

**FORDHAM UNIVERSITY SCHOOL OF LAW
FORDHAM COMPETITION LAW INSTITUTE**

**45th ANNUAL CONFERENCE ON INTERNATIONAL
ANTITRUST LAW AND POLICY**

*Fordham University School of Law
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Introductions & Welcome

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MR. KEYTE: Good morning, everybody. I'll get started while people are filing in. I'm not going to say anything interesting.

Welcome to the 45th Annual Conference on International Antitrust Law and Policy. It's my fifth year with the conference.

I apologize for the early date, but Fordham is in its 100th year and took up some later dates. Next year we'll be back in mid-September or so.

We're proud at Fordham to keep the conference as an international meeting place to

exchange ideas, to debate issues in a civilized manner, to look for areas of convergence, to discuss areas of divergence.

It seems that it was just a handful of years ago that I think everybody thought there was going to be more convergence, and certainly there has been a lot of convergence across mergers, cartels, Section 1 and 101 issues. But today there is a fair amount of divergence in the area of monopoly; dominance; ideas about leveraging, which is a fairly dead doctrine in the United States with *Trinko*, but is alive and well in the European Union and elsewhere; there is the *Intel* decision and the implications of that; and there may be down the road other big-name decisions that will clarify things in the European Union.

Yesterday we had an Economics Workshop with The Brattle Group in the afternoon and Compass Lexecon in the morning. They really were fantastic workshops where they delved very deeply into some merger issues, remedies, the *AMEX* decision, and structural modeling.

We will continue to do the Workshop and try to get as many young practitioners, enforcers, even young economists. It's just a fantastic program.

It's great also to have an international group that gets exposed to these discussions so that there really is a cross-border dialogue of some of the economic principles that often lead the way on enforcement and policy decisions.

The three panels for today fit into exactly what we try to choose, which is issues that are topical and cutting edge. First we will have Antitrust and Populism. We could call it progressivism. I don't know what the right word really is, but we'll probably hear that clarified. Eleanor Fox will moderate that. All Things Vertical is really just picking up on what I think is an area of continued divergence. Judge Ginsburg will moderate that panel. And then Emerging Issues in Health Care, which are always topical and complex. Professor Dan Sokol will lead that.

But first we will have our two keynote speakers for this morning, Makan Delrahim, Assistant Attorney General of the Department of Justice (DOJ), who has proven to be quite a force, not predictable but extremely active across all the antitrust topics and is doing a fantastic job, and we'll love to hear what he has to say. For the, at least on my watch, third or fourth time, Johannes Laitenberger of DG-COMP, who we always pepper with what we think are tough questions and he always handles them quite easily.

I will remind everybody that one of the benefits here is we'll do the keynotes back-to-back without interruption, and then I'll lead with a question or two, and then the audience can ask questions. So start getting those ready. It could be interesting and fun.

Makan, I'll turn it over to you.

Keynote Remarks

Makan Delrahim

Assistant Attorney General, Department of Justice

“Come Together”: Victories and New Challenges for the International Antitrust Community

MR. DELRAHIM: Thank you so much, James, and thanks to Fordham. It's an honor for me to be here amongst so many friends and colleagues, many of whom for many years and decades – it's my maybe second decade now in the business of the enforcement side – many familiar faces and friends throughout the years.

There are folks in the audience again that humble me being here because of their contributions not only to antitrust but to specifically international antitrust, many folks amongst us who I have looked up to for many years in my career and in my studies. We have folks like Judge Doug Ginsburg, who not only was the head of the Antitrust Division but had an illustrious career, has one, but still contributes to this field. Of course, President Mario Monti, who I think had one of the most important

impacts in Europe and in the area of convergence in the antitrust field, and he, despite his incredible many accomplishments afterwards, and pivotal accomplishments, in the late 2000s in Europe still continues to contribute in this world. And of course Fred Jenny, my friend not only from the judiciary in France and the Competition Committee of the OECD, but his continued involvement both in academia at New York University (NYU) and other places. And representing a lot of us at the International Competition Network (ICN), Andreas Mundt, who we met when he was at the Bundeskartellamt and we had similar jobs as deputies for international when he worked with Dr. Ulf Böge, and he continues to be the President of the ICN and to lead us.

These are folks along the way that remind me of that old Eagles song, "You may check out when you want, but you can never leave!"¹ – in a positive way because we all contribute. No matter what any one of

¹ *Hotel California* (1976).

us, including me, does in the future, I hope that we all continue to contribute to this field because it is so important and it has been such a civilized way of working towards the convergence that we all strive for.

Again I would like to thank James for all his work, and Barry Hawk over the years, almost four decades, where this forum has been such an important forum for such exchanges of ideas amongst the enforcers, academics, and members of the bar.

It is an honor to follow in the footsteps of former Assistant Attorney Generals for Antitrust appointed by both Republicans and Democrats over the years. At one time or another they have all been speakers at this conference.

A little less than a year ago, I had the great privilege of addressing the audience at NYU Law School for my very first remarks as Assistant Attorney General. At the time I focused on international engagement and global dialogue, which is an area of

significant importance to me and obviously to everybody in this room.

