PROGRAM

11:45 AM  REGISTRATION

12:10 PM  INTRODUCTORY REMARKS
Marianela López-Galdos  |  Director Competition & Regulatory Policy, CCIA

12:15 PM  KEYNOTE SPEECH
Bruce Hoffmann  |  Acting Director of Competition Bureau, FTC

12:30-1:30 PM  PANEL DISCUSSION
Cristina Caffarra  |  Vice President, Head of European Competition Practice, Charles River Associates
William E. Kovacic  |  Professor of Global Competition Law and Policy, George Washington University, and Director, Competition Law Center
Geoffrey Manne  |  Founder and Executive Director, International Center for Law and Economics
Nicolas Petit  |  Visiting Scholar at the Hoover Institution, Stanford University and Professor, Law School of the University of Liege
Marianela López-Galdos  |  Director of Competition & Regulatory Policy, CCIA (moderator)

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Since 1972, the Computer & Communications Industry Association has believed supporting competition and a climate for innovation to be central to U.S. economic success. CCIA does not have an antitrust policy ideology, and has found itself on the side of either companies or government regulators, depending on the case and the facts. The most critical facts are not how big a company is, but what it is doing and how those practices impact consumers. In tech antitrust cases over the past 45 years, often supporting government officials in antitrust investigations, CCIA has witnessed the importance of antitrust intervention when warranted by bad behavior by dominant companies. Because of that history, CCIA has an interest in seeing antitrust law preserved as a credible tool.

Just as competition is important, healthy robust debate about antitrust policy is a key step to ensuring policies are equipped to support innovation. As antitrust attorneys gathered in Washington for the Spring American Bar Association Antitrust Section conference, the tech industry was in the headlines with those with limited understanding of antitrust law or the digital economy calling for more regulation. CCIA’s lunch panel that week brought together the FTC’s Acting Director for the Bureau of Competition, Bruce Hoffman, for a keynote address. Hoffman, speaking in an unofficial capacity, told a roomful of antitrust attorneys, journalists, policymakers and staff that U.S. antitrust laws are strong and able to be applied to the tech industry. Afterwards a panel of antitrust experts, led by CCIA’s Marianela López-Galdos as moderator, discussed competition policy and what is at stake for the tech industry and the credibility of competition policy in this climate. The U.S. antitrust experts had various reasons for supporting the current antitrust framework based on the consumer welfare standard — ranging from history to avoiding political capture — if the goal is really to promote competition and protect consumers. To structure competition enforcement based on other considerations, like harm to competitors, blocks the very marketplace competition that is the foundation to any supply-demand based economy.

The United States’ tech industry and innovation culture is the envy of the world and this is, in part, a tribute to the U.S.’s approach to competition policy. Decisions in the 1970s on how to deal with dominant companies engaging in abusive practices like IBM and AT&T led to the software industry, Silicon Valley, the growth of the mobile phone industry and the internet functioning as a free, open platform for communications and business opportunities.

Tech companies have been a key driver of economic growth for the past two decades. According to a recent Department of Commerce study, the digital economy grew 3.7 percent in 2016 compared to the overall economy’s growth of 1.7 percent and the tech industry supports millions of higher paying jobs. Platforms offered by leading tech companies are used by smaller companies and traditional businesses to expand their markets. But it is also true that tech innovations and new online startups are disrupting legacy industries from entertainment to transportation. The U.S. has traditionally supported this Darwinian system of innovation, and it has given us an economic advantage over countries whose systems support protecting particular companies instead of the competitive process.

So as pundits call for antitrust regulation, or changes to the law to support more regulation, what’s at stake could be a system that protects consumers and fosters economic growth.

Edward J. Black
President and CEO, CCIA
CONFERENCE SUMMARY

On April 12 in Washington, D.C., CCIA hosted in Washington DC a luncheon panel event to discuss the implications of competition policy for the tech industry — in the U.S., in the EU and around the world. CCIA welcomed over 100 participants, which featured private practitioners, hill staffers, press academia, and worldwide enforcers.

KEYNOTE SPEECH:

BRUCE HOFFMAN

Note: This summary has been prepared by CCIA based on Mr. Hoffman’s remarks delivered at the event. Mr. Hoffman stated that his remarks did not necessarily represent those of the Federal Trade Commission or its Commissioners.

