



...with *Christine S. Wilson*



In this month's edition of CPI Talks we have the pleasure of speaking with Commissioner Christine S. Wilson of the Federal Trade Commission ("FTC").¹ Ms. Wilson was sworn in on September 26, 2018 as a Commissioner of the FTC. Commissioner Wilson previously served at the FTC as Chairman Tim Muris' Chief of Staff during the George W. Bush Administration, and as a law clerk in the Bureau of Competition while attending Georgetown University Law Center.

Thank you, Commissioner Wilson, for sharing your time for this interview with CPI.

- 1. Our recent CPI Chronicle for July featured articles on the *AT&T/Time Warner* case and vertical merger issues. Some authors argued that the Vertical Merger Guidelines need modernizing. Where do you stand on the proposals for new guidelines and what are some critical issues to address? And on the other hand, what doesn't need changing?**

I'll start by stating the obvious: New vertical merger guidelines would only be useful if the FTC and Antitrust Division of the U.S. Department of Justice ("DOJ") (together, "the Agencies") issue them jointly. Joint guidelines ensure that we apply the same antitrust rules in the same way regardless of which agency handles the investigation. No business should be asked to comply simultaneously with two different legal standards.

So then the question becomes, do the Agencies see a good reason to issue new guidelines? Drawing upon the work of commentators who have engaged in thoughtful analysis of these issues,² I believe there are at least four reasons why the Agencies in the past have issued guidelines. First, the Agencies may use guidelines as a way to summarize the law, in essence a Restatement of Antitrust Law. Second, the Agencies may use guidelines to clarify how they intend to approach topics on which there is no clear binding precedent. Third, guidelines may disclose and formalize an approach the Agencies have heretofore used informally, like the 1992 Horizontal Merger Guidelines did with unilateral effects. Fourth, the Agencies may use guidelines to advance new analytic techniques, like the 1982 Horizontal Merger Guidelines did with the hypothetical monopolist test.³

¹ The views expressed herein are the Commissioner's own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

² See Gregory J. Werden, *Should the Agencies Issue New Merger Guidelines?*, 16 *Geo. Mason L. Rev.* 839 (2009); Paul Yde, *Non-Horizontal Merger Guidelines: A Solution in Search of a Problem?*, *ANTITRUST* 74 (Fall 2007); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers (filed Sept. 6, 2018).

³ See Christine S. Wilson, *Vertical Merger Policy: What Do We Know and Where Do We Go?*, at 6, Keynote address at the GCR Live 8th Annual Antitrust Law Leaders Forum, Feb. 1, 2019, available at https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf (citing Werden, Yde, and others).

I said in February 2019 that issuing new vertical merger guidelines *could* be useful because doing so “is, *at least conceivably*, compatible with at least one of the reasons we issue guidelines, identifying and codifying existing agency practices.”⁴ Although the Agencies have not issued new vertical merger guidelines since then, the law continues to develop in this area; the D.C. Circuit decided *AT&T/Time Warner* later that month,⁵ and the FTC settled two mergers that included vertical elements.⁶

So what are the Agencies’ existing practices? In brief, we consider both sides of the ledger by assessing anticompetitive and procompetitive effects. In terms of harm, we investigate whether, post-transaction, the combined firm would have the ability and incentive to reduce competition in an upstream or downstream market. In terms of benefits, we investigate whether the merger would generate cognizable efficiencies, including the elimination of double-marginalization (“EDM”). Note that while EDM gets perhaps the most attention, it is not the only type of vertical efficiency; in fact, vertical mergers may also generate other categories of efficiencies, including better aligning upstream and downstream incentives or giving a firm that is already vertically integrated a more efficient input or outlet.

If the decision is made to move forward, I believe new vertical merger guidelines should address at least four topics. First, the guidelines should follow the general Clayton Act jurisprudence and begin with the standard rebuttable presumption that vertical mergers are lawful.⁷ Second, any new vertical merger guidelines should identify what a government plaintiff must show to rebut this presumption – what we typically call the *prima facie* case. Third, the guidelines should identify any affirmative defenses, like offsetting efficiencies, that a defendant may use to overcome a *prima facie* showing. And fourth, the guidelines should explain when and how the Agencies are likely to employ different types of vertical merger remedies, like firewalls.

