Competition Policy and the Tech Industry – What's at stake?

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Thank you to the Computer and Communications Industry Association for asking me to speak today, to Marianela Lopez-Galdos for organizing this event, and to my staff—in particular, Kelly Signs—for helping me prepare these remarks.

Before I begin, I need to provide the disclaimer that my remarks today do not necessarily represent the views of the Federal Trade Commission, any Commissioner, or any prospective Commissioner.

"Competition policy and the technology industry" is today's hot headline. It is a hot-button issue at conferences, in the media, and in the enforcement world. It is a broad topic. In fact, it's often not clear whether commentators discussing the "technology industry" mean to include in that "industry" firms in the "Online" space (which could be further divided into search, ratings/reviews, messaging/communication, social media, retail, and many other categories); hardware; software; intellectual property; and/or data (which could also be further divided into many categories, including collection, sale, and use).

For the purposes of today's discussion I will largely skip past this definitional issue, though it's important to note that it can be crucial in antitrust analysis. I will direct my remarks to technology broadly, and will indicate where I have in mind some more specific subset of the broader technology industry.

need to rethink their current focus, which is on protecting the competitive process and promoting consumer welfare,

> statutes, they are common-law provisions and, therefore, they are not locked in text or time.[1]

Last fall, Johannes Laitenberger, Director-General for Competition of the European Commission said something quite similar—that there is no need to reinvent antitrust to address the modern economy, because competition laws in Europe have been remarkably adaptable. Those laws, he pointed out, focus on broad policy prescriptions that leave room for analyses to be refined, tests to be modified, and guidance to be changed based on developments in markets and technology and in learning.[2]

I agree. The antitrust enterprise in the United States, and now elsewhere, has been a study in learning and thinking and evolution. For the most part, that effort has highly beneficial, including as we take our principles and apply them to new developments, such as today's technology industry.

With those larger points in mind, let me now turn to current views of the role of antitrust in the technology industry. Obviously (and as I noted earlier) I can't speak for everybody, but it's worthwhile starting with what the United States government has actually said on this issue. In June of 2015, the United States government made a submission to the OECD competition committee on this topic, which stated, in part:

> Innovation is the hallmark of a dynamic and competitive economy, but can pose challenges for legislative and regulatory bodies trying to keep pace with rapidly evolving businesses. Disruptive innovation (including new products, services, and business models), in particular, often results in new, better, and/or lower-priced products and services to consumers, but may not fit within existing regulatory frameworks, and thus, can raise challenges for regulators. Competition authorities can play an important role shaping the inevitable transitions caused by disruptive innovation, by advocating for regulatory responses that do not unduly restrain competition, enforcing competition rules to ensure that incumbents do not foreclose new rivals from the market, and using studies and other research methods to foster greater understanding of new technologies and business models.[3]

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[1] "The Importance of Antitrust Enforcement in the New Economy," remarks of Joel I. Klein, Assistant Attorney General of the Antitrust Division, Department of Justice before the New York State Bar Association, New York, Jan. 29, 1998, https://www.justice.gov/atr/speech/importance-antitrust-enforcement-new-economy

[2] "EU competition law in innovation and digital markets: fairness and the consumer welfare perspective," remarks of Johannes Laitenberger, Director-General for Competition, European Commission, Brussels, Oct. 10, 2017, http://ec.europa.eu/competition/speeches/text/sp2017_15_en.pdf

[3] Submission of the United States, Hearing on Disruptive Innovation (DAF/COMP (2015)54, 2015), https://www.ftc.gov/system/files/attachments/submissions-oecd-other-international-competition-fora/1507disruptive_innovation_us.pdf

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That 2015 statement is a highly pro-technology, pro-innovation statement of antitrust philosophy. It basically boils down to this: don't let incumbent industry participants and existing regulatory structures block innovation and deter the advancement of new technology. But does that statement mean that technology companies get a free pass because innovation is generally pro-competitive? Absolutely not.

With that in mind, I want to turn to how antitrust enforcers incorporate technology and on-going innovation in our competition work. First, I'm going to talk about mergers and how we

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What to do about data?

Let me turn to some specific issues that have come up in the popular press a

In other cases, older data may be more valuable than recent data, or vice versa; data is not necessarily fungible, and may change in value in idiosyncratic ways depending on the data at issue and the interests of the firm seeking to acquire the data. In contrast, money is always money—a dollar is worth a dollar, no matter how old it is—and the same dollar cannot be shared with more than one person at a time.

Further, there

more data.[11] But as the foregoing discussion indicates, this raises

unique to the technology industry). It's something that we think about a lot and we pay attention to in transactions where it appears to present possible issues. In fact, as I mentioned earlier, this issue was a driving concern behind the Commission's decision to challenge the CDK/AutoMate merger. Auto/Mate, the firm being acquired, had a fairly small share.

nothing particularly unique about technology firms when it comes to collusion. The incentives to profit by agreeing with your competitors are the same as in other industries, and the FTC,