Remarks to the Mentor Group
Forum for EU-US Legal-Economic Affairs
Brussels, April 16, 2013

Good afternoon, and thanks to Tom Kosmo and the Mentor Group for inviting me to address you today. I am delighted to be here in the company of Dr. Martin Selmayr, Advocate General Juliane Kokutt, and Judge Marc van der Woude, all of whom are thought leaders in the European Union privacy sphere.

Tom has asked me to speak to you today about the privacy regime in the United States. In so doing, I hope also to convey to you what I believe to be a central reality that lies at the interface between EU and U.S. privacy law: while many commenters dwell on the significant differences between the EU and US privacy regimes I believe it is important to recognize that we also have much in common.[1] On both sides of the Atlantic, we are grappling with how best to revise our privacy laws in light of the revolution in Internet and mobile technologies. In the United States, my agency – the Federal Trade Commission – is uniquely situated to play a critical role in answering this important policy question. After all, the Federal Trade Commission was the creation of the father of modern privacy law, Louis Brandeis.

Before he became a justice on the United States Supreme Court, before he wrote his famous dissent in Olmstead v United States where he argued that "against the government," Americans have "the right to be let alone",[2] Louis Brandeis was a "trustbuster" of the Progressive Era, leading a crusade against the large steel trusts and other monopolies that were engulfing the US economic system. His call to cut back on the trusts' economic power focused the 1912 presidential election on the "larger debate over the future of the economic system and the role of the national government in American life."[3] After Woodrow Wilson won that election with Brandeis's help, Wilson asked Brandeis to recommend specifically how to solve the problem of the trusts. Brandeis conceived of the Federal Trade Commission, which, at Brandeis' urging, Congress empowered to investigate and prohibit unfair methods of competition with a "broad and flexible mandate, wide-ranging powers, and the ability, at its best, to respond to the needs of changing times." [4]

Today, the FTC is the only federal agency in the United States with both consumer protection and competition jurisdiction. Our dual mission is to prevent business practices that are anticompetitive, and to stop deceptive or unfair practices that harm consumers. We seek to

[1] James Q. Whitman, *The two Western cultures of privacy: dignity versus liberty*, 113 YALE L. J. 1151 (2004).

for cross-border data transfers could enhance privacy protection, spur innovation and trade, and help us achieve interoperability between our two systems.

Winston Churchill has said that "[a] pessimist sees the difficulty in every opportunity; an optimist sees the opportunity in every difficulty". I, like Churchill, am an inveterate optimist. I know there are many who believe that the gap between the EU and US privacy regimes is growing. From where I sit, however, I see an opportunity for achieving real interoperability between our systems. Granted, in the US we largely employ a different mechanism – a flexible statutory mandate with broad enforcement authority. Yet we use our robust tools to achieve many of the same goals: protecting consumers' privacy in the growing data-driven marketplace – online and off, mobile and stationary. The FTC's common law of privacy is well respected by our international counterparts. Perhaps this is why many of my international colleagues confess – also under Chatham House rules – that for them, an ideal privacy regulatory regime would be one with "U.S. style enforcement, and EU style regulation."

Of course, in making this observation, I am not arguing that one legal system is somehow inherently better equipped to deal with privacy issues over the other. To the contrary, there is always room for improvement. This is why I support comprehensive privacy legislation in the U.S. What I am saying, however, is that although the U.S. may for historic reasons approach privacy through our different legal tradition – one that uses a framework approach, backed up by strong enforcement – I believe this approach achieves many of the same goals as those embraced by EU data protection authorities.

decency."[32] In advocating for the creation of a tort for breach of privacy to solve his concerns, Brandeis argued that an individual citizen's greatest tool in guarding his privacy was the common law, since "[t]he common law has always recognized a man's house as his castle, impregnable, often, even to his own officers engaged in the execution of its command."[33]

As we grapple with the new technologies of our day – on the internet, in mobile, and in the cloud – and our increasingly globalized and interdependent world, I w