2. What’s the deal with the FTC’s 13(b) authority?

For decades, the FTC has used Section 13(b) to halt certain unlawful practices that cause consumer injury. In 2018 alone, consumers received over \$1.6 billion in redress stemming from FTC enforcement actions.⁸

Decades of cases have established two key principles. First, the FTC may bring actions in federal district court to obtain injunctive relief under 13(b). Second, the authority to grant injunctive relief confers upon courts the full panoply of equitable remedies, including equitable monetary relief.⁹

4 *Id.* at 7.

5 *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

6 Press Release, Fed. Trade Comm’n, FTC Requires Fresenius Medical Care AG & KGaA and NxStage Medical, Inc. to Divest Bloodline Tubing Assets to B. Braun Medical, Inc. as a Condition of Merger, Feb. 19, 2019, <https://www.ftc.gov/news-events/press-releases/2019/02/ftc-requires-fresenius-medical-care-ag-kga-nxstage-medical-inc> (settling merger that included horizontal and vertical elements by accepting divestiture limited to the problematic horizontal overlap); Press Release, Fed. Trade Comm’n, FTC Imposes Conditions on UnitedHealth Group’s Proposed Acquisition of DaVita Medical Group, June 19, 2019, <https://www.ftc.gov/news-events/press-releases/2019/06/ftc-imposes-conditions-unitedhealth-groups-proposed-acquisition> (accepting a divestiture to remedy both horizontal and vertical concerns in the Las Vegas area).

7 Such a presumption would also be consistent with the empirical economic literature, which finds that the vast majority of vertical mergers are either competitively benign or efficiency enhancing. See, e.g. Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 680 (2007) (conducting a broad study of past vertical integrations and concluding “even in industries that are highly concentrated . . . , the net effect of vertical integration appears to be positive in many instances”); James C. Cooper, Luke M. Froeb, Dan O’Brien & Michael G. Vita, *Vertical Merger Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639, 658 (2005) (“Most studies find evidence that vertical restraints/vertical integration are procompetitive” and “[t]his efficiency often is plausibly attributable to the elimination of double-markups or other cost savings.”); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission’s Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, at 5-9 (filed Sept. 6, 2018) (summarizing the available empirical studies and concluding that either nine or ten of the eleven studies “indicated vertical integration resulted in positive welfare changes” or “no change” in welfare); David Reiffen & Michael Vita, *Is There New Thinking on Vertical Mergers? A Comment*, 63 ANTITRUST L.J. 917 (1995) (arguing the economics suggests the vast majority of vertical mergers are efficiency-enhancing); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment*, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with Reiffen & Vita that “efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases”).

8 FED. TRADE COMM’N, 2018 ANNUAL HIGHLIGHTS 25, Mar. 2019, available at <https://www.ftc.gov/reports/annual-highlights-2018>.

9 See *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016); *FTC v. Ross*, 743 F.3d 886, 890-92 (4th Cir. 2014); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2nd Cir. 2011); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-470 (11th Cir. 1996); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).

Our ability to protect consumers relies heavily on this authority. In 1994, Congress expressly affirmed that Section 13(b) authorizes the FTC to file suit to enjoin any violations of laws enforced by the FTC, to seek *ex parte* relief (including asset freezes), and to obtain consumer redress.¹⁰ But both district court and appellate judges have raised questions about our authority that conflict with the clear intent of Congress and long-established case law.

A case in the Third Circuit held, in February 2019, that the FTC cannot seek injunctive relief when the challenged conduct is not “ongoing or imminent.”¹¹ But fraudsters frequently cease their unlawful conduct when they learn of an impending law enforcement action. Similarly, companies often suspend dubious advertising claims or anticompetitive conduct during the pendency of an FTC investigation. The Third Circuit standard could prevent us from seeking injunctive or equitable monetary relief in these circumstances even if we can show that the conduct is likely to recur based on past practices. This outcome is contrary to both Congressional intent and the vast majority of Section 13(b) case law.

Another concerning development arose in a recent Ninth Circuit case.¹² There, one of the judges questioned the FTC’s authority to obtain equitable monetary relief under Section 13(b) and suggested that the Ninth Circuit consider the issue *en banc*. The Ninth Circuit declined to do so. Courts have long held that by granting the FTC authority to seek injunctive relief, Section 13(b) gives courts the authority to grant the full range of equitable relief.¹³ We believe this interpretation more accurately reflects Congressional intent and believe the Ninth Circuit correctly decided not to revisit this issue. Notably, no judge on the Ninth Circuit, including the judge who questioned the FTC’s authority initially, voted to rehear the matter *en banc*.

