among options, which in turn could lead to further restrictions, or distortions, in the options made available through the marketplace. These complexities must be factored into the enforcer's decisions regarding whether to prosecute and, if so, what remedy to seek. For a discussion of these interactions see Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law,* 65 ANTITRUST L.J. 713 (1997) 713, 734-44.

9. Of course, not every horizontal restraint is illegal. A joint venture that increases industry-wide innovation, for example, is generally procompetitive and legal. *See generally* 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 77 (Angland eds., 4th ed. 1997); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 140-240 (1994).

10. Price fixing also can, to a small degree, distort consumer choice. A few consumers might not purchase if they knew that prices were fixed. The principal reason why we condemn it, however, is because it eliminates the option of price competition from the market.

11. Price fixing also has a number of indirect anticompetitive effects. It shields inefficient firms from hard competition. *See* Lande, *supra* note 6, at 78-79. It also causes allocative inefficiency and a transfer of wealth from consumers to producers. *See id.* at 72-77.

12. *See* HOVENKAMP, *supra* note 9, at 455-66, 479-88.

13. For an overview of these effects, see Alan A. Fisher et al., *Do the DOJ Vertical Restraints Guidelines Provide Guidance?*, 32 ANTITRUST BULL. 609, 615-23 (1987).

14. *See id.* Of course, each of these practices also can cause significant, potentially offsetting procompetitive effects. *See id.* at 615-16. Moreover, these offsetting efficiencies can sometimes be characterized as attempts to overcome market failures. *See, e.g., id.* (discussing the point of sale "free rider" problem). If they are imposed by firms without market power the possibility that their anticompetitive effects (*i.e.*, their option distortions) will be significant is probably quite small. For this reason, non-price vertical restraints are judged under a rule of reason standard. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977). Many believe that RPM also should be judged under the rule of reason or even that it should be deemed per se legal. *See* Fisher et al., *supra* note 13, at 615 n.18. In any event, it is the possibility of anticompetitive option loss that makes antitrust law enforcement agencies concerned with these transactions.

15. For an excellent discussion of predatory pricing theory and case law, see James D. Hurwitz & William E. Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982); HOVENKAMP, *supra* note 9, at 298-328.

16. This assumes the existence of effective barriers to entry, for without them similar firms would be able to enter and offer the desired options.

17. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

18. For a thorough explanation and discussion of the necessary prerequisites to this conduct, see Thomas G. Krattenmaker et al., *Airlie House Conference on the Antitrust Alternative: Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 248-53, 265-69 (1987).

19. Actions that undercut the ability of competing firms to make free or informed decisions are properly considered antitrust violations, insofar as these actions ultimately affect the range of choice that is made available to the marketplace. For example, predation may be accomplished through false or deceptive information if an incumbent firm implements a "noisy" pricing strategy, which conceals the fact that its low prices are not based

upon superior efficiency but instead are actually below cost. Alternatively, a firm could develop an undeserved reputation for predatory pricing. In both these situations, the false information is likely to affect the target firm's offerings to the marketplace rather than its purchases from the marketplace, and thus raises more antitrust than consumer protection issues. *See infra* notes 44-45.

20. *See, e.g.,* Federal Trade Comm'n v. Algoma Lumber Co., 291 U.S. 67 (1934) (holding inferior "yellow pine" could not be sold as "white pine"); Federal Trade Comm'n v. Winsted Hosiery Co., 258 U.S. 483 (1922) (ruling clothing made from a part-wool mixture could not be sold as "wool").

21. *See, e.g.,* Carter Prods., Inc. v. Federal Trade Comm'n, 268 F.2d 461 (9th Cir. 1959) (describing situation where laxative pills were misrepresented as a "natural method of self-treatment, that they contained no strong medicines, and that they were effective to treat liver conditions"); Charles of the Ritz Distribs. Corp. v. Federal Trade Comm'n, 143 F.2d 676 (2d Cir. 1944) (ruling that no cosmetic cream could restore youth and that it was therefore deceptive to advertise a product as such).

22. *See, e.g.,* Continental Wax Corp. v. Federal Trade Comm'n , 330 F.2d 475 (2d Cir. 1964) (holding that the product name "Continental Six Month Floor Wax," where unsupportable by empirical evidence, was deceptive); *In re* Warner-Lambert Co., 86 F.T.C. 1398 (1975), *aff'd as modified*, 562 F.2d 749 (D.C. Cir. 1977) (ordering that manufacturer cease and desist from advertising that it mouthwash "prevented, cured and alleviated the common cold").

23. *In re* International Harvester Co., 104 F.T.C. at 1061.