“Don’t let the incumbents and existing regulatory structures block innovation and deter the advancement of new technology.”

The Conference opened with a keynote by Bruce Hoffman, Acting Director of the Bureau of Competition at the FTC, with an overview of the many concerns currently facing antitrust in the tech industry, namely: that the online space is too big or too powerful; the collection of data is contributing to market power; AI and algorithms could affect firm behavior; and concerns not unique to the tech industry that firms would take actions to reduce competition, such as buying competitors or taking actions that would disadvantage rivals.

There is a perception, continues Hoffman, that antitrust law is inadequate to address these concerns because it is “too dated.” Meanwhile others believe the focus that has developed in antitrust — of protecting the competitive process, and thinking about consumer welfare as opposed to protecting competitors — should be reconsidered. Specifically, some antitrust scholars are advocating for changing, antitrust law’s consumer welfare standard.

While Hoffman acknowledges that such critiques of antitrust enforcement can be beneficial — as challenges to fundamental assumptions can encourage one to think rigorously about whether an approach is correct — he encourages the audience, and especially skeptics of the consumer welfare standard, to remember that our current standard, that we use as our touchstone for antitrust enforcement both in the U.S. and Europe, is the result of decades of failed enforcement standards.

In other words, the U.S. has tried different antitrust enforcement standards over the past century — a benefit of having antitrust law for so long — and they have worked out poorly. The consumer welfare standard, Hoffman explains, is the result of learning from these decades of failed enforcement standards.

But does this mean that antitrust law isn’t up to the challenge of technology, that something in our antitrust laws should be radically changed to address the tech industry? According to Hoffman, this is not a new question.

Hoffman answers by quoting Joel Klein, who once served as the Assistant Attorney General of the Department of Justice’s Antitrust Division:
“Some... question whether the existing antitrust laws can possibly be relevant to today’s economy. The Sherman Act was passed in 1890 in response to the nationwide industrial trusts that the railroads had made possible, and the Clayton Act was passed in 1914 and was aimed largely at retailing and wholesaling practices in localized markets. How, then, can these ancient statutes be relevant to a 21st Century, information-based, economy? I get asked that question, especially by non-antitrust-lawyers, probably more than any other. And I answer, unhesitatingly, that the laws are just fine, precisely because, unlike most contemporary statutes, they are common-law provisions and, therefore, they are not locked in text or time.”

In the past, antitrust law has attracted, and overcome, similar concerns regarding its relevance to new innovations and sectors as it is currently facing with regard to the tech industry. But Hoffman notes that antitrust law is indeed still relevant because, “fundamentally, the antitrust enterprise in the U.S.... has been a century of learning, thinking, and evolution, and that has largely been beneficial.”

Hoffman not only believes antitrust law is equipped to be applied to the tech industry, he believes it can help advance it.

In June 2015 the U.S. government made a submission to the OECD competition committee in which it stated:

“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.”

This is a highly pro-technology, pro-innovation statement of antitrust philosophy, Hoffman explains, and it boils down to this:

“Don’t let the incumbents and existing regulatory structures block innovation and deter the advancement of new technology.”

Does this statement that tech companies get a free pass because innovation is typically pro-competitive? Absolutely not, Hoffman concludes.

The FTC and the DOJ believe in the rigorous enforcement of merger law, and they use the best available legal and economic tools, Hoffman asserts. They continue to apply the horizontal merger guidelines, which are “fully applicable to technology company mergers.”

There’s been a focus on price in these mergers, and price is an important factor, and has a virtue of being measurable, but that doesn’t mean it’s the only thing that is considered, Hoffman explains. Quality, output, and innovation effects are considered as well, and in fact have a long history of being factored into merger reviews. Sometimes these factors are simply shorthand as “price.” Vertical mergers are also an important enforcement issue. They’re somewhat more challenging to neatly encapsulate, but they’re something that the FTC does pay a lot of attention to, Hoffman says.

This does not necessarily mean the FTC takes issue with every vertical merger, Hoffman warns. In Amazon/Wholefoods merger, for example, which Hoffman characterizes as both vertical and horizontal, and involving a technology company, no issue was found with the transaction.

