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**Effective FTC rulemaking at the conjunction of  
consumer protection and competition**

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**Abstract:** The modern bifurcation of consumer protection law and antitrust law is an historical anomaly with problematic policy implications. Many unfair or deceptive acts or practices give firms an unfair advantage in the market and lessen competition, and many unfair methods of competition enable firms to “cheat” in the marketplace and consumers. Early FTC rulemakings and guides recognized the interrelated nature of consumer harms and unfair methods of competition. A robust and historically informed understanding of FTC UDAP authority is capacious enough to accommodate many of rulemakings that might be more naturally conceptualized as UMCs, with the added bonus of conferring the ability to enforce violations by imposing civil penalties. Reconceptualizing UDAP authority as having both consumer and competition implications will also enable better rulemaking because it offers a more holistic approach to practices that harm both consumers and competition.

## I. Introduction

In 2012, The Supreme Court in *AMG Capital Mgmt., LLC v. FTC*, dismantled the Federal Trade Commission's (FTC) ability to seek disgorgement and restitution under § 13(b) of the FTC Act. In the wake of losing a vital enforcement mechanism, the Commission pivoted towards rulemaking to realize its mandate.<sup>1</sup> On December 10, 2021, the Federal Trade Commission issued its "Statement of Regulatory Priorities," outlining its approach to reviewing existing rules and signaling a commitment to exploring new topics, including non-compete clauses, surveillance, the right to repair, and more.<sup>2</sup> The Statement indicated that the Commission intended to pursue "both unfair-methods-of-competition rulemakings as well as rulemakings to define with specificity unfair or deceptive acts or practices."<sup>3</sup> These two types of rulemakings—unfair methods of competition (UMC) and unfair or deceptive acts or practices (UDAP)—hinge on separate statutory hooks and offer different remedies. Crucially, UDAP rulemakings enable the Commission to seek civil penalties, while UMC does not.

This article argues that the Commission should pursue its consumer protection and competition mandates in the same regulatory actions; something I term "combined rulemaking." The FTC's statutory scheme implicitly distinguishes consumer protection and competition, separately authorizing UDAP and UMC rulemakings—but the two have historically been intertwined. Indeed, the first suite of rules the FTC issued via its rulemaking authority did not focus exclusively on one category, but instead listed both. This tracks common sense. Many unfair or deceptive acts are anticompetitive, and vice versa.

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<sup>1</sup> *AMG Capital Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341 (2021).

<sup>2</sup> FTC, *Statement of Policy Priorities*, 2 (2021)

[https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement\\_3084\\_FTC.pdf](https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf).

<sup>3</sup> *Id.* at 1.

Because market problems often could be properly cognized as both consumer and competition harms, the FTC should avoid attempting to cabin harms as *exclusively* UDAPs or UMCs. Not only is the conceptual divide unfounded, but so is any claimed historical divide, as the next section emphasizes. Recent FTC regulations have typically been based in either UDAP or UMC authority, however, for decades, the FTC issued rules based on both UDAP and UMC rulemaking authority and analyzed markets from both angles.<sup>4</sup> Lacking a conceptual or historical basis, artificial bifurcation of consumer protection and competition should give way to an interrelated bird’s-eye view: combined rulemaking.

## **II. Historically, FTC rulemakings designated prohibited practices as both UMC and UDAP**

### *A. Early rules were listed as both UDAP and UMC*

The Sleeping Bag Rule offers an early example of FTC combined rulemaking.<sup>5</sup> Prior to Commission intervention, sleeping bag sellers had been advertising sleeping bags based on the “cut size,” rather than the dimensions of the finished product, which were substantially smaller. Consumers, of course, were interested in the latter and harmed by purchasing products based on misleading characterizations. The practice harmed competition because it “divert[ed] business from competitors who clearly disclose the finished size of their sleeping bags.”<sup>6</sup> Consequently, the Sleeping Bag Rule, which required clear disclosure when advertised dimensions were “cut size” constituted both a UDAP and a UMC.

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<sup>4</sup> Examples of recent rules include eyeglasses (16 CFR Part 456) and school advertising (16 CFR Part 254).

<sup>5</sup> 28 Fed. Reg. 10900 (October 11, 1963) <https://www.govinfo.gov/content/pkg/FR-1963-10-11/pdf/FR-1963-10-11.pdf>.

