



**Computer & Communications
Industry Association**

Tech Advocacy Since 1972

COMPETITION, DATA AND INNOVATION IN THE DIGITAL ECONOMY

Washington, DC • March 28, 2019

3rd Spring Antitrust Conference – CCIA

www.ccianet.org

PROGRAM

11:45 AM	REGISTRATION
12:10 PM	INTRODUCTORY REMARKS Marianela López-Galdos Director, Competition & Regulatory Policy, CCIA
12:15 PM	KEYNOTE SPEECH Christine S. Wilson Commissioner, Federal Trade Commission
12:30-1:30 PM	PANEL DISCUSSION James Cooper Deputy Director for Economic Analysis, Federal Trade Commission, and Associate Professor, Antonin Scalia Law School, George Mason University Antonio Gomes Acting Deputy Director, Directorate for Financial and Enterprise Affairs, OECD Marianela López-Galdos Director of Competition & Regulatory Policy, CCIA (moderator) Terrell McSweeney Partner, Covington & Burling LLP, former Commissioner, Federal Trade Commission Daniel Sokol Professor, University of Florida Levin College of Law and Senior Of Counsel, Wilson Sonsini Goodrich & Rosati

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FOREWORD



As a trade association that has actively campaigned for competition in the technology industry since 1972, we were pleased to welcome those in town for the ABA Spring Meeting to a discussion on what's at stake for U.S. antitrust policy. Technology companies are disrupting legacy industries in retail, transportation, hotels and entertainment not without making a few enemies along the path to innovation. Part of America's economic success is owed to this climate of innovation that welcomes disruption and to antitrust laws that protect competition, not competitors.

Those who work in antitrust law and economics are not used to these issues making frequent headlines as we've seen this past year. Policy makers in Europe seem increasingly tempted to use antitrust to protect their own domestic industry, and some U.S. policymakers are likewise tempted to distinguish themselves and make headlines by simplistic attacks using antitrust and anti-tech rhetoric leading up to a historic election campaign season.

As Former FTC Commissioner Terrell Sweeney said during the CCIA lunch panel, "If what you're concerned about is a lack of comprehensive privacy framework, which is a legitimate concern, then the solution is to pass a comprehensive privacy framework, as opposed to necessarily trying to fix all of those problems through competition law enforcement, which is going to be a bit more limited to what you can do in that regard." Current FTC Commissioner Christine Wilson said in her keynote address that there are so many tools for regulators, like the FTC, to address privacy directly that there is "no need to shoehorn it into antitrust." FTC Deputy Director-Economic Analysis James Cooper said policymakers will continue to need to find ways to protect privacy while encouraging innovation.

Wilson, speaking in her personal capacity, also reminded those gathered that antitrust violations need to be based on economic facts and proven before an impartial judge before assigning remedies like breaking up companies. As for whether there is a need for special antitrust rules to deal with high tech markets, Wilson rejected any suggestion "that these markets are somehow unique and therefore warrant different treatment."

After the keynote, CCIA's Director of Competition Marianela Lopez-Galdos moderated a panel discussion in which most experts noted how the U.S. benefits from antitrust law grounded in the consumer welfare standard, as it's harder to manipulate to target companies for being big rather than for bad behavior.

CCIA understands concerns about various aspects of technology, but we also believe antitrust is too crucial of a tool to politicize it or use it to solve a myriad of issues for which it was never intended. Considering how crucial the digital economy is to the U.S. economy in terms of jobs and trade, this makes it even more important to be responsible in both rhetoric and action in shaping the antitrust landscape.

For the past two decades, tech companies have driven economic growth and are now the leading category within trade in services. According to the Bureau of Economic Analysis, the digital economy's contribution to the U.S. GDP in 2017 was \$1.35 trillion. The trade surplus after exporting \$439.1 billion and importing \$266.6 billion in digitally deliverable services is \$172.5 billion. The digital economy supported 5.1 million jobs in 2017 and the average salary for those jobs is \$132,223.

Robust debate based on the facts and the law seem more important than ever in this climate. So we appreciate all those who participated and attended our 2019 panel discussion.

A handwritten signature in black ink, which appears to read "E. J. Black".

Edward J. Black
President and CEO, CCIA

KEYNOTE SPEECH

CHRISTINE S. WILSON

Note: This summary has been prepared by CCIA based on Ms. Wilson's remarks delivered at the event. An official written copy of her remarks is available on the Federal Trade Commission website. Ms. Wilson stated that her remarks did not necessarily represent those of the FTC or any other Commissioner.



The Conference opened with a keynote speech by Christine Wilson, Commissioner at the Federal Trade Commission, who addresses the heart of many of today's antitrust debates: Do we need special rules, and particularly special antitrust rules, for high-technology markets?