On the other hand, Hoffman points out a number of merger cases the FTC has taken issue with. Last month the FTC sued to block CBK Auto/Mate, an auto dealer software platform. The FTC also sued to stop DraftKings — an online “sports participation merger” — merging with FanDuel. And, at the moment the FTC has four merger cases in litigation, and at least one involves a technology issue.

Hoffman then went over some specific issues that come up in the press and in antitrust conversations regarding around technology industry mergers:

The first: There is a notion, Hoffman explains, that a merger involving a firm gaining more data/information about its customers is the equivalent of a price increase or quality
decrease. But, according to Hoffman, at the moment there is neither a theoretical nor empirical basis for assuming that in every case a firm acquiring more data from consumers is imposing a price increase or decrease. The actual issue is much more complicated and is going to be fact-dependent.

Hoffman believes how customers themselves value data is central to this discussion (or, at least, it will be). Hoffman points out that it’s not clear that consumers value data at all, or at least value it in the same way as they do money. Although Hoffman admits that this is the sort of thing that could change rapidly, and that they don’t know precisely how data is valued by consumers, he believes the FTC should operate on what is known now: that consumers do not value data like they value money in their bank account.

Another complicating factor to determining the value of data is that it can be transferred to multiple firms. For instance, giving firm A data doesn’t mean you can’t also give data to firms B and C. In this way it is unlike money, Hoffman explains.

Data is also distinct from money in that consumers receive an immediate return for it. By this Hoffman means that, when you give data to a tech firm, it is often immediately used to improve the service.

Hoffman also addressed information asymmetries. The fact that there’s information asymmetries — i.e. that consumers don’t always know what they’re agreeing to — can be solved by competition. In other words, as Hoffman explains, companies often compete by identifying those information asymmetries and, in response, offering better security and privacy policies.

There is concern regarding tech firms’ tendency to buy startups and, in doing so, foreclosing the rivals that would have eventually unseated them. Some believe this is a competitive problem we should worry about. While this is a legitimate theory of competitive harm Hoffman utilizes when looking into mergers, he explains that it is bound by the ability to predict future competitiveness.

If the FTC instead adopted a general policy of blocking the acquisition of startups it could have two significant consequences, according to Hoffman: it could result in immediate consumer harm due to a loss of the expansion of the startup’s capabilities that the acquirer could provide; and it could decrease the capital available for startups, resulting in fewer startups.

Hoffman concludes by stating that antitrust laws are strong, able to be applied to the tech industry, and at the FTC they believe in thoughtful and fact based enforcement.

Note: The full text of Bruce Hoffman’s speech is also available at: https://www.ftc.gov/public-statements/2018/04/competition-policy-tech-industry-whats-stake
PANEL DISCUSSION

Note: This summary has been prepared by CCIA based on the discussions that took place during the event.

**GEOFFREY MANNE**, Founder and Executive Director of the International Center for Law and Economics, followed Hoffman and devoted his opening remarks to addressing the historical context of today’s “hipster antitrust” movement — i.e. the skeptics of the consumer welfare standard Hoffman alluded to.

“The theory is that, unconstrained by sufficient competitors, these [big] firms impose all manner of alleged harms: from fake news, to the demise of local retail, to low wages, to the veritable destruction of democracy,” Manne explains. What’s needed, proponents argue, is industrial policies that shackle large firms and increase smaller firms.

But Manne finds this counterintuitive. If you’re successful in reducing the size of firms, you make more important competition through political influence. And, if the standard for antitrust enforcement is extended beyond economic welfare effects, how long can they expect to resist calls to restrain enforcement precisely to further those goals? The incentive to get exemptions will increase, and you might end up with even more concentration, Manne argues.

The fundamental problem, as Manne sees it, is this: “if you make antitrust more political, you get less democratic, more politically determined results — precisely the opposite of what proponents [of hipster antitrust] claim to want.”

**CRISTINA CAFFARRA**, Vice President and Head of European Competition Practice at Charles River Associates, weighed in on why European regulators are seen as targeting American companies in the tech space.

While she acknowledges this perception reflects a sense of anxiety present among both European regulators and citizens about the power of large tech platforms, Caffarra admits that the ‘tech gap’ between Europe and America also plays into this perception.