Today presents an occasion for me to reflect on this past year, on the international engagement we have had during this time, and on what the international antitrust community has accomplished over the long term. I also want to reflect on how we as a community have been able to achieve so much and what we hope to do in the future.

As I was preparing to make these remarks, I recalled an article that I commend folks to read, published in the *Harvard Business Review* several years ago, called "How the Best of the Best Get Better and Better." It was written by a sports psychologist, Dr. Graham Jones. It grabbed my attention because it deals with how humans keep improving. How do we continue to break new barriers even when it seems that we are striving to achieve the impossible? How do we surpass what we perceive to be our limits?

English runner Roger Bannister, the first to

run a mile in under four minutes, answered that question this way: "Doctors and scientists said that breaking the four-minute mile was impossible, that one would die in the attempt. Thus, when I got up from the track after collapsing at the finish line, I figured I was dead."

The secret, it seems, is to forget about the limits. Although Dr. Jones wrote his article for sports stars and business leaders, his advice is relevant to us as members of the international antitrust community. It explains many of our successes and it is instructive about where we go from here.

The first thing we must do is focus on the long term. Dr. Jones noted that "The road to long-term success is paved with small achievements." As antitrust enforcers, we are required to spend much of our time making quick decisions, meeting immediate deadlines, sometimes responding to press leaks – as I had to do and excused myself from part of the meetings

yesterday – and this may not always leave us with the time to reflect on the big challenges that we face over the longer term.

When I look back at my predecessors and what they have said about international antitrust enforcement, both at Fordham and in other international settings, I was struck by how far we have come. I'm going to cover a few of those just to show us where we have come and where we can go.

In 1978, then-Assistant Attorney General John Shenefield, a friend of mine and a fellow Antitrust Modernization Commission Commissioner, highlighted a lack of consensus in the world of antitrust enforcement, concluding that "significant differences in local political and economic philosophies and the lack of an effective international administrative mechanism preclude for the foreseeable future the development of supernational regulation."

He lamented dissension among the United

States, Canada, and Great Britain regarding the issues of extraterritoriality and "look forward to a world where the vacuum is filled by consensus on a vigorous antitrust policy and the international mechanisms to implement it."

His remarks did not signal much optimism that consensus on the substance of the antitrust laws or the scope of its application would be realized anytime in the near term.

In 1981 we began to see some consensus on extraterritorial jurisdiction when then-Assistant Attorney General Bill Baxter addressed the ABA Section of Antitrust Law at Georgetown. At the time, AAG Baxter predicted that while disputes about alleged extraterritorial jurisdiction existed, "as the number of nations embracing antitrust policies expands, the number of conflicts will decrease."

Over the next decade, not only were his predictions of global expansion realized, but developments in the United States clarified the

extraterritorial reach of U.S. antitrust law and paved the way for better international cooperation.

In 1982 the United States Congress enacted the Foreign Trade Antitrust Improvement Act to address the application of U.S. antitrust law to foreign conduct. The "domestic effects" test contained in that law, and subsequently clarified by the U.S. Supreme Court in *Empagran*,² has proved a useful way to think about extraterritoriality, not only for us in the United States but in many of our sister jurisdictions. Today there is general consensus on the scope of extraterritorial jurisdiction of the antitrust laws.

While the adoption of competition laws around the world signaled increasing consensus regarding the need for antitrust enforcement, it created some challenges as well.

In 1993, when Anne Bingaman was the Assistant Attorney General, her speech at this

² *Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 2004 WL 1300131 (2004).

conference recognized the diversity of laws and challenged the international community to look for new ways to cooperate.

It was just six years later, again here at Fordham, that then-Assistant Attorney General Joel Klein noted the exceptional convergence regarding cartel enforcement and praised the cooperation that had resulted in the Organisation for Economic Co-operation and Development's (OECD) hardcore cartel recommendations.

Of course we did not stop there. Acting Assistant Attorney General Doug Melamed said at Fordham in 2000 that "our goal should be to achieve a reasonable degree of analytical and operational coherence in antitrust enforcement." But he acknowledged that with ninety or more antitrust agencies at the time it would be "a formidable task."

He envisioned a global competitive initiative, which, by the time Assistant Attorney General Charles James appeared at Fordham here in

2001, had become a concrete proposition called the Global Competition Network. Today, of course, we call this organization the International Competition Network (ICN).

While it makes me feel old, I admit, and even celebrate, that there are many talented young lawyers at the Justice Department and around the world who can't remember a time before the ICN. Robust and regular international discussion and cooperation has become our way of life, to do that civilly and with respect for each other's agencies.

The ICN is an example of just how much change is possible if we put our minds to it. In a recent speech at the Ronald Reagan Presidential Library in my hometown in California, U.S. Secretary of State Mike Pompeo spoke about the current political and humanitarian crises in my birth country of Iran. While Secretary Pompeo was addressing a very different set of challenges than the ones we face in the international competition community, his words

resonated with me. Of tackling major obstacles, he said, "I always remind people who think something's not possible, or think the time horizon will be measured in centuries not hours, that things change."