24. For statutory requirements regarding envirnomental advertisements, see FTC Guides and Trade Practice Rules, 16 C.F.R. §§ 260.1-.9 (1998).

25. The FTC cases cited in the preceding paragraphs each involved circumstances of deception. Matters involving the FTC's less frequently invoked consumer unfairness authority also involve the ability to make free choices, however. *See* Averitt & Lande, *supra* note 8.

26. *See Deceptive Acts and Practices,* 4 Trade Reg. Rep. (CCH) ¶ 13,205.

27. *Id.* at 20,916. Although the consumer's "conduct regarding a product" is treated separately from the initial purchase decision, the two concepts are clearly related in that they both bear on the desirability and utility of the product, and hence on the choice among options.

28. This should not be taken to imply that every practice that has the adverse economic effects of taking advantage of market failures, distorting options, or restricting consumer choice is or should be a law violation. Often these effects are insignificant or are outweighed by offsetting pro-competitive benefits. At other times, practical considerations may suggest that the most appropriate rule is one that is relatively inexpensive, predictable, and easy to administer, even if it does not halt all instances of anticompetitive behavior. For a discussion of these jurisprudential issues, see Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1652-59, 1670-77 (1983); Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CAL. L. REV. 959, 960 (1987) (stating "[a]ntitrust law cannot feasibly address every deviation from perfect competition . . . .").

29. *See* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 15-29 (3d ed. 1990).

30. *See* EDWIN MANSFIELD, MICROECONOMICS: THEORY & APPLICATIONS 232-33 (5th ed. 1985).

31. *See* JACK HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 417-19 (3d ed. 1984).

32. For example, a market with difficult entry and with sellers or buyers large enough to affect price could be said to experience a "physical" market failure. We also could ask how these firms were able to become so large, and to characterize the causes (e.g., the imperfect information or transaction costs themselves as "market failures").

33. For a further discussion of some of the complexities that can arise, including the issues of how often market failures are likely to occur and how quickly they will correct themselves, see Averitt & Lande, *supra* note 8.

34. *See* ABA SECTION OF ANTITRUST LAW, *supra* note 9, at 219-59.

35. *See* Richard O. Zerbe, Jr. & Donald S. Cooper,

An Empirical and Theoretical Comparison of Alternative Predation Rules, 61 TEX. L. REV. 655, 658 (1982).

36. If information is perfect and a would-be predator lowers price, an equally efficient competitor will have an incentive to mothball its plant and reopen it after the predation ends. If the intended victim runs out of money in the short run, it can get a loan and repay it out of its expected future monopoly profits. Since this mothballing can happen, the antecedent predation will not happen often. In Matshushita Electrical Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Supreme Court cited Judge Bork and other Chicago School analysts and essentially embraced the view that predatory pricing was an extremely rare phenomenon. The antipredation scenario might not work, however, if information is imperfect. Suppose the owner of the mothballed factory goes to a bank for a loan. The banker probably would say that — due to imperfect information — he or she was not certain that the victim was as efficient as the monopolist. The banker therefore would either deny the loan or would loan only at an extremely high rate. Thus, if information is imperfect even old-fashioned deep-pocket predation might be possible. For a discussion of more complex forms of predation, including "reputation predation" and "noisy pricing predation," see Averitt & Lande, *supra* note 8.

37. *See* Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

38. *See In re* Levi Strauss & Co., 92 F.T.C. 171 (1978) (Compl. ¶ 8).

39. *See* Sharon Oster, *The FTC v. Levi Strauss: An Analysis of the Economic Issues, Federal Trade Commission, in* IMPACT EVALUATIONS OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINT CASES 1, 48 (Ronald N. Lafferty et al., eds., 1984).

40. *See id.*

41. *See In re* Holland Furnace Co., 55 F.T.C. 55 (1958), *aff'd*, 295 F.2d 302 (7th Cir. 1961).

42. *See* Federal Trade Comm'n v. R.F. Keppel & Bro., 291 U.S. 304, 309 (1934).

43. Deception cases, an integral part of the larger effort to protect consumer sovereignty, are one specific application of the broad prohibition against "unfair" consumer practices embodied in Section 5 of the FTC Act. *See* Neil W. Averitt, *The Meaning of 'Unfair Acts or Practices' in Section 5 of the Federal Trade Commission Act,* 70 GEO. L.J. 225 (1981).

44. *See* Labeling and Advertising of Home Insulation, 16 C.F.R. § 460 (1996) (requiring disclosure of R-values); Automotive Fuel Ratings, Certification and Posting, 16 C.F.R. § 306 (1996) (requiring disclosure of octane ratings of automotive gasoline).