“When you look at startups that have become unicorns,” startups valued at more than a billion, Caffarra explains, “32 of them which are U.S. companies, 18 are them that are Chinese companies, [there’s] a smattering of UK companies, four of them, and pretty much nobody from continental europe.”
While the causes for this divide do not hail from competition policy enforcement, according to Caffarra, competition agencies are nevertheless highly motivated and sensitive to the perception that if they don’t do anything about it they will be “superseded and become obsolete.”

In the area of data, for example, European regulators’ way of thinking has already evolved. Caffarra says that while regulators had initial concern about the volume of data and the barriers of entry that data posed, “[they] moved on from the idea that the sheer volume of data is a problem in and of itself.”

NICOLAS PETIT, Visiting Scholar at the Hoover Institution at Stanford University, and a Professor at the Law School of the University of Liege, devoted his remarks to rebutting a laundry list of misperceptions about European enforcement agencies and their practices.

The first: “Don’t conflate the European Commission and the DG Competition,” and particularly what they’re doing in antitrust. “These are not necessarily coordinated on tech issues”, Petit explains.

Petit also distinguished between speech-related advocacy work and enforcement work. What you see in the press, Petit argues, is bombastic and less technical, and thus should be taken with a grain of salt. On the other hand, “enforcement work is based on more technocratic, technical, ... legally embedded principles.”

Petit then tackled the idea that there is a bias against the tech industry in Europe, which he states is unconvincing when looking at EU competition policy horizontally. That is, the EU allocates resources to many sectors at risk of collusion and monopolization — such as the banking, chemicals, and utilities sectors.

Petit concludes that, since these sectors are under heavy scrutiny, the idea that the tech industry is the singular focus of inspection and regulation does not have merit.

WILLIAM E. KOVACIC, Professor of Global Competition Law and Policy at George Washington University, where he also serves as the Director of their Competition Law Center — talked about the U.S.’s role in engaging the rest of the world on issues regarding technology and competition policy.

According to Kovacic, currently “there’s a broad perception in Europe and elsewhere that the U.S. doesn’t play in enforcement process. That the U.S. has become timid, passive, and not a major focus in shaping the debate.”

As a result, Kovacic believes that Europeans feel it is their duty to lead competition and enforcement policy, because “the U.S. has defaulted.”

Joseph Simons, who worked as director of the Bureau of Competition at the FTC, has been combatting this perception, and Kovacic predicts he will continue to do so in his new role as the new chairman of the Federal Trade Commission.

Simons, Kovacic reports, has brought more monopolization cases in his 30 months as director of the FTC’s Bureau of Competition than anyone else. He has also brought a number of merger challenges, under and above reporting thresholds.

“Joe has a program, and it will be interesting,” Kovacic asserts. “It will not be timid, and it will be focused on how the commission can make contributions.”
Companies that gather more data from their customers aren’t imposing the equivalent of higher prices or lesser-quality service, said Bruce Hoffman, a senior official at the US Federal Trade Commission.

As antitrust agencies review the effect of mergers and large platforms on data markets, Hoffman said enforcers were starting to grapple with some theories, but flagged the problems of linking data and price.

There’s no evidence suggesting U.S. consumers value personal data “at all,” though news like the Cambridge Analytica privacy breach (see 1804110065) could change perceptions rapidly, acting Director of the FTC Bureau of Competition Bruce Hoffman said Thursday. “There is no good reason to think that consumers value data about themselves in the same way that they value money in their bank accounts,” Hoffman said at a Computer and Communications Industry Association event.

There’s also no theoretical basis for assuming a company acquiring large amounts of data results in consumer harm equivalent to price increases or product quality reduction, Hoffman said... (For more, see Washington Internet Daily: Ref: 1804120055).

The Federal Trade Commission does not assume that a merger where companies obtain more consumer data is the equivalent of a price increase or quality decrease, the acting director of the FTC’s bureau of competition has said.

Speaking in his personal capacity yesterday, Bruce Hoffman applied his critique of the German competition authority’s conduct case against Facebook to the analysis of mergers among technology companies.

