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IS INFORMATION MARKET POWER?
PROTECTING CONSUMERS AND COMPETITION
IN THE DIGITAL AGE

A DISCUSSION WITH
FTC COMMISSIONER TERRELL McSWEENY

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P R O C E E D I N G S

MR. KERRY: Good afternoon, everybody, and welcome. I am Cameron Kerry. I'm the Ann R. and Andrew H. Tisch distinguished visiting fellow here at The Brookings Institution in the Center for Technology and Innovation, which is part of the Governance Studies Program. And technology and innovation is certainly at the heart of our discussion this afternoon as we welcome FTC Commissioner Terrell McSweeney.

She has been involved in those issues as a chief policy advisor to Vice President Biden when he was in the Senate and went from there to the Justice Department, where she was in charge of policy in the Antitrust Division. And then went from there to the White House, again to work for the Vice President on a range of technology issues. We certainly spent a number of hours together on intellectual property policy issues. And she joined the Federal Trade Commission in 2014.

COMMISSIONER McSWEENEY: That's right.

MR. KERRY: Right. So that's the bio in brief. So we will have sort of a brief fireside chat here and then I'm going to turn to you for questions. But we'd like to sort of make this a reasonably open conversation, so if you have burning question as we sort of move through the discussion, you're welcome to jump in while it's on topic.

But first, let me begin by sort of delving in a little bit more to your biography. You were I think a Senate page, if I recall, and at some point I think was the chief page before going to work in the Senate. And I want to look back a little bit on the Senate during some of that time and compare it to where we are today.

Nick Littlefield, who was Senator Kennedy's long-time chief assistant, chief of staff, has written a book about Ted Kennedy called "The Lion of the Senate." And E.J. Dionne here at Brookings did a wonderful review of it. It's an account of how Ted Kennedy in the 1990s, when the Democrats went into the minority, rallied the Democrats and, working with Orrin Hatch, his counterpart on the Labor and Education Committee, was able to get some remarkable legislation done, including the CHIPS program for children's health. So what could have been a period of gridlock was a period of remarkable legislative success.

FTC-2016/02/01

You know, here, some 20 years later, maybe we're seeing some signs of movement, but we've certainly been in a period of intense partisanship and not productive legislation. So looking back, how do you see it as different? How do you see the Senate without more Ted Kennedys and Joe Bidens as part of the mix?

COMMISSIONER McSWEENEY: Well, and John Kerrys. You know, I am going to date myself, I think, a little bit by admitting to both being a Senate page in the early '90s, but then I also worked in the Democratic Cloak Room during much of the period of time that they're discussing in that book. So it's fun to read those accounts because it maps on to wonderful anecdotes that I can recall from the Senate.

And I think you're absolutely right, today's Senate is a wildly different place than that Senate was, in some ways that are very positive. Right? So one of the transformations of the '90s was the fact that we really started to have women playing a much bigger role in the Senate. We had the election of all of the women senators. From my perspective, this was a really good thing because I was allowed to wear pantsuits onto the floor of the Senate for the first time, and that was lovely. (Laughter) I supported that innovation. And we got more accessible bathrooms and things like that. So I think some of the change here has been very positive.

I think some of the tradition of the institution around compromise is certainly different, I hope not permanently so. One of the things that really struck me about the book was really the acknowledgement that building trusted relationships and spending a huge amount of time really getting to know each other was absolutely vital to the senators being able to work together.

And then I think also vital, and there's been some discussion of this I know at Brookings and other institutions, being able to do some horse trading, good old political deal-making. There's a wonderful anecdote in the book involving my former boss Joe Biden. I did not work for him at the time. I have no idea if it's true, but essentially he's able to do a deal with Jesse Helms because he's working through some judicial noms that Helms wanted and some healthcare legislation that Kennedy wanted. And they slip off the floor and come back and it's done. And I really related to that anecdote because fast-forwarding about 20 years when I did work for Senator Biden in the Senate, we used to try to see him

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on the floor when he was voting to make sure he voted, you know, watching C-SPAN. And then occasionally he would just disappear, always to go off to go talk to somebody or whatever. And as staff we were always trying to hunt him down and find out where he actually was at any given moment, so I loved that part of that anecdote.

But I think that goes to show you that, you know, one of the things that's absolutely critical to working across party lines is building strong relationships of trust, and I'm hopeful that those relationships can continue to be built. I see some really nice models of them already in this Senate with some younger talent, so we have Senator Lee and Senator Klobuchar who worked together on the antitrust judiciary subcommittee and I think they can hopefully build a good relationship together. They seem to work quite well together. There's some lovely stories in this Senate of some of the women senators working together to solve problems that I've read in press and media accounts that sound very hopeful to me.