45. *See* 15 U.S.C. §§ 1-3 (1996).

46. *See* 15 U.S.C. § 15(a) (1996). Some exceptions exist for those relatively rare events that violate the FTC Act but not the Sherman or Clayton Acts. *See generally* Neil W. Averitt, *The Meaning of 'Unfair Methods of Competition' in Section 5 of the Federal trade Commission Act*, 21 B.C.L. REV. 227, 265 (1980).

47. The FTC Act was amended to provide special, specific rule making procedures for use "with respect to unfair or deceptive acts or practices. . . ." 15 U.S.C. § 57a(a)(1) (1996). The amendment spells out procedures affecting Federal Register notice, notice to Congress, the rights that the parties have to present evidence, specific points to be addressed by the Statement of Basis and Purpose, and similar matters. *See id.* at § 57a. The section further specifies that "[t]he Commission shall have no authority . . . other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices . . . ." *Id.* at § 57a(a)(2). Competition rules, in contrast, may be promulgated through the general procedures of the Administration Procedures Act. *See* National Petroleum Refiners Ass'n v. Federal Trade Comm'n, 482 F.2d 672 (D.C. Cir. 1973).

48. Courts are specifically authorized to grant redress in certain consumer protection matters. An amendment to the FTC Act states that, where there has been a violation of a rule involving unfair or deceptive acts or practices, or certain types of particularly clear violation of the general consumer protection statutes, courts "shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers . . . . Such relief may include . . . rescission or reformation of contracts, the refund of money or return of property, [or] the payment of damages. . . ." 15 U.S.C. § 57b(b) (1996). Somewhat similar remedial authority, usable in both competition and consumer protection contexts, has also been judicially implied as inherent in the courts' equitable powers to grant injunctions under § 13(b). *See* Federal

Trade Comm'n v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982).

49. CIDs may be used in antitrust matters, although the antitrust staff generally prefers to rely on conventional subpoenas. *See* 15 U.S.C. § 57b-1(a)(7) (1996) ("violation" includes "any antitrust violation"). For most forms of administrative litigation in consumer protection matters, however, CIDs *must* be used as the vehicle for discovery. "For the purpose of investigations performed pursuant to this section with respect to unfair or deceptive acts or practices . . . all actions of the Commission [under certain sections] shall be conducted pursuant to subsection (c). . . ." *Id.* at § 57b-1(b) (1996). That section then spells out special procedures covering such matters as oaths, where and how the CIDs are served, in what way the subjects of the inquiry may be represented by counsel, and the like. *See id.* at § 57b-1(c).

50. *See, e.g.,* Ciba Geigy, Ltd., Analysis to Aid Public Comment, FTC File No. 961-0055, 1997 WL 1540 (Fed. Reg. Jan. 3, 1997) (agreement intended to protect competition in development and commercialization of gene therapy treatments) (consent provisionally accepted Dec. 1996).

51. *See* Personal Protective Armor Association, 59 Fed. Reg. 19,019 (1994) (to be reported at 117 F.T.C. 104).

52. *U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines,* 62 Antitrust & Trade Reg. Rep. (BNA) § 0.1, at 107 (April 2, 1992).

53. *See id.*

54. Footnote 6 of the 1992 Horizontal Merger Guidelines reads, "Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service or innovation." *Id.*

55. They concede in a footnote that consumers can be harmed by oligopoly behavior "on terms of trade other than price." The footnote elaborates this consideration at somewhat more length than the federal guidelines. It reads as follows: "Tacit or active collusion on terms of trade other than price also produces wealth transfer effects. This would include, for example, an agreement to eliminate rivalry on service features or to limit the choices otherwise available to consumers." *See Merger Guidelines* 4 Trade Reg. Rep. (CCH) ¶ 13,104, § 2.11 n.14, at 20,573-9 (1992). *See also Horizontal Merger Guidelines* 4 Trade Reg. Rep. (CCH) ¶ 13,405, at 21,186 n.17 (March 10, 1987). These Guidelines also declare, more fundamentally, that the "central purpose" of merger law "is to prevent firms from attaining market or monopoly power, because firms possessing such power can raise prices to consumers above competitive levels . . . ." *Id.* at 21,185.

56. For purposes of this example, we assume that the other conditions of the industry, such as entry barriers, are conducive to an anticompetitive outcome.

57. In the real world, it is of course also possible that antitrust enforcers will simply observe the absence of a price rise and wrongly conclude that no anticompetitive effects at all have taken place.