Within the antitrust community we have effected enormous positive change thanks to those who had the creativity and vision to conceive of long-term goals and the tenacity to take each incremental step after incremental step. Many of those folks are here in this room. Some of them are not, including our good friend Jim Rill, who is not here today but had incredible contributions during his leadership of the International Competition Policy Advisory Committee (ICEPAC) during Attorney General Reno's tenure.

Looking back at all we have done in the four decades that we have been working together and meeting here at Fordham, I am deeply impressed by what we have accomplished by focusing on the long term.

The second pillar of Dr. Jones's philosophy

of constant betterment is the ability to reinvent ourselves. We must repeatedly embark on new cycles of improvement. While stability and predictability are vitally important in law enforcement and in government generally, we should never stop questioning whether we can change in ways that will improve our efficacy.

Again, Commissioner Monti's improvements in the European Commission are a living example of that, and our friends in China and the changes they have made in reforming their laws after just a short ten years is yet another good example of the improvements that they have made in reinventing themselves.

In my years as Assistant Attorney General we have taken several initiatives aimed at reinventing our policies at the Justice Department, for the better we hope.

For example, the Division convened a series of public roundtables at which participants from all sides weighed in on issues of regulatory reform, including the issues of anticompetitive regulations.

We have also embarked on a project to terminate over 1000 outdated consent decrees which have for years remained on our courts' dockets, and in some cases have even created anticompetitive market conditions themselves.

On the international front, we have also continually revisited our views. We have attempted to articulate our international competition policy as clearly as possible, adjusting our International Guidelines to keep them timely and relevant. We issued our original Guidelines jointly with the Federal Trade Commission in 1977 and then revisited them a decade later under Assistant Attorney General Rick Rule in 1988. The 1988 Guidelines expressly recognize the increasing relevance of foreign competition in every aspect of enforcement, reflecting the rapid increase in internationalization.

Our 1995 Guidelines emphasized global economic interdependence and the related issues of comity, mutual legal assistance, and the nexus between

antitrust and trade.

In 2017, finally, we issued our most recent update, reflecting a world in which case cooperation and policy discussions are almost everyday events, and we continue to think about improvements we can make in our agencies to do further.

We also strive to redefine and share our thinking through bilateral meetings and speeches. For example, our International Deputy AAG Roger Alford has mentioned recently "we are giving a great deal of thought to how we implement the principles of comity, not just in situations where two jurisdictions' remedies post a direct conflict, but also in situations in which one country's remedy conflicts with important interests, such as pro-innovation policies of another jurisdiction."

Another component of constant improvement is to draw inspiration from others. Dr. Jones described this as "consciously create[ing] situations in which their elite performers push one another to levels they

would never reach if they were working with less-accomplished colleagues." It is common in sports for elite athletes to train together. Likewise, it is common in the business world for top executives to push each other to excel, to compete.

While we and our international colleagues are not competing in any traditional sense, we can and do look to each other as sources of inspiration and improvement.

On Wednesday I had the great pleasure of attending the Heads of Agency Workshop here that precedes this conference each year. The discussion, which ranged from everyday obstacles we all confront, such as the use of IT in our investigations, to the cutting-edge issues presented by the digital economy and unilateral conduct, left me feeling invigorated to tackle the next challenge and confident in our abilities to take it on.

I notice the same effect when I engage with my international colleagues at bilateral meetings and

at the ICN and OECD. As a community we have built a table infrastructure that ensures that we learn from each other, challenging each other, and continually improving together.

That leads me to the final ingredient for improvement that I want to highlight today. That is the need to celebrate our victories, even on a telephone. Of course we all enjoy an occasion to get together and to share a drink or a meal, particularly when it's in Paris. But, as Dr. Jones writes, "The most important function of affirming victory is to provide encouragement for attempts at even tougher stretch goals."

While we have much to celebrate, I submit that there are new goals towards which we can and should strive.

In a recent speech, my friend and colleague, our United States Deputy Attorney General Rod Rosenstein, recounted an anecdote about the founding of the United States government, noting that Benjamin

Franklin described the government as "a republic, if you can keep it." Rod said that Franklin "used the word 'keep' as an active verb. It means there are things you need to do, if you want to preserve it. What Franklin had in mind is analogous to the 'keeper of the flame,' a person tasked to keep the fire burning. If you are a keeper of the flame, your assignment is not just to watch. You need to take action to keep the spark alive."

It is in this spirit that we must identify and pursue new goals. As you know, together with many of our enforcement colleagues, we at the Division and the Federal Trade Commission are working towards a Multilateral Framework on Procedures (MFP) that will encapsulate and allow its signatories to commit to each other to adhere to the fundamental procedural norms that many of us, if not all of us, already recognize and agree to.

Already the agencies that have participated in the discussions so far come from different legal

traditions, and operate in both administrative and prosecutorial systems. What may have seemed impossible at the outset is looking more and more possible every day. Earlier this week, we joined representatives from dozens of other agencies to discuss the draft text of this MFP. Many good comments and many suggestions were made, and I am happy to report that the areas of consensus far outweigh those that require additional discussion.

While we still have plenty of work to do on this, I hope that you will indulge me in imagining that fifteen years from now – perhaps at the 60th Annual Fordham Conference – we will look back at the MFP as an important instrument that improved the quality of our enforcement decisions and increased public trust in antitrust enforcement worldwide.