Commissioner Wilson began her talk by acknowledging that digital firms have indeed grown very large, but noted that just ten years ago, few of the largest firms were digital. The growth of these digital firms has caused some backlash; Commissioner Wilson mentioned both Senator Elizabeth Warren's comments on breaking up tech companies and the U.K. Furman Report, which calls for special rules for tech companies, as recent examples of such backlashes. Thus, Commissioner Wilson specifically addresses three ideas that have been proposed in response to the concerns about digital firms:

"First, the idea that some favored goals, like the protection of privacy, are exempt from the traditional antitrust requirement that the challenged conduct impair competition. Second, the idea that emerging technologies and business models, such as big data, create competitive harms that cannot be handled under the antitrust status quo, and therefore require special antitrust rules. Third, the idea that all of these poorly-defined ills can be solved simply by breaking up large technology firms into smaller pieces."

Regarding the first idea, Commissioner Wilson said that "because we have many tools already available to us to address privacy directly, there's no need to shoehorn it into antitrust analysis." The examples she used to demonstrate this point included the Gramm-Leach-Bliley Act to protect the privacy of financial information, HIPAA to protect the privacy of health

information, and COPPA to protect the privacy of children's data. Commissioner Wilson added that the FTC has used Section 5 of the FTC Act to bring hundreds of privacy and data security cases.

Regarding the second proposal on big data, Commissioner Wilson agreed with many of the presenters at the recent FTC Hearings on Competition and Consumer Protection that "any attempts to use antitrust to restrain the use of big data must demonstrate that the use of big data harms competition." Instead of singling out big data as inherently different, Wilson said that big data is just like any technology:

"I see little about big data that is inherently different from the types of markets and types of cases that we have seen before. I therefore see little reason to create special antitrust rules for mergers and conduct cases that implicate its use."

Regarding the third proposal, breaking up the tech companies, Commissioner Wilson noted that structural remedies "frequently fail to increase consumer welfare."

Commissioner Wilson concluded her remarks with a few observations. Given the checkered history of previous structural remedies, she argued that we should "think very carefully about whether there is an effective remedy before we bring the case." She cautioned against recent proposals to break up digital firms, and was particularly skeptical of attempts to do so "without proving an antitrust violation before an impartial judge." She ended her keynote by emphasizing her view:

"I emphatically reject any suggestion that these markets are somehow unique and therefore warrant different treatment. We should stick to the same sound, economically-driven analysis that has served us well for many years. Thus, we should focus on conduct that we can properly tie to a cognizable antitrust harm, including a reduction in output or an increase in price. I do not reject the possibility that we might find unlawful conduct in the high tech industry... But I reject attempts to short circuit the traditional process by simply assuming a problem and imposing a pre-ordained solution."

PANEL DISCUSSION



DANIEL SOKOL, Professor at the University of Florida Levin College of Law and Senior Of Counsel at Wilson Sonsini, followed Commissioner Wilson's opening speech by focusing his remarks on the attack of the consumer welfare standard and its ability to deal with non-price issues:

"So the question is, have we dealt with these non-price issues? [The answer is] yes. Really since early antitrust. I will focus on only one example. Brandeis believed in the rule of reason for Resale Price Maintenance — that's all about non-price competition. So one of two things: either people don't understand that antitrust can deal with non-price issues or people are being disingenuous about what being Brandeisian is really about. It's really about something else — I want a certain outcome and I'm willing to reverse-engineer it."

Instead, Sokol argues that the U.S. agencies prefer something quantifiable, like the consumer welfare standard, because they want to make the process "less political" than other parts of the government. Competition policy in the U.S., notes Sokol, is consistent because "if you make the arguments based on evidence and using economic analysis consistent with the evidence, you'll win on the merits."

Therefore, Professor Sokol believes that real competition is when you can show that your product, service or innovation is better. The questions presented for technology companies in the antitrust space are "not new", says Sokol, it's that "we're just applying the analysis in new ways." He argues that the attack on the consumer welfare standard because the outcome feels "unfair" is misplaced. To illustrate this point, he makes the analogy of being a parent and having his children complain about unfairness, but as a parent not knowing exactly what fairness means to each child. Similarly, there is no right answer when it comes to what is "unfair" in antitrust, and attacking the consumer welfare standard because an outcome seems "unfair" is problematic. Sokol questions what an alternative standard would be, if not a quantifiable standard like the consumer welfare one?