Similarly, in a recent Seventh Circuit case, one of the panel judges aggressively challenged 30 years of the Circuit’s own case law holding that the FTC can seek equitable monetary relief under Section 13(b), suggesting during oral argument that the precedent is no longer good law, even though the question was not really at issue in the case.¹⁴ We are still awaiting a decision in that matter.

The FTC’s authority under 13(b) also is at issue in an Eleventh Circuit case and another Third Circuit case, as well as in numerous cases pending in district courts. Although no court yet has held the FTC does not possess the authority, given the FTC’s heavy reliance on 13(b) to protect consumers, and in light of these developments, I have urged Congress to clarify Section 13(b) of the FTC Act.

3. Welfare standards...consumer or total or otherwise. Please give us your thoughts on the swirling debates on what should be the standard for antitrust enforcement. What is the right balance point?

The debate over the standard for antitrust enforcement is part of a broader discussion started by critics who believe that modern antitrust policy should be radically restructured to address their claim that antitrust enforcement has declined, and that consumers concomitantly have been harmed, since the 1970s or 1980s. Yet, the statistics that these critics use to assert the failure of antitrust do not withstand scrutiny.¹⁵ Similarly, the particular claimed shortcomings of the consumer welfare standard currently used by the Agencies and the courts are contradicted by the ev-

¹⁰ 108 Stat. 1691, 1790-91 (1994).

¹¹ *FTC v. Shire Viropharma Inc.*, No. 17-131-RGA, 2018 WL 1401329 (D. Del. Mar. 20, 2018); *aff’d*, 917 F.3d 147 (3rd Cir. 2019).

¹² *FTC v. AMG Servs., Inc.*, No. 2:12-cv-00536-GMN-VCF, 2016 WL 5791416, at *13 (D. Nev. Sept. 30, 2016), *aff’d*, 910 F.3d 417 (9th Cir. 2018).

¹³ See *supra* note 9 and accompanying text.

¹⁴ *FTC v. Credit Bureau Center, LLC*, 325 F. Supp. 3d 852 (N.D. Ill. 2018); *on appeal*, Nos. 18-2847 and 18-3310 (7th Cir).

¹⁵ See Statement of Comm’r Christine S. Wilson at 1-3, *In re Staples, Inc./Essendant, Inc.*, File No. 181-0180, Jan. 28, 2019, available at https://www.ftc.gov/system/files/documents/public_statements/1448307/181_0180_staples_essendant_wilson_statement.pdf; Michael Vita & F. David Osinski, *John Kwoka’s Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361 (2018); Joshua D. Wright, “Market Concentration,” Note submitted to the Hearing on Market Concentration, Directorate for Financial and Enterprise Affairs, Competition Committee, OECD (June 7, 2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)69/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf); Gregory J. Werden & Luke M. Froeb, *Don’t Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST, Fall 2018, at 74.

idence.¹⁶ Despite assertions to the contrary, the analytical framework employed by the Agencies and the courts clearly looks at more than effects on prices for consumers. For example, enforcers and judges look closely at the effects of mergers and business practices on quality and innovation. In fact, the *Horizontal Merger Guidelines* expressly address those concerns.¹⁷ Similarly, buyer power and monopsony are already addressed by the Agencies,¹⁸ although critics would have you believe otherwise. The FTC and DOJ have brought cases premised on these concerns.¹⁹ Thus, a careful analysis reveals that, ultimately, the case for replacing the consumer welfare standard just isn't there.²⁰

You also asked where the current debate should lead. Any standard that is adopted must be cost-effective and feasible for the enforcement Agencies and courts to administer, and must lead to consistent and predictable results. Consequently, I believe the standard must be tethered to well-established economic principles and tools. The advantage of the current consumer welfare standard is its reliance on economic principles. We have the tools to implement the standard in a cost-effective manner, and we get consistent outcomes no matter who is implementing the standard. In other words, the results are objective.

In contrast, many of the alternatives advanced by critics would lead to subjective outcomes. When goals beyond consumer welfare and efficiency are pursued, enforcement is more likely to be captured by rent seekers and outcomes are more susceptible to political whims and influence. The alternatives to consumer welfare would willingly sacrifice lower prices for consumers and efficiently greater output in favor of limiting firm size or preserving older technologies. I am not aware of any opinion poll that shows consumers would prefer a world of smaller but higher cost firms that charge higher prices.