Fair procedures are inextricably linked to good substantive outcomes. To quote Rod Rosenstein once more, “[t]he rule of law requires us to reserve judgment until we have heard from all parties and

completed a fair process. You cannot reach reliable factual conclusions unless you first weigh the credible evidence. You cannot offer reasoned legal opinions unless you consider conflicting arguments.”

Committing ourselves to providing parties with access to evidence, transparent decision-making, and judicial review, to name a few, will help us to ensure that our decisions are thoughtful, thorough, and respected. An unequivocal public commitment to these principles will also demonstrate to our own citizens and to those of other countries that we conduct ourselves with the highest degree of integrity and that they can have faith in both our processes and our conclusions.

I commend folks to read one of my personal legal heroes, a 1940 speech by later Justice Robert Jackson, at the time the Attorney General and before that the Head of the Antitrust Division and many other jobs he had in Franklin Delano Roosevelt's Administration, and particularly a quote where he

talks about the power of law enforcement, "the power that we have and the humility with which we must exercise that."

Although I have been in my position as Assistant Attorney General for slightly less than one year, I have seen firsthand the enormous progress we have made together over the last two decades.

As the Deputy for Appellate and International in the early 2000s, I participated in one of the early ICN annual conferences, where some of the best minds in international antitrust enforcement gathered to chart a course for collaboration and cooperation, and I am only heartened to see many of those folks continue that progress in this room.

The founding of the ICN was a huge accomplishment, and perhaps things could have stopped there. Instead, the best got even better, thanks to long-term planning, constant reinvention, mutual respect, and mutual inspiration. Now let's keep going and let's actively keep that spark alive.

Thank you.

Johannes Laitenberger
Director-General of DG Competition, EU Commission
Enforcement of Competition Rules in the European Union:
The Globalized Economy in the Digital Age

MR. LAITENBERGER: Ladies and gentlemen, first of all, I would like to thank as well and to pay tribute to James and to Barry for the accomplishment that is the Fordham Conference.

It is an honor to be part of this forty-five-year-old history, and it is indeed humbling to be able to speak in front of such a distinguished audience. With eminent members of the judiciary, like Judge Ginsburg and Advocate-General Wahl; with people of my generation as EU competition enforcers, like Prof. Senator Monti, who has done so much for EU competition enforcement and who remains an inspirational force to this day; with colleagues like Fred and Andreas who keep our community together; with our American colleagues from the Federal Trade Commission (FTC) like Maureen Ohlhausen and the team of the DOJ present here today; and all the other heads of authorities, economists, lawyers, it is a vibrant

forum and it is a great pleasure to be here.

I would like to talk today about enforcement of competition rules in the European Union with a focus on the globalized economy in the digital age. I will do so using two lines of argument: first, I will make a broad case for convergence and cooperation in our globalized economy; and then I will move to a few illustrations of the approaches taken by the European Union in enforcement in digital markets.

I can see from the program that the first panel in the afternoon has "convergence and divergence" in its title. We have not exchanged notes. It's just an instance of unplanned convergence, unplanned but unsurprising.

For decades, EU authorities have been part of an increasingly vigorous group advocating for international cooperation and convergence in competition enforcement. Convergence is predicated upon open markets with compatible standards, and the past decades have seen strong developments in that

sense.

Now, amid fresh tensions in global trade, serious reflections are in order on how to keep momentum. If one needs proof of the benefits of open markets, one needs look no further than the exchanges between the European Union and the United States. I trust that the *genius loci* will allow me to take this as an example.

In 2017 merchandise exports from Europe to the United States were worth \$430 billion while the United States exported merchandise to Europe for a record \$284 billion, pushing the peak imbalance of 2015 down 6 percent.

As to services, in 2016 Europe's exports to the United States amounted to \$212 billion while the United States had a \$67 billion trade surplus in services with exports to Europe reaching \$279 billion.

But these figures are dwarfed by foreign direct investment. In 2017 total U.S. investment in Europe exceeded \$2 trillion and the corresponding flow

from Europe to the United States was \$168 billion, over half of all FDI inflows into the United States.

In addition, in 2016 U.S.-controlled companies in Europe recorded \$720 billion in output while that of European affiliates in the United States was \$584 billion. The combined output is staggering. It is larger than the GDP of many countries.

Given this level of integration between Europe and the United States, we can speak accurately of a trans-Atlantic economy. As many as 50 million jobs depend on it on both sides of the Atlantic.

Similar developments can be shown for other regions of the planet.

This is not a zero-sum game in which the winnings of some are necessarily offset by the losses of others. As EU Competition Commissioner Margrethe Vestager said in a memorable speech earlier this week,³ “The world has changed vastly for the better. And

³ Commissioner Margrethe Vestager, “Fighting Fear with Factfulness – and Engagement,”

most of that change happened in the last few generations.”

At the same time, this development is not a *deus ex machina*. In her speech Margrethe Vestager reminds, for example, of the collapse of Lehman Brothers, almost to the day ten years ago, and the financial and economic crisis that followed.