On Tuesday, he had said the data-price analogy “can break down”... (For more, see Global Competition Review: https://globalcompetitionreview.com/article/usa/1167928/hoffman-data-is-not-also-money-in-mergers).
ATTENDEES

AGENCIES
Argentina National Competition Commission
European Commission
U.S. Federal Trade Commission
U.S. International Trade Commission

CONSULTING FIRMS
Capital Alpha Partners
FTI Consulting
McGuireWoods Consulting
McLane Consulting
Perry Bayliss Government Relations

BUSINESS SECTOR
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Equinix
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Microsoft
NetChoice
Quorum

HILL STAFFERS
Office of Representative Lacy Clay
Office of Senator Chris Coons
Office of Senator Kamala Harris

LAW FIRMS
Araoz & Rueda
ClearyGottlieb
Constantine Cannon
DLA Piper

Garrigues
Martinez Lage, Allendesalazar & Brokelmann
Mori Hamada & Matsumoto
Souza Mello
White & Case
WSGR

PRESS
Agence France-Presse
Bloomberg
GlobalCompetitionReview
MLex
Washington Internet Daily

THINK TANKS
Cato Institute
Competition Policy International
International Trade Administration
Parr Global
Technology Policy Institute
Techfreedom

UNIVERSITIES
The Catholic University of America Law School
Columbia Law School
Duke Law
Georgetown
George Washington University
IE Law School
John Hopkins - SAIS
Kobe University
UTDT
The Springboard Initiative is a CCIA project that provides data, insights, and perspectives on the benefits that competition among leading tech services delivers for consumers, businesses, and communities – advancing ideas that keep tech empowering people. For more, visit: www.springboardccia.com

Springboard: What is the Impact of Tech on the U.S. Economy?

Tech Companies Compete Fiercely

Social Media Use in 2018

Tech Invests In R&D

R&D Spending, Fiscal Year 2017

Top Ten Tech

Top Ten Non-Tech

Tech Faces Low Barriers to Entry

Tech Creates Employment Opportunities

Tech Drives Economic Growth

The digital economy "has been a bright spot in the U.S. economy," growing at an average rate of 5.6% per year. (For reference, the overall economy only grew at a rate of 1.5%.)

Productivity in 100 largest metro areas in US grew fastest in recent years among regions that specialize in tech & research-focused sectors.
Tech Empowers SMEs

Springboard Initiative
@springboardnyc
Leading tech services and the internet can profoundly empower individuals and small, upstart entrepreneurs - especially in their ability to connect marginalized people with economic opportunities.

Promoting the African Internet Economy
Author: Michael Kenne is a Senior Fellow at the Internet Society.

Springboard Initiative
@springboardnyc
Cloud-based services are especially helpful to small and medium-sized businesses, providing the latest technology with low upfront costs, according to USITC report http://bit.ly/2Y35Scz

Tech Helps Fight Inequality

Springboard Initiative
@springboardnyc
- Apr 2
While many goods and services have gotten dramatically more expensive over the past two decades, tech products have done just the opposite.

@Mark_L_Perry
(4/9) bit.ly/2OhhBU4

Consumers Choose Tech

Springboard Initiative
@springboardnyc
- Apr 2
Leading tech services remain among @FortuneMagazine’s most admired companies in the world. Consumers enjoy tech sector’s quality products & services at minimal prices.

Fortune Most Admired, IBM Revenue Growth: CIO Daily for January ...
Must-read business news, delivered every morning.
fortune.com

Tech Empowers Creators

Springboard Initiative
@springboardnyc
- Mar 29
There’s been a boom in TV not seen since the 80s, and leading tech services play a huge part in fostering and investing in creativity: BrittenNelson and Josef Aclan.

The Business of Too Much TV
There are more great shows in production now than ever before — but it’s never been harder to make one.

vulture.com

Springboard Initiative
@springboardnyc
- Apr 2
The internet distribution of music has enabled more independent artists to reach mass audiences, according to research from @ColumbiaU’s Joel Waidhofer.

bit.ly/2LDtHU
ABOUT CCIA

Computer & Communications Industry Association (CCIA): CCIA is an international not-for-profit membership organization dedicated to innovation and enhancing society’s access to information and communications. CCIA promotes open markets, open systems, open networks and full, fair and open competition in the computer, telecommunications and internet industries.

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