4. As the titles of some of your recent speeches suggest, “stay the course” and we all should “play by the same rules” seem to be themes that you focus on. Can you please go into a bit more detail on both of those themes?

Sure. In those speeches I responded to two complaints about the way we practice antitrust law today.

First, “stay the course” is my response to those who argue we must fundamentally rethink antitrust law in order to account for new technologies and business practices.²¹ Specifically, some argue that technology markets are so fundamentally different that they require special antitrust rules. The last time we heard this argument, both the D.C. Circuit (in *Microsoft*) and the Antitrust Modernization Commission rejected it, finding our existing antitrust laws flexible enough to cover novel situations.²² I believe the D.C. Circuit and the AMC both got it right then, and I believe the same answer applies today. So when I say “stay the course,” I mean that our approach to antitrust is fundamentally sound and does not require us to make wholesale – and potentially ill-considered – changes.

16 Christine S. Wilson, *Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get*, Luncheon Keynote Address at the George Mason University Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads (Feb. 15, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf [hereinafter *What You Measure Is What You Get*]; Elyse Dorsey, Geoffrey A. Manne, Jan M. Rybnicek, Kristian Stout & Joshua D. Wright, *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, __ PEPPERDINE L. REV. __ (forthcoming), available at <https://regproject.org/paper/consumer-welfare-the-rule-of-law-the-case-against-the-new-populist-antitrust-movement/>; Joe Kennedy, *Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy*, Info. Tech. & Innov. Foundation Report (Oct. 2018), at 5, available at <http://www2.itif.org/2018-consumer-welfare-standard.pdf>; Carl Shapiro, *Opening Statement before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights, Hearing on The Consumer Welfare Standard in Antitrust Law: Outdated or a Harbor in a Sea of Doubt*, at 3 (Dec. 13, 2017) (“[T]hose who say that the ‘consumer welfare’ standard is narrowly focused on price to the exclusion of other factors are simply incorrect: properly applied, the ‘consumer welfare’ standard includes a range of factors that benefit consumers, not just low prices but improved product variety and quality and of course more rapid innovation. Likewise those who say that the ‘consumer welfare’ standard is overly focused on short-term outcomes are mistaken.”).

17 U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *HORIZONTAL MERGER GUIDELINES* § 1 (Aug. 19, 2010) (“Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. . . . When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition.”).

18 See, e.g. *id.* § 12 *Mergers of Competing Buyers*, Example 24 (analyzing a hypothetical merger of the only two buyers of an agricultural product).

19 See, e.g. *Grifols, S.A.*, FTC Dkt. No. C-4654 (Sept. 17, 2018), <https://www.ftc.gov/enforcement/cases-proceedings/181-0081/grifols-sa-grifols-shared-services-north-america-inc-matter> (requiring a divestiture to avoid the creation of monopsony power in the purchase of blood plasma).

20 See *What You Measure Is What You Get*, *supra* note 16.

21 See Christine S. Wilson, *All (Industries) in the Same Boat: Staying the Course on the High Seas of High Tech*, Address at the CCA Conference on Competition, Data, and Innovation in the Digital Economy, Mar. 28, 2019, https://www.ftc.gov/system/files/documents/public_statements/1512148/wilson_remarks_ccia_3-28-19.pdf [hereinafter *Staying the Course*].

22 See *United States v. Microsoft Corp.*, 253 F.3d 34, 49-50 (D.C. Cir. 2001) (en banc) (per curiam); ANTITRUST MODERNIZATION COMMISSION, *REPORT AND RECOMMENDATION* 9 (Apr. 2007), available at https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (“There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.”).

Second, “we should all play by the same rules” is my response to those who argue that we should alter the fundamental rules of antitrust to help a favored group, such as small businesses, exporters, entrepreneurs, or innovators.²³ It is also my response to those who ask whether we need special antitrust rules for Big Tech.

