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

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Opening Remarks of Commissioner Terrell McSweeny[1]
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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 products, or "roof reports."[2] Roof reports use aerial images to calculate the dimensions of rooftops, primarily for insurance purposes. EagleView is the leading U.S. provider of "roof

[1] The views expressed in this speech are my own and do not necessarily reflect those of the Commission or any other Commissioner.

[2] Compl., In the Matter of Verisk Analytics, Inc. and EagleView Technology Corp., Dkt. No. 9363 (Dec. 16, 2014), http://www.ftc.gov/system/files/documents/cases/141216veriskcmpt.pdf.

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."[3]

In another example the FTC recently challenged the merger between the second and third largest sterilization companies in the world, Steris and Synergy.[4] 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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[3] Press Release, Verisk Analytics, *Verisk Insurance Solutions Announces Expansion of Imagery Database*, Aug. 4, 2015, http://www.verisk.com/press-releases-verisk/2015/august-2015/verisk-insurance-solutions-announces-expansion-of-imagery-database.html.

[4] Compl., *FTC v. Steris Corporation and Synergy Health Plc.*, No. 1:15-cv-01080-DAP (filed June 4, 2015), https://www.ftc.gov/system/files/documents/cases/150529sterissynergytro.pdf.

evidence that the evolving nature of the market itself precludes the merger's likely anticompetitive effects."[5]

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.[6] 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 some important conclusions. First, the evidence suggested that real estate agents use numerous methods in addition to the platforms operated by Zillow and Trulia to attract customers. Second, there was insufficient evidence leading the Commission to conclude that real estate agents would face higher prices for advertising after the merger, or that the combined firm would have a reduced incentive to innovate—on either the consumer side or the advertiser side of its platform. The Commission therefore closed its investigation. One question going forward for U.S. enforcers is what to do in cases where quality and innovation competition is harmed but where there are no real price effects.

Regarding the FTC's investigations involving potentially anticompetitive conduct on platforms, a central part of our analysis is how the conduct of allegedly dominant firms affects the introduction of competing technology. Competition among platforms is important and valuable, both from a price and innovation perspective. However, issues surrounding platform competition (including rules governing various platforms) are complex. There are differences in how the Commission should evaluate platform restrictions that affect competition on a specific platform versus how platform restrictions may impact competition outside that platform (i.e., inter-platform competition). Moreover, we should think carefully about the challenges of designing appropriate remedies in this regard.

Briefly, I'll also note that the FTC has a long history for advocating for disruptive entrants—most recently, urging regulators to not impede competition from new ride-sharing platforms like Uber and Lyft. The regulatory asymmetry issues in the sharing economy are similarly evident in online platforms. That is, regulating only some of the players in a market, or regulating online platforms and more traditional "non-platforms" differently, may distort

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[5] *See U.S. v. Bazaarvoice*, 2014 U.S. Dist. LEXIS 3284 (N.D. Cal. 2014) at *261.

[6] *See* Statement of Commissioner Ohlhausen, Commissioner Wright, and Commissioner McSweeny Concerning Zillow, Inc./Trulia, Inc., Feb. 19, 2015, https://www.ftc.gov/system/files/documents/public_statements/625671/150219zillowmko-jdw-tmstmt.pdf.

competition. Regulations should allow for flexibility in response to new and innovative methods of competition and should be narrowly tailored to specific public policy goals, like consumer safety.

II. Big Data and Competition

Between the sensors we use to track our steps, the Internet connected devices we have in our homes and cars, and the amount of information we are inputting into computers each day, we are producing more data than ever before. Big data is a tool, and like any other tool, it can be used for good or ill. In most circumstances, big data may be no different from any other business asset or tool that a firm may use in pursuit of larger market share or increased profits. But we need to be especially vigilant of the potential effects on innovation when the firms at issue house voluminous amounts of consumer data.

In the mergers involving big data that the FTC has investigated and challenged, the data is either a key input or the good or service itself. For example, before my time at the agency, the FTC challenged a consummated merger involving a merger-to-monopoly of companies providing kindergarten through 12th grade educational marketing data.[7] The FTC viewed the combination of the parties' educational marketing data as enhancing the merged firm's market power under a unilateral effects theory, which the Commission alleged caused anticompetitive effects in the form of increased price and reduced innovation, including the development of new product features.

Some have asked us to use our antitrust review—of mergers, for instance—to improve privacy protections for consumers. I see these as two separate issues and the Commission examines the competition and consumer protection issues separately based on the facts.

For example, in the FTC's review of the Facebook/WhatsApp transaction, our Bureau of Consumer Protection staff 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 about these privacy concerns and assure the public that the protections of applicable law (Section 5) and a 2011 order against Facebook

[7] Compl., In the Matter of The Dun & Bradstreet Corp., Dkt. No. 9342 (May 6, 2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/05/100507dunbradstreetcmpt.pdf.

would apply to WhatsApp's data.[8] 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.[9] 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 a kind of market power that creates a barrier to entry? It may be that an incumbent has significant advantages over new entrants when a firm has a database that would be difficult, costly, or time-consuming for a new firm to match or replicate. In those markets, network effects may exist—but only for so long as the data is useful for the incumbent (i.e., fresh and relevant). Again, any investigations in this space would utilize our existing competition tools, with a focus on innovation and non-price considerations. Moreover, we would need to carefully approach any remedial options, as well as consider any unintended consequences of our intervention, including on innovation.

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[8] *See* Press Release, Fed. Trade Comm'n, *FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition* (Apr. 10, 2014), https://www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed.

[9] *See* Press Release, Fed. Trade Comm'n, *Federal Trade Commission Closes Google/DoubleClick Investigation* (Dec. 20, 2007), https://www.ftc.gov/news-events/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation.