COMPETITION LAW: KEEPING PACE IN A DIGITAL AGE
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Keynote Remarks of Commissioner Terrell McSweeny

Good afternoon, everyone. Thank you, Spencer, for the introduction. And thank you to the Institute for Consumer Antitrust Studies for sponsoring this colloquium, now in its 16th year.

Just this morning, President Obama signed an executive order directing executive departments and agencies to take steps to promote competition within their areas of responsibility.[1] That order was accompanied by an issue brief put out by the Council of Economic Advisers, which notes indicators suggesting that competition may be decreasing in many sectors.[2] Academics have searched for the causes of this shift – and the paper points out that more research is needed to understand these trends. But one thing is clear: antitrust enforcers must continue to use all of the tools in their toolbox to protect competition and consumers.

Before I go any further, I will note that the views I am expressing are my own and do not necessarily reflect the views of the Commission or of my colleagues. With that disclaimer out of the way, I'll turn to my topic today – the role of competition enforcers in the digital age. Some say that so-called "new-economy competition" is different from competition in old-economy markets. That antitrust law and competition enforcers cannot keep pace with changes in high-tech markets.[3] They suggest that antitrust enforcers should *not* intervene in dynamic markets given the risk that even well-intentioned enforcement may do more harm than good.[4] Others view competition law as a vehicle to address emerging issues related to privacy and data security. Either approach would create new rules of the road for competition law.

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[1] *See* Exec. Order No. 13725 (April 15, 2016), https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.

[2] Council of Economic Advisers, Issue Brief: Benefits of Competition and Indicators of Market Power, April 15, 2016, https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

[3] *See, e.g.*, Ronald A. Cass, A*ntitrust for High-Tech and Low: Regulation, Innovation, and Risk*, 9 J.L. Econ. & Pol'y 169 (2012-2013), http://heinonline.org/HOL/Page?handle=hein.journals

reason, the revised 2010 Horizontal Merger Guidelines include a section that specifically addresses innovation effects.[6]

In a traditional commodity market – cement, for example – we generally can analyze the competitive effects of a merger by looking at price and quantity. If a particular merger is likely to raise prices or reduce quantity, we can be reasonably confident that that merger is anticompetitive. But for many digital markets, a traditional price-based approach to competition analysis may be ineffective. This is particularly true in what are known as two-sided markets, where one side may subsidize the prices users pay on the other side.

Indeed, in the digital context, there are a myriad of examples of products and services offered to customers for "free" – such as Internet search engines; social networks like Facebook and Twitter; booking engines such as OpenTable and Expedia; and even software such as Adobe PDF. Competition can be vigorous even where products or services are offered for free. Often that competition takes the form of innovation to provide customers with quality improvements or new products. The issue is whether to look just at price effects on the paying side of these platforms, or whether to consider harms – such as to quality and innovation – on the free side.[7] The Guidelines' section on innovation makes clear that we look at both sides in the merger enforcement context.

This is precisely what the FTC did in its review of *Zillow-Trulia*, which the Commission voted unanimously to close last year. On the paying side of the platform, staff investigated whether a merged Zillow-Trulia would be able to profitably raise advertising prices to real estate agents. But staff also examined whether the merger would reduce the combined entity's incentives to innovate by developing new features attractive to consumers, ultimately concluding that it would not.[8]

The FTC routinely challenges mergers that would harm competition in the research and development of new drugs and treatments. In some situations, we may look specifically at an "innovation market" or "R&D market." But innovation is often a key factor in conventional antitrust analysis. When a firm is planning to enter or expand its presence in a particular market,

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[6] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, 2010 HORIZONTAL MERGER GUIDELINES § 6.4.

[7] While two-sided markets may be more common in high-tech markets, they are hardly new. Newspapers and television programs are longstanding examples of two-sided markets. Antitrust has dealt with these issues in the past. Though they may be more common in the digital economy, this is not a radical enough event to abandon our current antitrust tools.

[8] *See* Statement of Commissioners Ohlhausen, Wright, and McSweeny Concerning Zillow, Inc. / Trulia, Inc., File No. 141-0214 (Feb. 19, 2015), https://www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf.

merger would harm future competition by terminating Synergy's entry plans and would deprive customers of a promising new sterilization technology.[13]

Unfortunately, last September the district court judge denied the FTC's request for injunctive relief. The judge disagreed with the FTC that Synergy would have entered the United States with x-ray sterilization services within a reasonable amount of time to compete against

successful online advertising product."[27] These examples highlight the fact that there is no one-size-fits-all approach to data holdings, and that appropriate antitrust analysis to this issue is a fact-specific enterprise.

As businesses come to rely increasingly on big data, privacy and data protection concerns have become frequent topics in discourse about competition policy. Some have suggested that competition law should focus more on privacy and data protection issues in analyzing platforms and other high-tech industries. Others, particularly in Europe, have suggested that competition law should be used as a tool to improve privacy and data protections for consumers.

In general, I see antitrust review and broader policy concerns regarding privacy and data protections as two separate issues. As I mentioned earlier, competition law in this country is a flexible tool. The U.S. antitrust agencies routinely analyze non-price considerations where there is evidence that those non-price considerations are important to competition. 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.

