

**PANEL DISCUSSION: WHY REGULATE ONLINE PLATFORMS: TRANSPARENCY, FAIRNESS,  
COMPETITION OR INNOVATION?**

**CRA Conference – Brussels, Belgium  
Opening Remarks of Commissioner Terrell McSweeney<sup>1</sup>  
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**I. Competition Tools Are Up to the Challenge**

I'd like to start by respectfully questioning the premise of regulating online platforms. The pertinent questions are: "Is competition somehow different in the high-tech, digital economy? And, if so, does that mean we need to apply a different set of rules"? To date, U.S. courts and antitrust agencies have taken a pragmatic perspective. That is, we believe the same antitrust rules apply, but we must apply them with sensitivity to the competitive dynamics of high-tech, dynamic markets.

From the U.S. perspective, the role of competition law and law enforcement is essential to optimizing innovation. Some critics argue that competition law is either insufficient on the one hand or, on the other hand, improperly interferes in the rapid pace of innovation. I actually believe modern antitrust law and enforcers are not only up to the challenge, but we play a vital role in ensuring that high-tech markets remain fertile grounds for new products and ideas.

It is true that antitrust enforcers typically focus on the likely price effects of the merger or conduct at issue. For many high-tech markets, using a traditional price-based approach to competition analysis may be ineffective—in particular, where one side of a two-sided platform operates for free or at minimal cost. But competition agencies routinely analyze non-price considerations as well. The revised 2010 FTC/DOJ Horizontal Merger Guidelines include a section specifically addressing innovation effects. The Guidelines and our other antitrust tools are designed to be flexible and can be applied regardless of industry.

For example, the Commission's challenge late last year to Verisk Analytics' proposed acquisition of EagleView Technology focused on the market for rooftop aerial measurement

reports.” Verisk, the leading provider of downstream software platforms, had also recently entered into the roof report business. There was strong qualitative evidence that Verisk was uniquely well positioned to compete against EagleView in providing roof reports. One of the things the FTC examined was the future trajectory of competition between the merging parties to offer customers ever more innovative products. Verisk had made substantial investments in capturing high-resolution aerial images of rooftops, which allowed it to provide more accurate measurement tools to customers. After the FTC filed for an injunction, the parties promptly abandoned the deal. Developments since that time have demonstrated the wisdom of the Commission’s action. Verisk publicly announced earlier this year that it was actually accelerating its collection of aerial images. In its press release, Verisk characterized its initiative as merely “the most recent step [in the company’s] ongoing efforts” in the area, and cited Verisk’s “long-term commitment to the highest-quality imagery and data.”<sup>3</sup>

In another example the FTC recently challenged the merger between the second and third largest sterilization companies in the world, Steris and Synergy.<sup>4</sup> Synergy sought to introduce emerging x-ray sterilization technology into the United States to compete against Steris. The Commission alleged the merger would harm future competition by terminating Synergy’s entry plans. Unfortunately, in September the district court judge denied the FTC’s request for injunctive relief, finding that Synergy would not have entered the United States with x-ray sterilization services within a reasonable amount of time to compete against Steris. The Commission subsequently dismissed the administrative action. While I disagreed with the district court judge’s ruling, this matter nevertheless provides a concrete example of the Commission’s willingness to take innovation and quality competition seriously, by focusing on the future effects of a transaction.

Even in high-tech markets that are rapidly evolving and subject to potential disruption, anticompetitive effects and harm to innovation must be offset by merger-specific efficiencies. As Judge Orrick wrote in upholding DOJ’s challenge to Bazaarvoice’s acquisition of PowerReviews, “while Bazaarvoice indisputably operates in a dynamic and evolving field, it did not present

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<sup>3</sup> Press Release, Verisk Analytics, *Verisk Insurance Solutions Announces Expansion of Imagery Database*, Aug. 4, 2015,

evidence that the evolving nature of the market itself precludes the merger's likely anticompetitive effects."<sup>5</sup>

In some instances, the FTC investigates possible adverse effects on innovation and concludes these effects are unlikely. Earlier this year, the FTC closed its investigation of Zillow's acquisition of Trulia.<sup>6</sup> Zillow and Trulia operate two-sided platforms, i.e., websites and mobile apps that provide consumers with free access to residential real estate listings and information. They support this offering by selling advertising products to real estate agents looking to reach those consumers. Our staff conducted a thorough investigation that yielded



would apply to WhatsApp's data.<sup>8</sup> On the competition side, our Bureau of Competition staff allowed the transaction to proceed with no conditions.

The FTC has yet to challenge a merger specifically based on the likelihood that it would lead to a diminution in privacy protections, but we have recognized the possibility that consumer privacy can be a non-price dimension of competition. For example, in the Google/DoubleClick merger investigation (before my time at the FTC), the Commission considered whether the merger of Google and DoubleClick's respective consumer information data sets could be exploited in a way that threatened consumers' privacy.<sup>9</sup> While a majority of the Commission did not find any evidence to support this theory in that case, I will continue to encourage staff to explore those types of theories going forward.

The question then becomes: Can one company controlling vast amounts of data possess in( )-2( 10(g)1o