MR. KERRY: So you're on a commission that's made up of two parties, the Democrats in the majority. Are there lessons you take away from that to make sure that the commission operates, as much as possible, with five votes, four votes?

COMMISSIONER McSWEENEY: Yes. Well, it was a lot of fun for me, I joined the commission in its 100th year of operation, which for an American government institution is a relatively rare thing for an independent commission. I think only the Fed has survived longer than we have, but only by a few months. So the longevity of the FTC, I think, has a lot to do with its strong tradition of bipartisanship and being relatively judicious in its use of authority, with some exceptions over its 100-year period in which it sort of ran headlong very quickly into congressional oversight. But I think it really does continue to be an excellent example of bipartisanship.

By far, most of the votes that we take are unanimous. It is rare that we disagree. When we do disagree it's usually a principled, substantive disagreement. We try to make that relatively clear. And I spend a lot of time working with my, unfortunately, now just one Republican colleague. We have a vacant seat, but I think it's very, very important.

And we have a lot of conversation about how important that is at the Trade Commission,

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as well. I think we really do want to preserve the ability to see each other's points of view, to compromise where necessary in order to really achieve a bipartisan consensus.

MR. KERRY: So let's fast forward a little bit to the present and really up to the minute. We've read the stories in today's papers that the deadline for a Safe Harbor agreement of yesterday has gone by the board, and certainly the talk among negotiators and others when I was in Brussels last week was it was really up until this evening Brussels time to reach a deal. But now it's evening in Brussels. I think Commissioner Jourová may be briefing the European Parliament as we speak. What do you see as we move ahead in terms of the Safe Harbor agreement and the role of the FTC in ensuring that data flows can happen and meet the standards that the Europeans are asking for?

COMMISSIONER McSWEENEY: Well, I'll start by answering the question with the usual disclaimer, that I'm here speaking individually and not on behalf of my colleagues. That's the way we preserve our bipartisanship and camaraderie. But I suspect this is probably a bipartisan view that I'm about to have.

First, as you say, Safe Harbor, incredibly timely. I don't have the benefit of knowing exactly what the commissioner is currently saying about the state of negotiations because I think that's happening right now. You know, one of the things I think we'll need to look for in coming days is what the Article 29 Working Group says. They have a regularly scheduled meeting on Wednesday of this week.

Stepping back from that, you know, I certainly believe that the FTC must continue to support the Department of Commerce, who are the leads in this negotiation process with the European Commission, in trying to achieve some sort of workable framework. I think we're perfectly capable of doing that. The FTC plays a really important role in protecting consumer data by making sure that companies that make commitments under our framework adhere to them. And I think we demonstrated by bringing more than 30 cases under the Safe Harbor before it was struck down that we are capable of that and we could continue to play that role.

We are working really hard to try to make sure that amongst our counterparts in Europe there is a strong understanding of the enforcement perspective of the Federal Trade Commission, but also the real -- I think we talked about this further -- mosaic of privacy laws that exist in the United States

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and how we approach privacy protection, which I think one could argue really is undergirded by the same set of principles that goes into the European view around privacy, as well. We do have a different system. We have a common law based system, one that approaches privacy law and regulation on a sectoral-based model. But we also are very active consumer protection enforcers. The FTC has had more than 100 cases in 20-(inaudible). And so as a result, I think that we can firmly argue that while we have different systems, especially on the commercial side, Americans do have strong privacy protections. And we have a demonstrated track record of being able to enforce and make sure that companies are adhering to the commitments that they're making, which is a key part of the discussion, as well.

I can't speak to the differences on the national security side. I think you're probably more well-versed in those than I am because the FTC focuses on the commercial side. But I do think what we need to be able to talk about are the areas of common ground here, and as I see it there are a lot.

MR. KERRY: So there also seem to be differences. I mean, certainly data and American companies have been a source of tension in a number of areas in the economic discussion. We're seeing that with Safe Harbor and data protection. And the panel that I was on last week was focused on trade and the Trade in Services Agreement and Transatlantic Partnership Agreement and what role data should or should not play in those. And, of course, we have a lot of focus in various ways on what the Europeans call GAFA -- Google, Apple, Facebook, Amazon; I got the A's in the wrong order -- and this inquiry into digital platforms as part of Europe's Digital Single Market agenda.

I want to come to sort of look at some of the issues that are in play there, but let's step back a little bit to sort of the general principles here and your views in terms of the role of competition policy in technology and how do you look at competitive issues in the technology framework. How do you look at innovation of marketplaces? How do you look at the issues of disruptive technologies, of network effects in these new marketplaces?