58. *Cf.* National Macaroni Mfrs. Ass'n. v. Federal Trade Comm'n, 345 F.2d 421 (7th Cir. 1965) (manufacturers had agreed to use less desirable mix of ingredients). Other forms of non-price competition may involve product variety rather than product quality. Some consumer needs will not be met by even a high-quality product at a low price if it is the wrong kind of product. The consumer harm felt here, while real, is also not particularly well suited to price analysis. For example, a family of seven might strongly prefer to purchase a van rather than a conventional car. In an extreme case we can imagine that after a series of mergers the resulting automobile monopoly might decide to limit consumer choice to cars only. This family's welfare will be significantly diminished by the lack of product variety even if the new cars are priced at a competitive level. Since this welfare loss cannot be readily quantified, however, particularly in the absence of market prices for vans, it would not seem useful to try evaluating the desirability of these automobile mergers solely in price terms.

59. In looking for possible harms to non-price competition, antitrust decision makers need to be careful and cautious. The consumer choice model will remind the antitrust agencies of the relevance of non-price factors, but it does not alter or expand the actual reach of Section 7. Harms to non-price competition are already covered by the Clayton Act and have already informed decisions in merger cases. *See, e.g.,* Federal Trade Comm'n v. PPG Indus., Inc., 798 F.2d 1500 (D.C. Cir. 1986) (enjoining preliminarily the merger of manufacturers of "high technology" aircraft transparencies, who competed, among other ways, in new product development).

60. Antitrust enforcers could not challenge every merger involving intellectual property on the grounds that, by removing the products of the acquired firm as an independent force in the market, the merger would necessarily impair consumer choice. True, in some linguistic sense every merger of a product involving some element of creativity removes a choice from the market. The incorporation of Oldsmobile into General Motors deprived those consumers who preferred the independent Oldsmobile design department of that choice. This alone cannot be the basis for illegality, however, for such an argument would prove too much. It would result in the illegality of every merger involving non-fungible products, regardless of how small the element of independence in the product or how much or little importance consumers attach to that independence in the context of the particular product involved. Congress cannot have intended this to constitute the "substantial" lessening of competition that is the concern of Section 7. Actually figuring out how to express the threshold of substantiality for different types of non-price competition would be a difficult job, of course, because there is probably no empirical bright-line test comparable to the measure of concentration at which price effects often become visible. Defining such a threshold is nonetheless a task that needs to be undertaken if antitrust is to fully come to grips with non-price competition.

61. An absence of price effects is particularly likely if we assume relatively low entry barriers and a strategy of limit pricing by the firms in the market.

62. *See* Associated Press v. United States, 326 U.S. 1, 20 (1945) (ruling First Amendment considerations support application of Sherman Act to the media since both these provisions are intended to encourage diversity, although the media context did not alter ordinary Sherman Act standards).

63. Unfair or Deceptive Advertising of Cigarettes in Relation to the Health Hazards of Smoking, Statement of Basis and Purpose, 29 Fed. Reg. 8324, 8355 (1964). These criteria were set out in full, and briefly discussed, in Federal Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 n.5 (1972).

64. *Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction,* 4 Trade Reg. Rep. (CCH) ¶ 13,203 at p. 20,909-03 (Dec. 17, 1980).

65. *See* 15 U.S.C. § 45(n) ("In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primarily basis for such determination").

66. *See Policy Statement, supra* note 64, at 20,909 (Most unfairness actions "are brought, not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision making").

67. Organizationally, countries adopting new laws might wish to consider the approach that the United States has taken and have both these types of issues handled by one agency, equivalent to our FTC. There is logic to this approach since the two areas of concern have such a close functional relationship.

68. There is room for disagreement as to whether general provisions of this sort are desirable in the first place. Clearly they have both advantages and disadvantages. As disadvantages, they offer less certainty and leave more room for judicial discretion than would simple prohibitions against things like price-fixing. This may be a particular concern in countries that do not yet have a tradition of a non-partisan judiciary. On the other hand, general provisions allow the law to better adapt to changing business practices and to new forms of organization. A resolution of this dispute is beyond the scope of this article, although we may note in passing that many jurisdictions have found it desirable to adopt some form of general clause, either overtly or through expansive constructions of terms such as "contracts in restraint of trade." In any event, if a decision is made to adopt some form of supplemental general clause, then we believe that the form set out here will achieve the benefits of that approach while creating the fewest associated difficulties.

69. If one contrasts an option-oriented definition of antitrust to other possibilities, one should conclude that the option-oriented version is superior. *See* Neil W. Averitt & Robert H. Lande, A New Definition of Antitrust: Option Restriction (1997) (unpublished manuscript, on file with authors).

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