The idea of special rules is almost as old as antitrust law itself. For example, Louis Brandeis, eponym of the neo-Brandeisians, represented many small businesses early in his legal career.²⁴ As a result of that experience, he decided that his former clients were morally and economically “better” than larger firms (prompting his phrase, the “curse of bigness”).²⁵ So when the DOJ stepped up enforcement of the Sherman Act by attacking price-fixing cartels, many of which were comprised of the types of small enterprises Brandeis used to represent, he complained bitterly and sought, unsuccessfully, to allow his favored group legally to fix prices.²⁶

That argument has come back into vogue in some quarters. In the United States, groups like the Open Markets Institute once again argue that small producers should be exempt from the antitrust laws, and permitted to engage in price-fixing with impunity, because they are inherently “better” than larger businesses.²⁷ Abroad, some argue that national champions should receive special treatment in merger reviews.²⁸

In the United States, we believe that “the antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.”²⁹ We sometimes forget the reason the Magna Carta is so important: It established the foundational legal principle that all people, up to and including the king, are subject to the laws of the land.³⁰ I believe that principle remains true today, and therefore reject special antitrust exemptions for favored groups. Or, to restate it in the affirmative, I believe we should all play by the same antitrust rules.³¹

5. Some would argue that the links between data protection, data portability, privacy, and antitrust law are gradually starting to bleed together. What are your thoughts on these links and what role should antitrust play in all of this? Does the United States need a GDPR or some equivalent or should the U.S. forge a different path?

23 See Christine S. Wilson, *Why We Should All Play By the Same Antitrust Rules*, from *Big Tech to Small Business*, Address at the American Enterprise Institute, May 4, 2019, available at https://www.ftc.gov/system/files/documents/public_statements/1527497/wilson_remarks_aei_5-4-19.pdf [hereinafter *Play By the Same Rules*].

24 THOMAS K. McCRAW, *PROPHETS OF REGULATION* 87 (1984) (describing the typical Brandeis clients as “small and medium-sized manufacturers of boots, shoes, and paper,” as well as “wholesalers and retailers”)

25 *Id.* at 104 (quoting Brandeis at a Congressional hearing arguing that “[b]ig business is not more efficient than little business. It is a mistake to suppose that the department stores can do business cheaper than the little dealer” and explaining that department stores obtain an unfair advantage by buying “in bulk and avail[ing] themselves of quantity discounts”); see also Louis D. Brandeis, *A Curse of Bigness*, *HARPER’S WKLY.*, Jan. 10, 1914, at 18, 18 (coining the phrase).

26 *PROPHETS OF REGULATION*, *supra* note 24, at 104 (describing Brandeis’s proposal as seeking “that small retailers be exempted from the antitrust laws and permitted, in concert with each other, to fix the prices of consumer goods”).

27 Open Markets Institute, *Restoring Antimonopoly Through Bright-Line Rules*, Apr. 26, 2019, <https://openmarketsinstitute.org/op-eds-and-articles/restoring-antimonopoly-bright-line-rules/> (proposing complete antitrust immunity for “workers, professionals, [and] small businesses”).

28 See, e.g. FEDERAL MINISTRY FOR ECONOMIC AFFAIRS AND ENERGY, *NATIONAL INDUSTRIAL POLICY 2030*, at 11, May 2, 2019, available at https://www.bmwi.de/Redaktion/EN/Publikationen/Industry/national-industry-strategy-2030.pdf?__blob=publicationFile&v=9 (arguing that “European and German competition law must be reviewed and changed where applicable” to promote the development of “National and European champions” that can compete “at eye level” with foreign firms); Konstantinos Efstathiou, *The Alstom-Siemens Merger and the Need for European Champions*, *BRUEGEL*, Mar. 11, 2019, <https://bruegel.org/2019/03/the-alstom-siemens-merger-and-the-need-for-european-champions/> (summarizing the debate in the EU).

29 *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

30 U.K. Parliament, *Why Is Magna Carta Significant?*, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/magnacarta/magnacartasignificant/> (last accessed July 23, 2019) (“Magna Carta is significant because it is a statement of law that applied to the kings as well as to his subjects. Although the idea of England as a community with a law of the land independent of the will of the king was implicit in custom before 1215, Magna Carta gave this concept its first clear expression in writing.”).

31 See *Play By the Same Rules*, *supra* note 23.

Let me take those questions one at a time.