There is a need for public policies to make sure that the opportunities are for the many, not just a few, and that those who cannot avail themselves from these opportunities are not left behind. As Margrethe Vestager put it, “We still have work to do, to make sure that trade is fair as well as free.” She goes on stressing that also competition policy and enforcement “keep the market working fairly for consumers.” In a global and digital world, this is more than ever a shared challenge and task.

On the strength of these arguments, I am thus convinced that competition enforcers need to

continue working with each other in multilateral and bilateral efforts to make sure our rules are compatible and convergent. This is all the more urgent in an integrated business environment shaken by protectionist shivers.

According to the latest *World Trade Organization Annual Report* issued in the spring, growth in global trade in 2017 was the strongest since 2011. But trade tensions have escalated in 2018 and, as WTO Director-General Roberto Azevêdo remarked, “we can take nothing for granted.”

Competition enforcers are among the actors who can defend the open rule-based system that has created the conditions for the positive global economic performance of the past years and decades.

As far as the European Commission is concerned, this is not merely “talking the talk.” We now cooperate with our sister agencies in all cases, with significant implications beyond our jurisdiction.

<https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fighting->

Between 2010 and 2017, to give you some figures, we cooperated with competition agencies outside of the European Union in 65 percent of all cartel cases and in 54 percent of complex merger cases. There is no doubt that we also "walk the walk."

Beyond our daily practice we have also been very active in multilateral fora, such as the International Competition Network and the OECD's Competition Commission, and the United Nations Conference on Trade and Development (UNCTAD) Intergovernmental Group of Experts on Competition Law and Policy.

As to bilateral agreements, I'm happy to report continued momentum.

In early June, Margrethe Vestager and Alejandra Palacios, the Chairwoman of the Federal Economic Competition Commission (COFECE) of Mexico signed an Administrative Agreement on Cooperation. This agreement provides for a framework for dialogue

on competition policy issues, for sharing views, and nonconfidential information on individual cases. This is just the last example of bilateral initiatives tailor-made for competition policy and enforcement.

The first fully fledged cooperation agreement was of course signed with the United States in 1991. Canada, Japan, the Republic of Korea, and Switzerland followed over the years.

The cooperation agreement with Switzerland is a so-called second-generation agreement, allowing under certain conditions to exchange confidential information between the competition authorities. Second-generation agreements are also in preparation with other jurisdictions.

In addition, memoranda of understanding are now in place with a number of further countries: Brazil since 2009, Russia in 2011, India in 2013, South Africa in 2016; and China in 2004, 2012, and 2017.

Finally, since 2006 the European Commission

has started trade negotiations with thirty-six non-EU countries. Fourteen of these have been concluded and all include competition provisions. The latest big news in this context is of course the Economic Partnership Agreement signed between the European Union and Japan on July 17th of this year.

Another move that aims to seek common ground for competition enforcers is the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (MFP) recently launched by the U.S. DOJ.

Given our shared impetus to promote and strengthen due process, the European Commission in coordination with the other EU competition authorities in the European Competition Network has engaged in talks with the DOJ and other international partners to better understand the objective of the MFP initiative and to discuss how it could fit in with the decades-long ongoing unsuccessful multilateral efforts to promote legal procedural convergence, and this

constructive conversation is ongoing.

Global procedural convergence plays an important role to make sure competition authorities can work together effectively on competition issues that affect consumers and markets globally and ensure due process and legal certainty for companies. The Commission fully supports and continues to actively contribute to the important work on this issue in all fora, and in the ICN and the OECD's Competition Committee in particular.

Let me recall just two examples of the progress made this year. In March the ICN adopted Guiding Principles for Procedural Fairness in Competition Agency Enforcement, and in June the OECD's Competition Committee launched a new project to advance its work on transparency and procedural fairness.

So we have a common goal. That is to make sure that any new initiative strengthens multilateralism and extends the reach, the

effectiveness, and consistency of the principles that we share.

All of this looks at the necessary framework for cooperation among competition authorities.

Now I would like to give you a tangible example of how cooperation works on the ground. I will look at the merger between Bayer and Monsanto approved with matching remedies by the European Commission last March and by the U.S. DOJ in May.

This was a large deal involving companies with global operations. The transaction was notified to at least seventeen enforcement agencies. In situations of this complexity, it is crucial for the companies that enforcers coordinate the process and the substance of their reviews as they protect consumer welfare in their respective jurisdictions.

This case was cooperation at its best. It was not a lucky outcome but the result of hard work to conclude the case. The Commission has actively cooperated with as many as ten authorities.

The most intense exchanges, as Makan knows well, were with his agency. Our team traveled to Washington, D.C. for a dedicated workshop. We exchanged the evidence found in our respective reviews and we made sure that the remedies were fully compatible and the time aligned. In sum, we are looking at a success cooperation story.

And this is not the only one. We have worked closely with the FTC, as well as with China's Ministry of Commerce of the People's Republic of China (MOFCOM), for instance in our review of ChemChina's acquisition of Syngenta. Both the Commission and the FTC cleared the acquisition with remedies, which although they addressed concerns that were unique to each market, were mutually compatible. We also had teams traveling between Washington, D.C. and Brussels when we were reviewing the *Dow/DuPont* merger, to stick to the agrochemical industry.