COMMISSIONER McSWEENEY: Well, I think you're right to approach this from the point of view of innovation. I think as a competition enforcer we play a very critical role in optimizing conditions for innovation by making sure that markets remain competitive. And I firmly believe that my colleagues on the European Commission and DG Comp really view their role as competition enforcers in a similar light.

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So I'd love to get back to the DSM question when we can because I think that's also undergirded by trying to promote innovation within Europe, as well. And I would argue that some of the same conditions that we have here in the U.S. that are very pro innovation, such as competition, would be great for the Europeans, as well, and certainly thing that they care deeply about.

So the role of competition enforcers in high tech, it's a very timely topic. I think that we, in using the antitrust toolbox, need to be very careful not to conflate consumer protection issues with antitrust issues while, at the same time, being imaginative and creative enforcers. So what do I mean by that?

We traditionally approach a lot of merger enforcement looks at price effects and that kind of data. That's very valuable from an antitrust perspective, but one of the things that's also valuable is looking at innovation competition, at non-price competition. And I think we shouldn't shy away from innovation effects theories when we're trying to think about high-tech markets.

You've seen that recently in the FTC enforcement. I think you've seen it where there have been a few cases where these issues have come up prominently in the Verisk-EagleView transaction. In Zillow and Trulia we looked at some of these issues, as well, but there in the absence of price effects didn't take any actions. I think that's an interesting question that's open for antitrust enforcers, which is if you see harms to quality and innovation competition, especially in a two-sided market, but there's no price effects, what do you do in that situation? And that one, I think, is sort of a frontier for us.

And then you see it in Steris/Synergy, a transaction that we challenged on an innovation theory, but lost in court. So this is a very dynamic space for U.S. enforcers.

I would also note that my colleagues at the Department of Justice Antitrust Division while I was there were successful in a case called Bazaarvoice, which was very important, as well. Again, challenging in a very dynamic high-tech market transaction and winning in court, as well.

So I think antitrust enforcers have an excellent set of tools for protecting innovation and for policing competition in a high-tech market, and we have to use them.

MR. KERRY: So what do you see at the barriers to entry at these marketplaces? I

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mean, the argument is that choice is just one click away.

COMMISSIONER McSWEENEY: Right.

MR. KERRY: That in a marketplace where you could start a successful venture with a handful of people. I think Instagram had 15 people, employees, when it was acquired by Google. So the argument is there are not a lot of barriers to entry to bring competition to the marketplace. Are there barriers? What do you think the barriers are? And what do you look at to assess those questions?

COMMISSIONER McSWEENEY: Well, I'd step back first by saying I think assessing whether there are barriers to entry, especially in conduct situations, is absolutely critical to using antitrust enforcement to optimize innovation. So I think that's the right inquiry.

And as you point out, in data-driven markets we actually haven't so far seen a lot of issues there, right, which is a little bit -- it's a little bit counterintuitive, I think, but they are generally characterized by low barriers entry. And that's because data is so ubiquitous, increasingly ubiquitous, and it's relatively easy to collect. And you do see a lot of these markets being characterized by leapfrogging, so very aggressive innovation competition to attract users, right, which is why I think, again, looking at innovation competition and understanding it is so important and not devaluing it or walking away from trying to understand the innovation competition because it can be very hard to quantify. We like econometrics in antitrust, but innovation competition is very often characterized by more qualitative evidence.

MR. KERRY: So you brought up data markets, which brings us back to some of the transatlantic data discussions. Is data in any way different? Is the ability to collect, to aggregate lots of data from lots of customer devices, other devices, does that in some way generate market power? How do you see those issues emerging here?

COMMISSIONER McSWEENEY: I think I certainly wouldn't say that data can never confer market power, but I think it's important to understand that there are lots of sources of data, so it may be possible to aggregate quite a lot of data that's relatively easy to get. So that's part of this discussion about what market power is.

I think where the antitrust enforcers have been quite useful and very important is when

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they think about whether an incumbent with a large amount of data is using that market power to extend its monopoly in some way, so building on the Microsoft case and going forward. Those kinds of conduct issues I think are really interesting. They're incredibly fact-specific, incredibly case-specific, and so I think that we need to proceed very, very carefully there. I'm not saying it's impossible for data to confer market power, but I think it's something in this environment that we need to be very thoughtful about.