<sup>6</sup> *Id.*

The FTC further explicated the foundation for substantive combined rulemaking in July of 1964 when it promulgated the Cigarette Rule.<sup>7</sup> Because the Rule established the jurisprudential theory undergirding FTC rulemaking, its publication in the federal register contains a treatise on the FTC's history and purpose. According to the Rule, the 1938 Wheeler-Lea amendments to the FTC Act elevated and combined UDAP and UMC considerations:

It should be noted that the amendments do not confine the Commission's jurisdiction to deceptive acts or practices, on the one hand, and monopolistic or anticompetitive methods, on the other.... The purpose of the amendments was to make clear that the protection of the consumer from unfair trade practices, equally with the protection of competitors and the competitive process, is a concern of public policy within the scope of responsibility of the Federal Trade Commission.

Building on this framework, the Cigarette Rule crystallized the logic behind why some deceptive practices are also anticompetitive. Within the cigarette market, deceptive advertising harmed consumers because it gave them false information, but it also harmed competitors by giving the firms willing to stretch the truth an unfair competitive advantage. Firms raced to the bottom in making unfounded claims regarding their products' safety. Quoting a 1941 FTC report, the Rule summarized this phenomenon as one in which businessmen feel they must "stoop to unfair tactics" but would abandon such tactics if they could be assured "that their competitors will likewise stop and not take advantage of the situation."<sup>8</sup> Against this backdrop, the Cigarette Rule relied on both UMC and UDAP as independent sources of justificatory authority.<sup>9</sup> As a basic matter of logic, the Rule found that "if a practice both exploits consumers unfairly and injures competitors, it will be[...]an unfair method of competition as well as an unfair act or practice."<sup>10</sup>

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<sup>7</sup>29 Fed. Reg. 8324 (July 2, 1964). <https://tile.loc.gov/storage-services/service/ll/fedreg/fr029/fr029129/fr029129.pdf>\_Note: a substantive act of Congress preempted this rule before it went into effect, but the rule made the case for FTC rulemaking. *See* 15 U.S.C. § 1334(a) (2018).

<sup>8</sup> 29 Fed. Reg. 8367 (July 2, 1964).

<sup>9</sup> 29 Fed. Reg. 8373 (July 2, 1964).

<sup>10</sup> 29 Fed. Reg. 8354 n.88 (July 2, 1964).

Although the Cigarette Rule emphasized the harms to consumers throughout, it engaged in an analysis of the cigarette industry that also considered competitive harms, which set the stage for later FTC rules to do the same and clarified the conceptual basis for prior rules and guides.<sup>11</sup>

Similarly, the Incandescent Lightbulb Rule regulated industry advertisements based on an analysis of harms to consumers and competition.<sup>12</sup> Based on an industry study, the FTC concluded that light bulbs burned out too quickly and competitors struggled to communicate superior products to consumers. To improve products for consumers and enable a competitive playing field, the Lightbulb Rule declared failures to disclose bulb life *both* an unfair method of competition and an unfair or deceptive act or practice. Restoring this mindset will prove crucial to effective rulemaking moving forward.

#### *B. Many FTC rules are both UDAP and UMC, activating civil penalties*

The passage of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act streamlined UDAP rulemaking and granting the FTC the ability to collect civil penalties, while leaving UMC rulemaking largely unchanged.<sup>13</sup> This procedural and statutory bifurcation compounded an existing institutional one—the separation between Bureau of Consumer Protection and the Bureau of Competition—to add fuel to an “either-or” approach. These categories obscure more than they reveal. Because UDAP (but not UMC) provides a path to civil penalties, but many market harms could be cognized as both, this article recommends listing both

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<sup>11</sup> The first case to interpret the Cigarette Rule, *FTC v. Sperry & Hutchinson Co.*, emphasized that the FTC had a broad mandate to protect both competitors and consumers. Quoting the House Report on the 1938 Wheeler-Lea amendment, the Court found that the amendment “makes the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.” 405 U.S. 233, 244 (1972) (quotations omitted). While affirming this broad mandate, the Supreme Court remanded an FTC order against a trading stamp company on other grounds, namely because it “failed to ‘articulate any rational connection between the facts found and the choice made.’” *Id.* at 249.