TERRELL MCSWEENEY, Partner at Covington & Burling LLP and former Commissioner at the FTC, also discusses the sufficiency of the consumer welfare standard and consequently, the debate on whether the U.S. should turn to antitrust law to solve other problems like economic

inequality. McSweeney's position is similar to Sokol's, as she cautions against using antitrust to try to delve into other purposes, and instead recognizing in which areas antitrust law is good at addressing:

"I do think we have to be mindful in the antitrust world in explaining how antitrust law works...and really, I think being honest about what antitrust law is good at and where it should be applied in some of these questions, and where antitrust law may have some limitations or may be less applicable."

For example, she believes antitrust should not be inserted into the privacy debate unless there are actual competitive concerns:

"Competition [law] rightly focuses on competitive process. If there isn't a ton of competition occurring on privacy, there's not very much a competition enforcer can do about it, and it's not going to solve the problem unless there's either demand in the marketplace, incentives to create more privacy, or regulations and laws that require it. I think we have to be honest and forthright in these conversations about which frameworks are appropriate and for what purpose."

Additionally, McSweeney argues that the consumer welfare standard is adequate for today's times:

"In part, because the CWS is not limited to simply a price effects analysis. It has been mischaracterized in a lot of these debates and it does allow enforcers to take into account innovation and quality effects as the Commissioner has just noted. I think there's a lot of flexibility in the antitrust framework and it is incumbent on the antitrust enforcers to continue to use all of the tools in their toolbox to keep pace with changes in the economy."

PANEL DISCUSSION



ANTONIO GOMES, Acting Deputy Director, Directorate for Financial and Enterprise Affairs at the OECD, gave an overview on how different jurisdictions were looking at the high-tech industry from an antitrust perspective. Like the previous panelists, he believes that the current toolkits such as the consumer welfare standard, are adequate at addressing antitrust concerns in the digital economy:

“Let me start by saying that we’ve been looking at the digital economy at the OECD for quite a while now. We’ve looked at different areas from big data to algorithms, to multi-sided markets, etc. One of the areas we have looked was precisely innovation as we’ve been talking about. We’ve also looked at whether our tools are actually fit for purpose and whether we should re-think or redefine our tools. One of the conclusions that we have from several sessions and hearings was in fact our tools are fit for purpose and eventually they might need to be refined, not necessarily redefined.”

Gomes ultimately makes three points on innovation and competition. He first discussed questions on the sufficiency on the consumer welfare standard and its relationship with innovation. Of course, Gomes argues, innovation leads to product improvement, which leads to new products that can improve future consumer welfare. However, the threat of competitors innovating can represent a competitive constraint. Therefore, a proper analysis of the consumer welfare standard should actually require an assessment of innovation.

Gomes’s second point is that in terms of innovation and competition there are quite a few qualitative tools, but it is difficult to find the right quantitative tools. It is very important, argues Gomes, that we continue to do research on the impact and intersection between innovation and competition.

Lastly, Gomes reiterates that concerns on how to factor in innovation in the growth of digital markets is going to continue, and is therefore critical to the competition community.



JAMES COOPER, Deputy Director for Economic Analysis in the FTC’s Bureau of Consumer Protection, and Associate Professor of Law (on leave) at the Antonin Scalia Law School, George Mason University, discussed the developments in Europe and the U.S. in the privacy space. In Europe, says

Cooper, there’s the GDPR, while in the U.S. there has been a lot of movement on the Hill and the FTC towards a comprehensive federal privacy legislation. Yet despite concerns that the U.S. is behind on the curve in terms of privacy developments, Cooper believes that is not the case. In fact, he argues there has been robust enforcement on this front, even with just the FTC as the primary enforcement agency:

“Since the FTC got into the business of privacy in the late ‘90s, we’ve brought 76 stand alone privacy cases under Section 5... all of the major technology companies, they’re all under 20-year FTC orders for privacy, data security, or both. We also vigorously enforce COPPA and FICRA, GLB... That’s just the FTC.”



PANEL DISCUSSION

Cooper views the U.S. approach to privacy to be robust, but different from the European approach, which is more regulatory and top-down. He explains that the difference may be due in part to being from very to fundamentally different legal systems:

“For the most part, we come from a common law system. We are used to the bottom up approach, that’s how the common law works. It’s a different system, but that’s just how ours has evolved. But the notion that we have lacked privacy protections until now is, I think, incorrect.”

In addition, Cooper, like Commissioner McSweeney and some of the other panelists, also did not believe in shoehorning privacy into antitrust.

“I think the case law is pretty clear that privacy can’t be directly considered by antitrust. There are cases going back to the late seventies and eighties...that make it pretty clear that antitrust is about competition. It’s not about bringing in other values...Maybe these bridges will be unsafe but that’s not our job. Our [A court’s] job is [to ask]: “does this private price-fixing agreement tend to restrict competition to raise prices?” That’s the job of antitrust. Without any major Congressional fix or large-scale backtracking on stare decisis I can’t imagine anything changing here in the U.S. with respect to that.”



