Key point from Thomas J. Rosch, Retired Partner, Latham & Watkins LLP, USA

I. First, The EU has different views about privacy than we in the U.S. have. That is to be expected. The people in the EU had to endure invasions of privacy prompted by "isms"—Communism, Fascism, and National Socialism, just to name a few—that we in the U.S. could only dream about in our wildest nightmares. Accordingly, the Europeans define privacy in a very different fashion than we do.

II. Second, the Administration led the FTC staff—and then the FTC Commissioners--to adopt a new way of analyzing privacy in the U.S. in late 2010. This new mode of analysis was based on "unfairness" instead of "deception." An invasion of privacy, in other words, could exist, regardless of what a firm's privacy statement said. This mode of analysis was unveiled in a series of Reports and then as a law enforcement tool in the Wyndham Hotels case.

III. Third, the Brookings Institution in April of 2014 issued a warning to the EU in general and to the FTC in particular that an unlimited view of privacy risked being confused with privacy itself. The Institution's warning echoed concerns which the Commission itself voiced to the Congress in the early 1980s and which culminated in the Congress enacting legislation to avoid that result.

IV To avoid that risk, the Institution sought to separate privacy into three "buckets": the first "bucket" being one in which the interests of consumers were clearly aligned with those who would invade those interests; the second "bucket" being one in which the interests of consumers were sometimes coincidental with those who would invade those interests; and the third "bucket" being one in which the interests of consumers rarely, if ever, coincided.

V. I, for one, am dubious about whether the Institution's "buckets" approach will yield results which are any more unbounded than the EU's analysis. For one thing, the "buckets" strike me as being somewhat arbitrary. Which leads me to my second concern that is closely akin to that described by the authors of the Institution's warning. It is whether the FTC's mode of analysis, based as it is on "unfairness", risks becoming synonymous with privacy itself. "Fairness" is a concept—like privacy itself—which is largely in "the eye of the beholder." So I would continue to anchor "privacy" in "deception." Lest "deception" be considered too limiting, I would define it as including "half-truths" as well as outright lies. As I observed in the Google "unfair competition case, "half-truths" are considered "deceptive" under current FTC law.