Of course, not all international cases require the same degree of cooperation. In spite of

globalization, many markets still show significant difference. Take AT&T's acquisition of Time Warner. AT&T does have some business in Europe, but nothing compared to its position in the United States, and this explains why the case made waves in the United States but was swiftly approved in Europe.

Conversely, there are cases that raise serious concerns in the European Union but not in the United States. Deutsche Börse's merger with NYSE Euronext, for instance, was settled by the DOJ with remedies; it was prohibited by the European Commission because it would have resulted in a quasi-monopoly in European financial derivatives traded on the exchanges.

These are some of the reasons why I am convinced that convergence and cooperation among competition enforcers are simply a must in our global age. But our times are marked by the digital revolution as much as by global economic integration. I will therefore turn to my second line of argument,

the enforcement approaches taken in the European Union in the digital market.

Before I do, let me clarify that although I am focusing on digital markets today, competition policy and enforcement continue to take care of the interests of law-abiding firms and the welfare of consumers across all industries and markets in Europe's Single Market. So there is not the tunnel vision just on digital issues.

For example, since the start of 2017 the European Commission took nine new cartel decisions, imposing fines for a total of €2.75 billion. Most of these decisions were related to the automotive sector.

Also, last year the Commission took 380 merger decisions. Apart from information and communication technologies, the main sectors we worked on included renewable energy, media, airlines, and the agrochemical industries.

The point I am making here is that while we follow digital markets in their evolution and

anticipate the possible implications for competition control, we keep looking at the economy as a whole. We look into proposed mergers or conducts whenever they raise competition concerns regardless of whether they take place in the digital sector of other industries, and we always closely analyze markets to tailor EU competition policy and enforcement to their specific features.

In digital markets, we often observe that innovation plays a crucial role. We also frequently see network effects with the associated high switching costs, multi-sided markets, and strong links between adjacent markets. Finally – but this is a common observation – digital markets are places where companies can grow very fast, which is of course not in itself a competition concern.

I hasten to add that these observations should not lead us to generalize. Each market shows its own features. However, when a digital market does show these structural features, it can become tempting

for a company to entrench its market position, take advantage of "winner takes all" effects, and leverage its dominance from one market to another. These are behaviors that may give rise to competition concerns and call for the intervention of competition enforcers.

In fact, there is great continuity between the approach we follow in digital and other markets. EU competition law principles are general and apply across all sectors. We assess every case, we look into it on its own merit, we look at the factual findings of our painstaking investigations, and we assess them against our principles and laws. This has been the bedrock of our enforcement practice in the European Union for over six decades, and we will keep true to this orientation.

When it comes to digital companies, there is no doubt they have produced great benefits for consumers and society over the past few years and decades, and will continue to do so. EU competition

enforcers recognize these benefits and potential and regard them as all the more reason to keep the Digital Single Market open so that technology firms can continue to give consumers more and more value.

We have just seen some of the features that competition enforcers find in digital markets. Now I would like to show the role some of them had in a few notable antitrust decisions taken by the Commission this summer.

On July 18th the Commission found that Google had engaged in conduct aimed at protecting and strengthening its dominant position in general Internet search through various restrictions in relation to its Android mobile operating system. The case is essentially about three types of restrictions that Google imposed on mobile device manufacturers and network operators.

- First, Google made sure that its search engine would be preinstalled on practically all Android devices. It did so by tying the Google search

app and the Chrome browser to the PlayStore, which smartphone and tablet manufacturers see as a must-have.

- Second, Google paid mobile device manufacturers and network operators to make sure that its search engine would be the only one preinstalled on many Android devices.

- Third, Google obstructed the development of so-called "Android forks," which are modified versions of Android. These forks could have provided a launch pad for rival search engines and other app developers.

In this way Google prevented competing search engines from acquiring traffic and valuable data which could have allowed them to improve their products.

Beyond its own merits, the case is important as it sets out a framework for the assessment of anticompetitive conduct in the mobile sphere, in particular with regard to the assessment of conduct

resulting in the preinstallation of mobile software applications.

The preinstallation and default setting of apps can of course have beneficial effects for consumers who can enjoy fully-functioning devices immediately after purchase. Some refer to this as the "out of the box" experience.

However, preinstallation can also lead to anticompetitive effects, and this can be particularly the case when preinstallation of a tied app is imposed as a condition to obtain another app which is in a dominant position. In these circumstances the preinstallation of the tied app can reduce customers' incentives to download competing apps and lead to the foreclosure of credible competitors.

Whether the effects of preinstallation are on balance positive or negative for competition and consumers will ultimately depend on empirical analysis. Competition agencies are not new to this type of assessment. Both the DOJ and the Commission

looked at whether the preinstallation of Microsoft's Internet Explorer browser restricted competition in the context of their respective antitrust investigations. The Commission also ran a similar analysis in the context of the recent *Microsoft/LinkedIn* merger case. But this is the first time the Commission has comprehensively assessed the effects on competition of preinstallation in a mobile Internet environment.