<sup>12</sup> 35 FR 11784 (July 23, 1970) <https://www.govinfo.gov/content/pkg/FR-1970-07-23/pdf/FR-1970-07-23.pdf>.

<sup>13</sup> Pub. L. No. 93-637 88 Stat. 2183 (1975) (“Magnuson-Moss Act”); Kurt Walters, *FTC Rulemaking: Existing Authorities & Recommendations* (July 31, 2019) <http://dx.doi.org/10.2139/ssrn.3794346>.

as statutory hooks and activating the civil penalties available only through UDAP.<sup>14</sup> In the wake of *AMG Capital*, the FTC has a handicapped toolbox in terms of enforcement—particularly with regard to monetary deterrence. Taking seriously the legal and historical foundation for a synthesized approach to rulemaking thus has a strong normative justification and positive prescriptive implications for the FTC’s ability to realize its mandate.

### **III. UDAP and UMC are artificially bifurcated**

The FTC’s UDAP rulemaking authority targets consumer protection. Section 18 of the FTC Act authorizes the FTC to issue “interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of [the] title).”<sup>15</sup> While this language may sound broad, two terms are further defined via statute and policy statement: “unfair” and “deceptive.” Through these two sources, both terms are tied exclusively to “consumers.” 15 U.S.C. § 45(n) limits the FTC to defining an act as “unfair” only if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”<sup>16</sup> Consequently, the FTC’s unfairness authority under UDAP cognizes the harmed party as consumers. The Commission’s definition of “deception” makes a similar move. As defined in the FTC’s “Policy Statement on Deception,” “deception” contains three prongs: (1) there must be a representation, omission, or practice that is likely to mislead the consumers; (2) the act or practice must be considered from the perspective of the reasonable

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<sup>14</sup> It is worth noting that there is a key difference between civil penalties and other remedies, such as disgorgement, that direct funds back to harmed consumers. While both deter, only the latter can make consumers whole.

<sup>15</sup> 15 U.S.C. § 57a (2018).

<sup>16</sup> 15 U.S.C. § 45(n) (2018).

consumer; and (3) the representation, omission, or practice must be material.<sup>17</sup> In this manner, the FTC Act creates a conception of UDAP authority that fundamentally protects *consumers*.

In contrast to UDAP's emphasis on consumers, UMC rulemaking concerns competition generally. Section 6(g) of the FTC Act authorizes the Commission "to make rules and regulations for the purpose of carrying out the provisions of this subchapter."<sup>18</sup> Section 18 of the FTC Act defines the particular framework for UDAP rulemaking and explicitly bars and rulemaking other than UMC.<sup>19</sup> Consequently, 6(g) authorizes the FTC to "prescribe rules (including interpretive rules), and general statements of policy" regarding "unfair methods of competition in or affecting commerce." While this authority has lain dormant for many years, now-Chair Lina Khan and former Commissioner Rohit Chopra resurrected the legal and substantive case for issuing rules regulating unfair methods of competition in a 2020 University of Chicago Law Review Article.<sup>20</sup>

Traditionally, consumer protection conceives of itself as fundamentally protecting *consumers* and antitrust law as fundamentally protecting *competition*.<sup>21</sup> These two ends are often aligned, but occasionally in tension. For example, a robust conception of consumer protection

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<sup>17</sup> *FTC Policy Statement on Deception* (1983)

[https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf). Because this is a policy statement, it is worth examining whether the FTC should revoke this definition linking deception to consumers and expand the definition to deception affecting commerce, which mirrors the original statutory language.

<sup>18</sup> 15 U.S.C. § 46 (2018).

<sup>19</sup> 15 U.S.C. § 57a(2) (2018). ("The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.")

<sup>20</sup> Rohit Chopra and Lina Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357 (2020) <https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/4/>.