MR. KERRY: So that brings us, I guess, back to what some of your counterparts are doing in Europe and try to look at some of these issues that I think the focus is on the so-called platforms that those in some instances can bring network effects that do give some of the leverage that you're talking about, the ability to extend power into other marketplaces. Are you following the process over there? And what is your sense of how that's developing, how that differs or resembles some of the issues that you've raised about power in these marketplaces?

COMMISSIONER McSWEENEY: Well, I do think probably some of the fundamental differences in the way our government works are probably underpinning a bit of the difference, so, of course, in Europe you have a much more regulatory approach whereas in the U.S. we have a much more common law-based approach. So this is a fundamental difference, but I think can make it seem sometimes like maybe we're departing from each other.

I do follow carefully what is happening in Europe. I don't have any inside information about any of the cases there. And, of course, our most prominent case, the Google case, predated my time on the FTC, so I also don't have any inside information on how that Trade Commission decided the case. But I do think and I'm very hopeful that to the extent that there are differences, we have far more in common right now with our enforcement approach and dealing with high tech than we do real departures and differences and gaps.

You know, I'd add, and I think we'll get to this in our conversation, the area that seems to be conflated the most, and this gets back to where we started, is around consumer protection, harms from big data, privacy, those kinds of issues, and antitrust. Right? And that's where I do spend quite a lot of time explaining what, in my view, is the right approach to optimizing innovation, which is strong antitrust enforcers, but combined with strong consumer protection to protect against privacy or big data harms, if

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you will. Whereas, you know, I think that there can be -- I have heard some advocate for more of a combination there and I think that can be a very tricky thing.

MR. KERRY: So let me follow up a little bit on what you just said about consumer protection and particularly the impacts of big data. This is something that the White House big data inquiry shed some light on. And I think compared to the work that we did when I was in the administration, it took things deeper in terms of exploring some of the potential harms that can come from data, the aggregation of data, as well as I think some of the potential upsides, as well.

The FTC has been looking at issues of discrimination. What do you see as the discrimination risks from data and how should we broadly deal with it? How should the FTC deal with it?

COMMISSIONER McSWEENEY: Well, I think the FTC is an unusual entity in that it does combine both consumer protection and antitrust into one agency. And, in some ways, that has really been very helpful for us in thinking about these very complicated issues and the effects that they have on consumers. So I would say we have been looking not only at data discrimination issues, privacy issues, but also data brokers and the Internet of Things, as well, and, quite appropriately, using our ability and authorities to study trends in the marketplace to help us understand where some of the potential pitfalls lie for consumers.

Right now I would say transparency is still a really big issue for consumers combined with trust. Right? So this is playing out most visibly right now in consumer demand for Internet of Things products, where you seek trust. And I think that really -- that comes out in different polling information and I tend to think of it as a whole range of issues around privacy and security or maybe even security of my private information. But trust is a fundamental issue for consumers.

Consumers may not adopt new technology as willingly if they feel they can't trust it, and that seems to be a little bit more true in the "things" space maybe than in the freemium service space on the Internet, just anecdotally looking at some of the demand data. So I think we have to step back and then ask ourselves why that is happening. And that's something that the Trade Commission is thinking a lot about.

I think we have identified serious gaps in the data security practices of a lot of consumer-

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FTC-2016/02/01

facing Internet of Things goods and we think there should be stronger data security there. I think we have really spent a lot of time, quite rightly, thinking about how consumers can get clear information and consent to different collection and practices with their data if they choose to share it. I think consumers want increasingly some transparency. And I think when we think about these issues of discrimination, particularly on the consumer protection side, what we have to ask ourselves is do the existing laws that protect equal opportunity, protect access to credit, protect housing, protect our civil rights, do they provide enough protection from automated discrimination? Can we even understand when it's happening? Is there sufficient transparency?

And then that raises kind of what is the enforcement responsibility of a consumer protector like the FTC? But also, what is the corporate responsibility of companies using data analytics? Do they need to have -- we espouse at the Trade Commission privacy by design, security by design. Do they need to have data ethics by design whereby they are testing, tracking, responding to incidents where an algorithm, for example, is completely benign on its face, but is having a discriminatory impact on a group of people.

MR. KERRY: So you said a lot there. Should we expect some enforcement cases down the road on Internet of Things transparency or security?

COMMISSIONER McSWEENY: Well, so we started the conversation talking about Safe Harbor and I said, you know, the U.S. has strong privacy protections, which is true, I think. But now we're talking about where some of the gaps exist, right, and may exist in some of the frontiers here. You know, I would argue that the Trade Commission has been really good at making sure that companies are not deceiving consumers, so they are adhering to the practices and promises that they're making consumers. We have been I think using our authority judiciously in the data security space to say that it's unfair if you don't secure the data that you have because of the harms that are associated with the release of it. But, you know, we don't have a universal requirement that everybody have a privacy policy, right, although, in fairness, I think surveys indicate most companies now do.