This assessment is strongly grounded on the merits of the case and the evidence gathered. For example, we have found that on Android devices where Google Search is preinstalled more than 95 percent of all search queries were made via Google Search. On the other hand, on Windows mobile devices, where Google Search was not preinstalled, less than 25 percent of all search queries were made via Google Search. This shows that preinstallation of Google Search had a clear impact on the choice of consumers, a choice that is influenced by the mere fact that the

product is made available in a convenient and easy-to-use way rather than by the actual merits and quality of that product.

Let me also mention another aspect of the case which is important from the policy perspective. As part of its decision the Commission sanctioned Google's so-called "anti-fragmentation agreements," which in essence prevented device manufacturers from shipping devices based on Android forks. We have investigated in detail this aspect of Google's conduct and concluded that it affected competition as it deprived competing operating system developers from the opportunity of finding partners that would distribute devices based on their own implementations of Android.

As part of this analysis we reviewed internal documents showing that a number of device manufacturers had an interest in shipping devices based on Amazon's version of Android, called Fire OS, but were prevented from doing so due to Google's

conduct.

Thus, we are firmly convinced that our analysis is fully in line with an effects-based assessment and consistent with the caselaw of the European Union's courts, which for example have already confirmed in the *Microsoft* case that preinstallation by means of tying is capable of foreclosing effective competition.

It is also consistent with our other recent infringement actions which are also based on an effects-based approach. In this respect, let me stress that when looking at how to prove anticompetitive effects there is no place for formalism. There is not a single method or tool to prove effects. Different ways may be more or less suitable depending on the circumstances of the case.

In the *Google Shopping* case, for example, we looked at 5.2 terabytes of Google Search data to show that Google's illegal advantage granted to its own comparison-shopping service was restricting

competition.

In the *Qualcomm* exclusivity payments case, we relied on a number of qualitative sources of evidence which confirmed that Qualcomm's exclusivity payments influenced sourcing decisions.

As elsewhere in law enforcement, what matters is that effects are established convincingly. Other notable decisions the Commission took this summer, certainly very important from a consumer point of view, involved consumer electronics manufacturers' Asus, Pioneer, Philips, and the Denon & Marantz Group. In July the Commission imposed fines of more than €100 million on these companies for resale price maintenance in online markets.

A prominent feature in these cases was the use of pricing algorithms. Many online retailers use pricing software that automatically adjusts their own retail prices to those of competitors by way of an algorithm. These cases show that resale price maintenance practices when applied to low-pricing

online retailers had a broader impact on the overall prices for the consumer electronics products involved. This is because the price increases were picked up automatically by retail competitors using pricing algorithms, including very big online players.

In addition, the growing use of automated monitoring tools allowed the manufacturers to closely track their retailers' prices and swiftly intervene when prices went down.

Another prominent feature of these four cases is the development of the new cooperation procedure outside the area of cartels that the Commission inaugurated with the *ARA* case two years ago. Under the procedure companies may receive reduced fines if they expressly acknowledge the infringement and provide evidence that add significant value to the evidence the Commission has already gathered. This allows the Commission to speed up investigations, which may greatly increase the relevance and impact of its decision particularly in

digital industries.

The decisions involving consumer electronics manufacturers followed a systemic inquiry of the E-commerce sector that DG Competition conducted between 2015 and 2017. The study is a contribution, one of many, that competition policy and enforcement gives to the Commission's overall objective of bringing Europe's Single Market online.

Building the Single Market online and offline means tearing down internal barriers to trade. As seen, we are now following up the inquiry with actual decisions. But things began to improve even before that. When we launched the inquiry, many companies started to remove on their own initiative the online barriers that they had erected.

These cases are some illustrations of the challenges that we find in digital markets in the European Union and elsewhere. The features I have briefly reviewed were not all present in the same way in the old economy, or even five years ago.

Whilst this will not force an overhaul of the legal frameworks in our respective jurisdictions, we need to seriously reflect about how policy and enforcement should evolve to stay ahead of the curve. Recent initiatives taken in Washington, D.C. and in Brussels go in this direction. On this side of the Atlantic, the Federal Trade Commission launched a series of hearings and a process for written contributions. On the other shore, Commissioner Vestager appointed in March a Panel of Special Advisors on the Competition Implications of Digitization. The Commissioner also announced a conference on data privacy platforms and innovation to be held in Brussels in January 2019, and we have launched a call for public contributions on these topics. I take this opportunity to invite you to send us your written contributions by the end of September.

Initiatives such as these will help us deepen the reflection to find common approaches in this and other industries. This is a goal we all

share, even when we do not overlook the fact that our respective jurisdictions have different economic structures and that there is not a perfect overlap between our legal and enforcement orientations in every detail.

For example, some may be tempted to draw analogies between EU competition law and the Supreme Court's recent *American Express* judgment. I am not sure that would be helpful because both EU and U.S. competition laws take the two-sided nature of a market into account, but they do so in different ways.

First, the anti-steering provisions at issue in *American Express* are prohibited by law in the European Union. In a sense, EU views about anti-steering provisions were so strong that the European Union preferred to address them through regulation.

Second, under EU competition law the burden of showing efficiencies falls on the defendant, not the claimant, and in this respect the law leaves little scope to offset harm in one market citing

efficiencies in another market.