PRESS REPORTS

BLOOMBERG GOVERNMENT: FTC'S WILSON REBUKES WARREN'S BIG TECH BREAKUP PLAN

BY: VICTORIA GRAHAM

<https://www.bgov.com/core/news/#!/articles/PP3BXM6KLVR4>

"Democratic presidential candidate Elizabeth Warren's proposal to break up tech companies should be met with skepticism because such plans skirt the necessary task of proving anti-competitive harm," a Republican Federal Trade Commissioner said.

"Proposals that simply assume liability and then propose a legislative remedy are attractive in part because they avoid grappling with thorny legal and intellectual questions," FTC Commissioner Christine Wilson said March 28th at a Computer and Communications Industry Association event.

LAW 360: FTC'S WILSON WARNS AGAINST PLATFORM TO BREAK UP TECH COS.

BY: MATTHEW PERLMAN

<https://www.law360.com/technology/articles/1144263>

Republican Federal Trade Commissioner Christine S. Wilson on Thursday warned against plans floated in recent weeks to break-up large technology companies like Google and Facebook, saying that it's important to tie enforcement actions to sound economics.

During a panel discussion at the American Bar Association's annual spring meeting on Thursday, Wilson alluded to plans like the one floated by Sen. Elizabeth Warren, D-Mass., earlier this month that would see some of the most dominant tech platforms broken into smaller components. Wilson said these ideas are problematic because they target specific entities instead of requiring an economic analysis and a finding of harm, the way monopolization claims are usually made.

CITING LACK OF PROOF, FTC'S WILSON BLASTS TECH ANTITRUST PROPOSALS LIKE SEN. WARREN'S

WASHINGTON INTERNET DAILY

29 MAR 19

FTC Commissioner Christine Wilson ripped proposals to break up big tech platforms, as suggested by Sen. Elizabeth Warren, D-Mass., and some others (see 1903180058). "I reject attempts to short-circuit the traditional process and simply assume a problem and impose a preordained solution," Wilson said at a Computer and Communications Industry Association event Thursday.

PRESS REPORTS

MLEX: “DON’T POUR PRIVACY INTO ‘ANTITRUST VESSEL,’ FTC OFFICIAL SAYS”

BY: JOSHUA SISCO AND FLAVIA FORTES

28 MAR 19

Privacy concerns typically have no place in antitrust enforcement actions, a Republican Federal Trade Commission member and a senior consumer protection official said.

“I have a lot of concern about what it would mean to try to pour into the vessel of antitrust law, privacy. I have a number of concerns,” FTC Commissioner Noah Phillips said today during a panel at a conference* in Washington, DC.

James Cooper, deputy director of the FTC’s Bureau of Consumer Protection, speaking at a separate event**, also pointed to the problematic interaction of privacy and antitrust.

“Privacy is a nebulous term. Its content is not clear. And people have really heterogeneous preferences for privacy,” Phillips said. “For some people, it is more like data security. For some people, it is more like ownership of data, or an ability to control how it moves in the economy once it is shared.”

FTC COMMISSIONER AND STAFFER: DON’T “SHOEHORN” PRIVACY INTO ANTITRUST

GLOBAL COMPETITION REVIEW | BY: PALLAVI GUNIGANTI

MARCH 29, 2019

While some politicians have called for privacy to become part of competition analysis, both a commissioner and a senior staffer at the Federal Trade Commission have argued for the two concerns to remain separate.

Commissioner Christine Wilson on Thursday argued that the FTC’s bureau of consumer protection helps to enforce the “robust privacy and data security regime” created by various US laws. She spoke at a discussion on competition, data and innovation in the digital economy hosted by technology industry lobbyist CCIA.

With many tools to address privacy qua privacy directly – including proposed federal privacy legislation, which Wilson said she supports – there is “no need to shoehorn it” into antitrust analysis, the commissioner said.

If companies compete on privacy and data security, the FTC may properly consider it in its antitrust analyses, but otherwise privacy is “not part of our assessment”, Wilson said.

ATTENDEES

PUBLIC AGENCIES

Argentina National Competition Commission
Bank of England
European Parliament Office in Washington DC
Malaysian Investment Development Authority
U.S. Federal Trade Commission
U.S. Federal Communications Commission
U.S. Federal Highway Administration Center for Accelerating Innovation

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PRESS

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Broadband Breakfast
Communications Daily
Global Competition Review
The Information
MLex
Mother Jones
National Journal
Reuters

UNIVERSITIES

The George Washington University
Massachusetts Institute of Technology
University of International Business and Economic

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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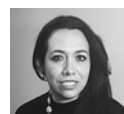
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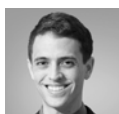
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