To your first question, I view privacy and data protection as topics distinct from competition law.³² The FTC's antitrust and consumer protection authorities are based upon separate statutory provisions that were enacted at different times and for different reasons.³³ Competition law in the United States arose from concerns about large "trusts" and their ability to overcharge consumers. Although it is now statutory,³⁴ the underlying framework dates back to common law limitations upon restraints of trade. In contrast, U.S. privacy protections developed gradually and contain a broad mix of constitutional, statutory, and common law provisions at both the federal and state levels.³⁵ The separation of antitrust and consumer protection appropriately continues today.

Because we have many tools available to address privacy *qua* privacy directly, there is no need to shoehorn it into competition analysis. Conceptually, privacy and data security *could* be non-price facets of competition in some antitrust cases, if firms compete on the basis of privacy or data policies to attract customers.³⁶ But if privacy or data security issues not related to competition arise in the course of a merger review, then we appropriately handle those aspects as consumer protection matters.³⁷

To your second question, I believe we need a comprehensive federal privacy law that sets expectations for businesses and empowers consumers to make informed decisions. From a practical perspective, the impending risk of conflicting state mandates makes passing federal privacy legislation particularly important.

That said, I do not believe we should adopt GDPR wholesale. We should instead learn from GDPR, emulating its best features and minimizing its negative, if unintended, consequences. On the one hand, GDPR contains many of the "best practices" for which the FTC has advocated over the years, including transparency and systematic risk assessment and mitigation protocols. On the other hand, GDPR also has significant weaknesses. For example, preliminary research indicates that GDPR has reduced innovation and investment in the EU.³⁸ It may also entrench incumbents, which can more easily afford to hire the necessary compliance staff and fund the development of compliant systems.

Procedurally, a new federal privacy law should provide the FTC with broad authority to deter abuses. In other privacy statutes, such as COPPA and Gramm-Leach-Bliley, Congress has built in a deterrence function by authorizing the FTC to impose civil monetary penalties even for first-time violations. It should repeat that approach here. Privacy is industry and technology neutral, so the law should likewise apply broadly, including reaching non-profits and common carriers. Given the pace of innovation in data-centric industries, carefully crafted federal privacy legislation will set expectations for the business community and empower consumers to make informed choices about when and how they share their data – while preserving or even enhancing incentives to innovate and compete. Thus, when drafting privacy legislation, Congress should ensure that competition and innovation are fostered rather than inhibited.

³² See, e.g. *Staying the Course*, *supra* note 21.

³³ See *id.* at 5 (citing Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and The Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121, 138-150 (2015)).

³⁴ See 15 U.S.C. § 1 *et seq.*

³⁵ See *Staying the Course*, *supra* note 21, at 5-6 (noting provisions from the Fourth Amendment to the U.S. Constitution to modern federal statutes like the Gramm-Leach-Bliley and Fair Credit Reporting Acts to a limited right to privacy arising under the common law of various states).

³⁶ For example, in the *Google-DoubleClick* merger the Commission investigated whether the merger would allow the merging firms to exploit consumer information "in a way that threatens consumers' privacy" but did not find any evidence that the proposed transaction would harm competition, including "non-price attributes of competition, such as consumer privacy." Statement of the Federal Trade Commission at 2-3, *Google/DoubleClick*, FTC File No. 071-0170, Dec. 20, 2007, available at https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

³⁷ See, e.g. Letter from Jessica Rich, Director of the Bureau of Consumer Protection, Fed. Trade Comm'n, to Erin Egan, Facebook, Inc., and Anne Hoge, WhatsApp Inc., Apr. 10, 2014, available at https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf; See Letter from Jessica Rich, Director of the Bureau of Consumer Protection, Fed. Trade Comm'n, to Elise Frejke, Frejke PLLC, *In re RadioShack Corp.*, May 16, 2015, available at https://www.ftc.gov/system/files/documents/public_statements/643291/150518radioshackletter.pdf.

³⁸ See Jian Jia, Ginger Zhe Jin & Liad Wagman, *The Short-Run Effects of GDPR on Technology Venture Investment*, NBER Working Paper No. 25248, Nov. 2018, available at <https://www.nber.org/papers/w25248.pdf>.

6. In a recent Wall Street Journal commentary, you referred to the district court's ruling in the *FTC v. Qualcomm* case as “alarming” and called for it to be revisited. Can you go into a few specifics?

Absolutely. As I wrote in the op-ed,³⁹ I believe the district court's ruling is both bad law and bad policy.