So I think we need to continue to use our authority as we have been to protect people from deception in the marketplace, to keep moving with consumers as they move from a brick-and-mortar

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world to an interconnected one. I continue to believe the FTC should really emphasize its enforcement around data security practices, and I think you'll see more to come from us on that. You know, we've had some really interesting financial technology cases, where we've been trying to make sure that consumers are protected in some of these payment mechanisms that they may be using. I think those are really important, as well.

And, you know, I think when it comes to the discrimination question, the FTC's already enforced using its Fair Credit Reporting Act authority. And I think we'll have to look carefully at this conduct going forward.

MR. KERRY: So you mentioned transparency and I guess I'm not sure in this day and age what that means. The FTC has said in words to the effect the notice and choice system is broken, that, yes, it's important to have privacy policies because you and your staff and other watchdogs read them, but consumers by and large don't. So if that's the case, how do you achieve transparency? What does that mean in an era of mobile devices? What does it mean in an era of sensors and other things that you don't even have any real interaction with?

COMMISSIONER McSWEENEY: Well, that's why I was really excited about Privacy Con, which was a presentation of research that the FTC hosted a couple of weeks ago because, I agree, this is one of those tough intractable questions. You and I have been talking about it for the full, I don't know, time of this administration, eight years or so. It's not getting easier, for sure, with the Internet of Things. But some of the technology that's coming, that's not quite on the market yet, but that could be available, I think is very, very hopeful.

Privacy assistance, for example, that might be able to look at the content of all of those privacy policies and figure out which ones map on to your choices, right, and solve that problem of reading a 60-page privacy policy for you and keep you in a sort of consistent privacy space. Perhaps those could even be optimized to understand what sensors are trying to ping your device and see where you are, that maybe you could have additional tools to understand what kind of cross-device tracking is being used and that kind of thing. There are already some tools on the market, like Ghostery, that help you understand how you're being tracked on the web.

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So I think technology might be one of the solutions here and I'm optimistic about it, but that's also why -- and we can talk a little bit about this -- I think promoting innovation and competition that includes privacy and security is going to be really valuable to consumers. So I think as an antitrust enforcer privacy competition is the thing that I ought to care about, as well. So to me it's a form of quality and innovation competition.

MR. KERRY: How about transparency in algorithms?

COMMISSIONER McSWEENEY: Yes.

MR. KERRY: It's getting behind the way that algorithms work, understanding more about those, so that's something that's at the intersection of transparency and maybe technology and what you were talking about in terms of discrimination, understanding how the data works at the back end. How do we get that transparency?

COMMISSIONER McSWEENEY: Well, and this is one of the critically important, very complicated issues. We can identify now some of the discrimination that might be occurring due to algorithms. There are some very prominent studies out there that have identified everything from staplers being priced differently based on how far away you are from a Staples to women not seeing career coaching ads because they were being served a bunch of other stuff not related to careers at all, you know, things that are a problematic result. And I think almost any sensible person in the room would say that's a problematic result, even if it's their company that's engaging in it. Right? It's very difficult to unpack how that result happened. And I think that's where we need to bring more technologists into government and we are expanding our resources at the FTC, the Office of Technology and Research and Investigations. We need to bring in our own capacity to understand what's happening.

We are very optimistic about some of the research that's happening in the academic community that helps us understand a little bit about how this is working. And that's where I think we need to have a real data ethics by design conversation with people who are using data analytics because, in many ways, if they use tools to test what's happening with their algorithms, they're the ones that are going to be in a really good position to try to stop disparate impacts where they see them arising.

Ultimately, do we need to think about how the enforcers keep pace here and whether we

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need to bring enforcement actions? Yeah, I would leave the door open for that.

MR. KERRY: So I'm going to turn to --

COMMISSIONER McSWEENY: But I would caveat it by saying it would be incredibly fact-specific, so I do think, you know, we'd have to really proceed there very, very carefully.

MR. KERRY: Good. Well, I want to turn to our audience for some questions, so get ready. I have one question I want to ask as we go to that.

You talked at CES about encryption. You've been quite vocal that you think that trying to put backdoors on encrypted technology is a bad idea. A law enforcement imperative, what's an FTC commissioner doing wading into this territory?

COMMISSIONER McSWEENY: That is a question my staff ask me all the time.