<sup>21</sup> Interestingly, consumers may actually include purchasers of a product, as well as small businesses, religious organizations, and other non-profits. *F.T.C. v. IFC Credit Corp.*, 543 F. Supp. 2d 925 (N.D. Ill. 2008) (finding that small businesses and religious organizations were "consumers" within the definition of the FTC Act) ("Congress has entrusted to the FTC the power to determine whether a particular act or practice is unfair. Consistent with its Congressional mandate, the FTC has concluded that small businesses and religious and other not-for-profit organizations are consumers and are entitled to protection from deceptive and unfair acts and practices. That is the end of the matter so long as that judgment is reasonable.").

policy may place onerous requirements on businesses and thus raise barriers to market entry in a manner that is prohibitively high—an outcome that undermines competition. So how should the FTC approach rulemaking, given that these twin goals are occasionally in tension? Is competition an end in and of itself, or is it merely a means to promote consumer welfare? While the two concepts are occasionally in tension, they are far more often aligned, and focusing on the symbiotic relationship between competition and consumer protection will promote more effective rulemaking for overall market health.

*A. Many practices that deceive consumers are unfair methods of competition*

As the FTC underscored in some of its early rulemakings, false advertising offers a clean example of a deceptive practice that also constitutes an unfair method of competition. Misleading messages attract consumers to a deceptive competitor where they will not receive the good or service that cause them to choose the deceptive firm, all while depriving the honest competitor of business. This weakens the honest competitor, leading it to become deceptive also in order to compete, or to shrink or exit, thereby depriving consumers of good options.<sup>22</sup> This dynamic accounts for the intuition behind casting the Sleeping Bag Rule, Cigarette Rule, and Lightbulb Rule as both UDAP and UMC.

More recently, the FTC's Funeral Rule offers an additional example of a consumer protection measure that also improves competition.<sup>23</sup> The rule solves a market failure especially pronounced in the funeral industry: bereaved consumers are poor shoppers. Their cost of time and attention is temporarily high, and therefore they do not engage in as much price comparisons as they otherwise would. The funeral rule is designed to increase transparency of prices and

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<sup>22</sup> Xavier Gabaix and David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, *The Quarterly Journal of Economics*, Volume 121, Issue 2 (May 2006) <https://doi.org/10.1162/qjec.2006.121.2.505>.

<sup>23</sup> FTC Funeral Industry Practices Rule, 16 C.F.R. § 453 (2018).

lower the cost of gathering information for consumers. The economics literature shows that lower costs of gathering information and comparing sellers results in lower equilibrium prices.<sup>24</sup>

*B. Many unfair methods of competition are unfair or deceptive to consumers*

Platform defaults offer an example of anticompetitive behavior that clearly harms consumers. In effect, defaults guide consumers into choices that are profitable for platforms, rather than leveraging their full agency. Economic research has shown that defaults, such as automatic reenrollment policies, enable companies to profit from consumer inertia.<sup>25</sup> Defaults—especially invisible ones—essentially nudge consumers into accepting a given instead of shopping and weighing their options, a subtly deceptive tactic that harms consumers by hiding their option set. Within a similar vein, others have made a strong case for cognizing platform interoperability restrictions as a UDAP.<sup>26</sup> When platforms cannot interact, that artificially limits a consumer’s option set, harming both the consumer and competition.

Both consumers and competitors are harmed when companies lie about how they are profiting from data. Such practices give firms an unfair advantage over competitors and deceive consumers who believe they are granting their data for one use when it is being leveraged for another.<sup>27</sup> Facebook offers a prime example of a company that supposedly outcompeted other social media platforms, when in all likelihood, it was running a different race.<sup>28</sup> Lying about how

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<sup>24</sup> Stefania Sitzia, et. al., *Inattentive consumers in markets for services*. Theory Decis 79 (2015) <https://doi.org/10.1007/s11238-014-9466-8>.

<sup>25</sup> Fiona Scott Morton, et. al., *The impact of consumer inattention on insurer pricing in the Medicare Part D program*, The RAND Journal of Economics, vol 48(4), (2017).

<sup>26</sup> Daniel Backman, et. al. *Messaging Interoperability through FTC Rulemaking*, Thurmond Arnold Project (May 25, 2022).

<sup>27</sup> Fiona Scott Morton and David Dinielli, Roadmap for an Antitrust Case Against Facebook (June 2020); *see also* Dina Srinivasan, *The Antitrust Case Against Facebook* (September 10, 2018). Berkeley Bus. 16 L. J. 1, <https://ssrn.com/abstract=3247362>.

<sup>28</sup> *Id.*

consumer data is used enables companies to “cheat” in the competitive market and robs consumers of the ability to make choices based on how they want their data handled.