It is bad law because the district court radically expanded the substantive reach of antitrust law to create new legal obligations. The court did so primarily by reviving and expanding an old antitrust case called *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*⁴⁰ The Supreme Court has said that firms have a very limited “duty to deal” and has characterized *Aspen* as “at or near the outer boundary” of U.S. antitrust law.⁴¹ The district court, though, took *Aspen* even further. For example, because Qualcomm licensed some patents to some competitors in 1999,⁴² the court ruled that it had a perpetual antitrust obligation to license every patent to every competitor.⁴³ The court also ruled that breaching a contract – in this case a “FRAND” promise – is itself an antitrust violation,⁴⁴ thereby permitting more intrusive remedies than otherwise would be available under contract law.

It is bad policy because the court's order appears to apply world-wide,⁴⁵ even though the jurisdiction of U.S. courts is limited both by U.S. law and principles of international comity. This provision of the order is also contrary to the longstanding policy of both Agencies, whose “general practice is to seek an effective remedy” that is both “restricted to the United States” and “tailor[ed] . . . to address the identified competitive harm to U.S. commerce and consumers without unnecessarily conflicting with the laws, policies, or remedies of foreign jurisdictions.”⁴⁶

Thankfully, serious damage can yet be avoided. Since I wrote the op-ed, many others have echoed my concerns, including the DOJ.⁴⁷ With the matter now on appeal,⁴⁸ the Ninth Circuit Court of Appeals, and potentially the Supreme Court, will have a chance to assess the wisdom of the district court's sweeping legal and policy changes.

39 Christine S. Wilson, *A Court's Dangerous Antitrust Overreach*, WALL ST. J., May 29, 2019, <https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055>.

40 472 U.S. 585 (1985).

41 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

42 See *FTC v. Qualcomm Inc.*, No. 17-cv-00220, 2019 WL 2206013, at *4, 77, 83-84 (N.D. Cal. May 21, 2019).

43 See *id.* at *81-83 (finding the first element of *Aspen Skiing* met “because Qualcomm previously licensed its rivals” other patents in 1999, “but voluntarily stopped licensing rivals even though doing so was profitable” and ultimately concluding that “Qualcomm Has an Antitrust Duty to License its SEPs to Rivals”).

44 See *id.* at *114-15 (concluding that “Qualcomm's Refusal to License Rivals Bolsters Qualcomm's Monopoly Share” because “Qualcomm also refuses to license rivals in violation of its FRAND commitments and its antitrust duty to deal with rivals”).

45 See *id.* at *15, 20 (finding “the geographic boundaries” of the relevant markets “are worldwide”); *id.* at *137-140 (requiring Qualcomm to sell chips products to “customers” and “make exhaustive SEP licenses available to modem-chip suppliers” without including any territorial limitations).

46 Note by the United States ¶¶ 6, 9, Roundtable on the Extraterritorial Reach of Competition Remedies, Working Party No. 3 on Co-operation and Enforcement, OECD Directorate for Financial and Enterprise Affairs, Competition Committee, DAF/COMP/WP3/WD(2017)41, Dec. 1, 2017.

47 United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal at 6, 11, *FTC v. Qualcomm*, No. 19-16122 (9th Cir. filed July 16, 2019) (arguing the district court “erroneously expan[ded] *Aspen Skiing*” and that “the court failed to justify the extraterritorial obligations on Qualcomm”); see also, e.g. Jan Wolfe, *Qualcomm Has Strong Argument to Win Reversal of U.S. Antitrust Ruling: Legal Experts*, REUTERS, May 31, 2019 (“Jonathan Barnett, a law professor at the University of Southern California, agreed that Koh's decision was in danger of being overturned by an appeals court,” particularly on the *Aspen Skiing* analysis); Lisa Kimmel et al., District Court Decision in *FTC v. Qualcomm* Spawns Controversy: Four Issues to Watch on Appeal, June 4, 2019, <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/District-Court-Decision-in-FTC-v-Qualcomm-Spawns-Controversy-Four-Issues-to-Watch-on-Appeal> (“[T]here are purely legal reasons to question the court's embrace of *Aspen Skiing* to impose a duty to license intellectual property given that the case did not involve the licensing of intellectual property. Moreover, the Federal Circuit has held that the antitrust laws do not impose any duty to share intellectual property and the relevant Ninth Circuit precedent has been widely criticized.”).

48 *FTC v. Qualcomm*, No. 19-16122 (9th Cir.).

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