(Laughter) You know, first of all, I would say do I believe law enforcement needs the right tools to do their jobs? Sure. I just don't believe backdoors are the right tools, and I take that view from a consumer protection point of view. I believe that consumer data security is absolutely essential for innovation, for the flourishing of the internet of things, for all of this amazing new tech that is being delivered to us on a daily basis. And I think every single engineer and technologist, computer scientist, expert in this area that I talk to, who is not in law enforcement, tells me it's not possible for the government to mandate backdoors in consumer-facing technology without creating security vulnerabilities. So I take that very, very seriously.

And also then look at the market here. It's possible to use encrypted technology, which is great for securing consumer data, is also open source. So it's possible to use it and I think those folks who are bad actors are going to be able to use it regardless of what requirements we put on legitimate commercial actors in the United States.

This is a tricky issue, I get it. I think we're conflating some of this with a much broader conversation about it's called sometimes "going dark" or something like that. And I think it's legitimate for people to be trying to come together from both sides here and understand what tools are actually needed. But in order to protect consumers who are using more and more commercial products that are sharing more and more of their information and more and more of their data, we need to be very, very careful in

FTC-2016/02/01

doing anything that weakens the use of encryption on those technologies.

MR. KERRY: So I saw a hand go up very quickly right here. Yes, if you could just identify yourself.

MR. GOODFRIEND: Thank you for a very interesting presentation. My name's André Goodfriend at the State Department.

And the discussion has been very much focused on how do we protect our information with regards to privacy, corporate privacy, public data privacy, at the same time mentioning transparency. And transparency is one of the government's goals, as well, with the Open Government Initiative. How do you reshape the conversation to promote transparency? For example, Zillow is also an example of government data helping the market and making data transparent so that perhaps looking at the title here, "Is Information Market Power," if information in the hands of companies is their power. Is it possible to shift the balance and have more information available to the public, including public data because we may want our information to be accessible, so that the public has that power, as well?

So the question is can this discussion be framed in terms of promoting more data access, more transparency, instead of just how do we keep the data protected?

COMMISSIONER McSWEENEY: Well, I think that's a really, really important point. So this conversation tends to be one of those, especially because I come from a consumer protection background where I'm kind of identifying all the potential pitfalls for consumers without spending a lot of time talking about all of the great benefits that are newer to all of us from the use of data analytics, both in the provisioning of better government services, but also from innovation in the private sector. So I think we need to sort of start the conversation about data around a lot of the real good and promise of it. Right? It is really, really important and the fact that we have more and more computing power that's being brought to bear on it to provide better and better outcomes is a benefit.

I think this administration through its Open Data Initiative has really been trying to promote as much as possible the freeing up of government data in a privacy-sensitive, privacy-protected way in order to facilitate innovation. We even partnered with the private sector in the FTC in ways that I'm really happy about using some of our data.

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We used information that we had around robocalls, which are these robot calls that thwart the Do Not Call list and annoy you on your telephone or your mobile phone with a recorded message or some sort of customer service call. Right? This is a thorny law enforcement challenge for us because it's easy to generate millions of calls. They frequently come from offshore. You know, you stamp one out over here, it pops up over there. It's sort of a whack-a-mole problem. So using the Open Data Platform we were able to create a competition and we've now got a couple of private sector companies, Nomorobo and RoboKiller, that are providing consumers with new tools to try to block those kinds of calls. To that to me is a really great example.

And this is an FTC one, so I'm familiar with it, but I think there are examples from all over the government where they've been able to use the Open Data Platform to take information that they had, partner and create with it, and create new and better tools for people, which is terrific.

And this is another reason why I actually care deeply about making sure that we continue to have strong encryption in this country, I think there are some pretty exciting tools that are 5 and 10 years down the line here that will allow us to compare different encrypted sets of data without having the government or even the humans even know what's in that data, right. So my personal information never needs to be shared in order for us to get the benefit of a large dataset.

So those kinds of technologies and tools I think will be tremendously beneficial.

MR. KERRY: So I think I saw a hand at the back there somewhere. If you could just wait for the microphone. Okay, I guess I was mistaken.

So let me explore a little bit more the possibilities of technology here. You've talked a little bit about that. Latanya Sweeney, who was for a while at the FTC as the chief technologist before going back to Harvard, said something roughly like technology created these problems. It's going to be up to technology to fix them.

COMMISSIONER McSWEENEY: That's true.

MR. KERRY: So what have you seen in terms of the work that the FTC has done with a series now of chief technologists? And what do you see as some of the lessons and some of the other exciting things that you learn about at Privacy Con? How can technology solve these problems?