#### **IV. The FTC should leverage a historically-informed, holistic approach to rulemaking**

##### *A. The current structure of the FTC in dividing the Bureau of Competition and the Bureau of Consumer Protection papers over an artificial dichotomy that weakens its effectiveness*

Commissioner Slaughter underscored the need for both consumer protection and competition perspectives in her recent article concerning algorithms and economic justice. She highlighted that:

The pitfalls associated with algorithmic decision-making sound most obviously in the laws the FTC enforces through our consumer protection mission. But the FTC is also responsible for promoting competition, and the threats posed by algorithms profoundly affect that mission as well; moreover, these two missions are not actually distinct, and problems—including those related to algorithms and economic justice—need to be considered with both competition and consumer protection lenses.<sup>29</sup>

Commissioner Slaughter’s analysis should be incorporated in far more issue areas than simply artificial intelligence and algorithmic decision-making. Although the FTC is currently structured to sort projects into either the Bureau of Competition (BC) or the Bureau of Consumer Protection (BCP), as Acting Chairwoman, Commissioner Slaughter instantiated a new rulemaking group within the Office of the General Counsel to combine both perspectives.<sup>30</sup> Her press release makes this point especially salient, as “the new structure will allow the FTC to take a strategic and harmonized approach to rulemaking *across its different authorities and mission areas*”

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<sup>29</sup> Rebecca Kelly Slaughter, *Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission*, Yale J.L. & Tech., 31-32 (August 2021) [https://yolt.org/sites/default/files/23\\_yale\\_j.l.\\_tech.\\_special\\_issue\\_1.pdf](https://yolt.org/sites/default/files/23_yale_j.l._tech._special_issue_1.pdf).

<sup>30</sup> *FTC Acting Chairwoman Slaughter Announces New Rulemaking Group* (March 25, 2021) <https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>.

(emphasis added).<sup>31</sup> Harmonizing between BCP and BC will prove essential for effective rulemaking.

*B. Analogous institutions, such as the CMA, do not divide these two fields*

The UK's equivalent organization, the Competition and Markets Authority (CMA), explicitly investigates "entire markets" with an eye toward both "competition or consumer problems."<sup>32</sup> When the CMA begins an industry audit, it combs for signs of market failure generally, without looking through a specific lens and offers solutions that could be cognized as both pro-consumer and pro-competition. This offers a more robust toolbox that has enabled the CMA to intervene effectively on issues including deceptive online reviews, clear and honest price advertisements, and subscription-based sales in utility markets.<sup>33</sup>

## **V. Conclusion**

The FTC should incorporate both consumer protection and competition in its rulemaking analyses. Moreover, because of the symbiotic relationship between these two lenses, many competitive harms could also be cognized as harms to consumers, activating UDAP rulemaking and the civil penalties that follow.

In accepting the 1912 Progressive Party nomination, Theodore Roosevelt highlighted the tension between enabling enough concentration in markets to produce goods that benefit consumers and making sure that too much consolidation does not threaten the well-being of the people:

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<sup>31</sup> *Id.*

<sup>32</sup> *Competition and Markets Authority: About Us* (2022) <https://www.gov.uk/government/organisations/competition-and-markets-authority/about>.

<sup>33</sup> Gregory Crawford, et. al., *Digital Regulation Project: Consumer Protection for Online Markets and Large Digital Platforms* (May 20, 2021) <https://tobin.yale.edu/sites/default/files/pdfs/digital%20regulation%20papers/Digital%20Regulation%20Project%20-%20Consumer%20Protection%20-%20Discussion%20Paper%20No%201.pdf>.

Concentration and cooperation are conditions imperatively essential for industrial advance; but if we allow concentration and cooperation there must be control in order to protect the people, and adequate control is only possible through the administrative commission.<sup>34</sup>

Roosevelt understood that a key feature of antitrust would lie in promoting the right level of competition to benefit consumers. Both too much and too little consolidation could threaten consumer well-being, and a successful analysis would take into account both features of the marketplace. The FTC's history lays a foundation for reviving a similar method of analysis, and Chair Khan's revival of the FTC's rulemaking authority offers an opportune vehicle to put that method into action.

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<sup>34</sup> Confession of Faith, Aug. 6, 1912 Theodore Roosevelt, 17 Works of Theodore Roosevelt 254, 276.