I mentioned the *Google/DoubleClick* investigation earlier. In that matter, the FTC considered whether the merger of Google and DoubleClick's respective consumer information data sets could be exploited in a way that threatened consumers' privacy as part of its competition analysis. 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 be sure that the Commission understands dimensions of privacy and security competition when reviewing transactions.

Absent a clear nexus to competition, however, privacy and data protection concerns are best handled as consumer protection issues.[28] For example, in *Facebook-WhatsApp* (2014), staff from the FTC's Bureau of Consumer Protection (BCP) focused on how the merger would affect the promises that WhatsApp had made to consumers about the limited nature of the data it collects, maintains, and shares with third parties – promises that exceeded those of Facebook at the time the merger was announced. BCP concluded it was appropriate to alert the companies

[27] Statement of the Fed. Trade Comm'n Concerning Google/DoubleClick (Dec. 20, 2007), File No. 071-0170 at 12, https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

[28] Our agency has evolved into the premier privacy enforcer through our existing consumer protection authorities. Since we brought our first data privacy case over a decade ago, the FTC has brought more than 50 cases alleging violations of consumers' privacy. Additionally, the FTC has used its convening power to hold workshops and issue

about these privacy concerns and assure the public that the protections of applicable law, including Section 5 and a 2011 FTC order against Facebook, would apply to WhatsApp's data.[29] This was a consumer protection issue, and it was handled appropriately as such. On the competition side, our Bureau of Competition staff allowed the transaction to proceed with no conditions.

Similarly, concerns were raised last year regarding RadioShack's proposed sale of its database of customers as part of its ongoing bankruptcy proceedings. Several states objected to the proposed sale on the grounds that RadioShack had promised customers that it would not resell customer data to third parties.[30] Our BCP director, Jessica Rich, wrote a letter acknowledging the "special circumstances" involved in a bankruptcy proceeding and providing guidance on how RadioShack might transfer customer information in a manner consistent with the promises it had made to consumers.[31]

The European Data Protection Supervisor has recently suggested that consumers do not appreciate the actual costs associated with "free" products – and that "it may therefore be necessary to develop a concept of consumer harm, particularly through violation of rights to data protection, for competition enforcement in digital sectors of the economy."[32]

If you break this language down, the concern seems to be that consumers are not as focused on privacy and data protection practices as they *should* be. I'm open to the possibility that consumers may systematically underestimate the effects of privacy or data protection practices – or that they may simply make the rational decision that it isn't worth the time to fully evaluate those costs. One interesting point in the European Data Protection Supervisor's report was that it would take an Internet user, on average, 244 hours per year to read the privacy policies associated with each website they viewed.[33] The FTC has advocated for greater transparency and choice for consumers with respect to privacy and data protection policies,

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[29] Letter from Jessica Rich, Director, Bureau of Consumer Protection, Fed. Trade Comm'n, to Erin Egan, Chief Privacy Officer, Facebook, and to Anne Hoge, General Counsel, WhatsApp Inc. (April 10, 2014), https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf.

[30] *See* Megan Geuss, *FTC Proposes a Compromise so RadioShack Can Sell Consumer Data*, ARS T

including recommending that Congress consider enacting general privacy legislation, data security and breach notification legislation, and data broker legislation.[34]

At the same time, I believe that it is dangerous to engage in competition analysis based on what we think consumers *should* want or value, independent of market realities. To do so is to cross the line from antitrust enforcement to market regulation. However well intentioned, I do not believe that this is the appropriate role of antitrust law.

If market participants are competing on the basis of privacy or data policies to attract consumers, that would certainly be an element of our competition analysis. But if they *aren't*, and if there isn't evidence that those dimensions are particularly relevant to competition, then using competition law to address privacy or data issues is like trying to force a square peg into a round hole. To the extent that there is a problem, it should be solved through legislation, regulation, or consumer protection law enforcement – not using the antitrust laws to solve a policy issue they are ill-suited to address.

III. New Frontiers in a Digital World

Before closing, I'd like to briefly mention a potential frontier in antitrust analysis – the rise of high velocity computerized markets and the role of algorithms and machine learning in them.[35] Last year, DOJ brought a case for price fixing against two e-commerce sellers who agreed to align their algorithms to increase online prices for their goods – posters.[36] In that case humans reached an agreement to use technology to fix prices – but how should antitrust enforcers handle situations in which the human role is less clear? Traditionally, there are three challenges to maintaining a collusive scheme: (1) detecting cheating am

responding to new market developments, and (3) avoiding detection by antitrust officials. Algorithms could be used in an attempt to overcome these challenges, such as by automating conspirators' responses to changing market developments, mitigating the need for ongoing coordination between the participants.

There is also a possibility that, as algorithms become more sophisticated, they may be more likely to engage in consciously parallel behavior. Professors Maurice Stucke and Ariel Ezrachi, who both participated in this morning's panels, co-authored a recent paper on artificial intelligence and the enforcement challenges that may be raised by collusion involving pricing algorithms.[37] Stucke and Ezrachi suggest that it may be difficult to challenge algorithms engaged in conscious parallelism under current laws absent awareness or anticompetitive intent by the humans using the technology. They urge policymakers to recognize the "dwindling relevance of traditional antitrust concepts of