FTC-2016/02/01

COMMISSIONER McSWEENY: Sure. Well, I think it's probably true, technology created the problems to the extent you think they're problem and now we're relying on technology to fix them.

MR. KERRY: Her words.

COMMISSIONER McSWEENY: That just strikes me as probably true of any change over time. So I guess my main takeaway is because a lot of these technology innovations and issues are incredibly technical, we do need more people informing policymakers and law enforcers and anybody thinking about them to be able to explain to those people how the stuff works. Right? So I spend a lot of time -- I do not code, okay; I'm a lawyer by training -- I spend a lot of time with technology people, like our chief technology officers and a growing group of staff that we have that are technically capable, getting them to explain to me how something works, how a hack took place if we're looking at a breach or how the technology is actually functioning. Because I think it's really, really important that if we're making decisions that are based on how a technology is working that we understand what underpins those.

So I would say, one, if we're going to be relying on technology to fix the problems that technology has created, we're going to need to get a lot more technologists into government and helping inform people who are writing laws on the Hill and that kind of thing.

And, I mean, I don't know, I don't think it's a solution to sort of stop innovating or stop the development here, especially when you think about all the tremendous consumer benefits that we have from the growing use of data analytics. I think the toughest thing is going to be to make sure that enforcers like the FTC continue to have the resources to keep pace with all of that change and to adequately protect consumers.

MR. KERRY: I see a hand going up back there.

MR. LAROA: Hi, Gaurav Laroia from Free Press. I'm curious about how cooperation between the FTC and the FCC has shaped up after the Open Internet Order on consumer privacy.

COMMISSIONER McSWEENY: The cooperation between the FCC and FTC in my experience at the Trade Commission over the last couple of years has been excellent. We've brought a number of cases together, the cramming cases, we've been working very closely with them. And now we're going to, I think, have to work very closely with them as they think about what they're doing on

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FTC-2016/02/01

privacy.

I encourage as much as possible our staff to have conversations where it's appropriate. You know, I think we will look very carefully at what they do with their rulemaking authority. We certainly are capable of commenting on it if we like what we see or if we don't like what we see. And I do think it's incumbent on us to make sure that we're really using a consistent approach across government agencies. So I do think that's a good government thing, right, to try to be consistent where possible.

So I'm eager to see what the FCC does. I don't believe that this is one of those spaces where you have to have just one government agency trying to protect consumer privacy. I think consumers are probably best served with as many cops on the beat as possible.

MR. KERRY: Any other questions? Yes, sir. A microphone right in front of you here.

MR. O'CONNOR: Thank you. My name is Dan O'Connor. I'm with the Computer and Communications Industry Association.

You brought up DSM, Digital Single Market Initiative, in Europe. More and more of my time these days is spent dealing with the Brussels office. It's a somewhat massive undertaking. And I know you've at least been across the pond once, probably more, to discuss all manner of issues with your European interlocutors.

So my question on this is that there's a lot, especially in France and Germany, there's the sense that maybe competition enforcement, particularly in these new areas of technology, might not be good enough to deal with problems that arise. And they're trying to move towards a more, you know, ex ante regulatory approach to dealing with issues that surround data or choice, like the platform regulation especially. And I was curious, a lot of your comments indicated, you know, fact-specific analysis of case-by-case situations in new areas, and I was curious if you could kind of compare and contrast or your thoughts on going about looking at new areas where there might be consumer privacy issues or competition issues, whether you like an ex post or ex ante.

COMMISSIONER McSWEENEY: So you've put your finger exactly on the big policy conversation that we're all having. This should actually bring us back full circle rather nicely.

You know, I think in the U.S. we tend to, at this point in time, adopt a relatively

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FTC-2016/02/01

conservative point of view towards ex ante regulation and we rely heavily on ex post enforcement. I think that that is a good paradigm. I would caveat that by saying I'm a progressive, so I believe where you have evidence of market failure or where you have evidence that a strong set of ex ante rules, like the Open Internet Order, are going to be protective of innovation and of a demand and growth pipeline, that that would be very useful. So you shouldn't simply always rely on ex post enforcement.

However, I would say the DSM process, and from the conversation I've had with a lot of my European colleagues and (inaudible) that I meet there when I travel there, is certainly about trying to think about how to sort through a number of really challenging issues. Again, to optimize innovation, but also using frameworks that do tend to rely more heavily on ex ante regulation and how to get that balance right.

It's an incredibly complicated problem and I'm not going to sit here and tell you that I have the solution for Europe, they should just be ex post enforcers, because I don't think that's what would work there. But I think we need to continue to have the dialogue, and this is what I try to do, and just explain how it works in the U.S. and be honest about where some of the gaps may be in that system.

I tend to believe that when it comes to protecting competition in high-tech markets that, for example, you can have some nice ex ante rules with Open Internet Order, but you can rely heavily on ex post enforcement to protect competition and innovation as long as you have competition enforcers that are willing to use all the tools in their toolbox. And so I think we are up to that challenge.

And, you know, I think it gets us back to the Safe Harbor question, which is, are we going to be able to be in an era of convergence or are we going to be in an era of divergence? And my biggest fear 60,000 feet up is that divergence here on some of these key areas, such as Safe Harbor, such as competition, really leads to a fracturing of the Internet and that's not a good thing for consumers in my view.

So I'm very hopeful that we can avoid that, but that's the work of all of these conversations that are happening now.

MR. KERRY: Well, let's take another question here and then I want to wrap up on that point to bring it full circle.

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SPEAKER: Thanks. My name is Jean (inaudible). I actually have two questions.

What about the title of the panel? If information is not market power, what is the business model of most operators in this field?

And the second question is, and it relates to a remark that was made a couple of years ago maybe by Vinton Cerf on privacy, saying essentially privacy did not exist in the 19th century because the mailman would read your letters. It does not exist now with new technology. Grow up and live with that. So do you ever feel that you are fighting a rear guard battle?

COMMISSIONER McSWEENY: Well, I didn't live in the 19th century, so I actually don't know exactly what it would have felt like in terms of privacy then. You know, I think that's why I tend to really come down on the side of technologies that help people secure their private information. I think our best set of tools to maintaining security and privacy of our information are probably being able to use technologies that are encrypted and things like that. There is certainly a diversity of different technologies available in the marketplace.

Is it very difficult if you're an average consumer to surf the web and remain undetected? Yes, I agree that it is. I think the question that we tend to wrestle with here in the United States especially is the degree to which American consumers actually care about that. Right? And there's a lot of debate there, so I'm not going to step into that right now.

I think we do need to continue to be very vigilant and I tend to believe that consumers' trust and adoption and use of technology depends very much on the degree to which they feel they understand what's happening to their information and the degree to which their information is being securely held by the companies that are acquiring it.

Sorry, what was the first part of your question?

SPEAKER: (inaudible)

COMMISSIONER McSWEENY: Oh, data as market power. So I think you were asking, you know, if data isn't market power, what is, right, in a data market? So I didn't mean to suggest that having a vast amount of data isn't conferring a competitive advantage or even market power. I think what I was trying to point out is that for an antitrust enforcer, a legally acquired monopoly in the United States

FTC-2016/02/01

is okay. It's not okay when you're using that monopoly power to extend into another market, when you're creating barriers for a new entrance and innovators.

I mean, just reading the literature that exists right now, and I advocate for continued study of this issue, it doesn't suggest to me that data isn't readily available. In fact, it's more and more available, getting to your privacy point. And it's also available from a variety of sources. So while I do think there are network effects, I think we have to be mindful of what the economics tell us about how these markets function.

MR. KERRY: So to wrap it up, you talked about convergence or divergence. Where do you work in common, where do you collaborate with European regulators? And how do we promote convergence?

COMMISSIONER McSWEENEY: Well, we promote convergence, to get back really full circle to your point about the lion of the Senate, I mean, I think you promote convergence by building relationships, continuing to have dialogue. And one of the things that actually Assistant Attorney General Bill Baer said this very well in the fall in a speech he was giving on this topic, we actually have been in a dialogue with our DG Comp counterparts in the European Commission around competition issues for really the last four decades. And I think as a result that has brought these institutions closer and closer together. We're using economics, we're using the same set of principles. We agree far more than we disagree. Our case teams are in constant conversation about multinational transactions if they're both reviewing them and that kind of thing. So I'm really very hopeful about the amount of convergence that currently exists.

We've been talking today about some of the thornier, trickier areas where there is certainly more work to do and I think that's where the backdrop needs to be a conversation about innovation policy, about the benefit of innovation to consumers, and about the benefit to democracies and the world or an open, democratic Internet that can cross borders. Right? You know, I'd be very worried about the lessons that countries that aren't as democratic, that don't share the same values might take from a fracturing of the European and American relations over some of these issues.

MR. KERRY: Well, Commissioner McSweeney, I want to thank you very much for coming

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FTC-2016/02/01

here this afternoon on behalf of the Center for Innovation and Technology. That's, as I said at the outset, the heart of the conversation and I think the heart of where you just ended this up.

So thank you again for this conversation. Thank you all for joining us.

COMMISSIONER McSWEENY: Thank you very much. (Applause)