We also know that the overlap is not 100 percent in our approaches to some unilateral conduct scenarios. U.S. colleagues have underlined the gaps in this area between EU competition law and U.S. antitrust law showing that there are differences in outcomes. I think this is a correct reflection. Sometimes there are also differences in objectives.

But this is part of the respectful and fruitful debate among sister agencies I advocated in the first part of my remarks today. The debate is possible in the first place because on both sides of the Atlantic we share much more than separates us. We share an underlying notion of competition policy and enforcement based on due process that takes an evidence-based approach and that focuses on consumer welfare.

Consensus around these and other broad principles is strong, but we may still struggle with the fine print. And from time to time we might be

faced when we look at certain things from our preconceptions with the problem that Saint Augustine had with the concept of time: "What then is time?" he wrote, "If no one asks me, I know what it is. If I wish to explain it to him who asks, I do not know."

Broad principles in competition control can mask factual complexities and differences in value judgments in specific situations. But we cannot give up on discussing these differences and trying to seek convergence. Whilst we need to proceed with caution and mutual respect, we cannot be deterred.

Saint Augustine himself was not deterred from the task of refining the explanation by its innate difficulty. Neither should we be. The legal standards we are bound to require it.

I would like to thank Fordham for giving us a forum to pursue this noble endeavor, and I would like to thank you for being part of it.

Makan made a musical analogy at the beginning when he referred to *Hotel California* from

the Eagles. Let me end with a musical analogy that is a tiny little bit younger than the Fordham Conference but still from the 1970s, Fleetwood Mac's *Don't Stop Thinking About Tomorrow*. So let's think together about tomorrow.

* * *

MR. KEYTE: There are a lot of incredibly interesting and utterly complex things to take in from both sets of remarks.

I will invite Makan and Johannes up to the dais and then we'll have some questions, which I will lead off with.

Please, everybody, it's a good time for questions. You have them captive for fifteen or twenty minutes.

The first one I had - I found it interesting, Johannes, the discussion of how much cooperation and work is done in the merger area. I was wondering - and maybe it's what you were alluding to - but from both of you, what are the efforts or

planned efforts for exploring or undertaking that level of discussion and cooperation with respect to monopoly and dominance matters where there seems to be still some significant degree of at least different outcomes for similar conduct?

MR. DELRAHIM: Let me put it this way. I think we might have similar concerns and how we approach it might differ, and that only improves in the same spirit of the improvements we continue to have in the last thirty years by dialogue, by explaining where we come from.

I recall we had a good meeting in Brussels earlier this year where we had a very spirited and good, positive discussion with the Commissioner, with Johannes, with Carles, and others on the issue of intellectual property and standard-setting organizations, discussing why and where we come from as far as the treatment of antitrust law in the licensing of intellectual property in that type of a context. So we had that good discussion. If there's

one area where there has been, let's say, further enlightenment by the new administration in the U.S. administration of that policy, I would point to that, if there's any area that our enforcement objectives have changed.

We might be at different places at the moment, but as we understand where we come from, what are the economic underpinnings, we hopefully will continue to converge on that area.

I mean certainly the digital area is one, and we come to it from a perspective, particularly in the unilateral conduct area, of avoiding false-positives because of the harm that it could do to consumers. Helping each other understand where we come from and recognizing the concerns across the Atlantic.

MR. LAITENBERGER: I would very much echo the remarks of Makan. This is not an issue where there is one Big Bang moment, where we would sit together, go over the issues once and for all, and

then walk out with a Gospel.

I think this is a dialogue that takes place in different occasions, in different fora, in bilateral meetings as the ones that Makan has quoted and that are frequent and regular and intense.

It is part of our multilateral discussions in the different fora that have been abundantly mentioned this morning, from the OECD to the ICN.

It is part also of the discussion of the results of judicial review of what we do on both sides of the Atlantic. You mentioned, for instance, our European Court of Justice's *Intel* judgment, which has also sparked interest on this side of the Atlantic. Even if I have pointed to the limits of analogy between the U.S. Supreme Court's *AMEX* judgment and EU competition law, it is certainly an issue that sparks interest in the European Union as well.

So I think it is a very intensive process of learning, of confronting what we know from the markets, what is the evidence that we can gather, also

the conclusions we draw.

I think it is indeed animated by a mutual spirit to avoid both false-positives and false-negatives. From our point of view, there is not a "good false" and a "bad false" - false is false - so overenforcement is as bad as underenforcement. In that respect, learning from each other is a very important part of the work of competition agencies.

MR. KEYTE: All right. Thank you.

Questions?

QUESTION: My name is Koren Wong-Ervin and I work at Qualcomm. My question is my own.

I was thinking. In both of your remarks I was struck by the use of the word "effects-based analysis" and was hoping you would talk more about what that really means to you. It seems to me that all antitrust is really effects-based; it's just that truncated analysis sort of harnesses decision theory to come up with sort of shorthand analysis.

When you're talking about effects-based,

particularly for vertical restraints, how do you decide to use a truncated analysis? What do you think of some of the meta-studies by Francine Lafontaine and Margaret Slade, or Daniel O'Brien or others, that say vertical restraints are generally procompetitive or benign and should have a full-blown effects-based analysis?

If you could just talk more about what you mean by effects-based and when you decide to use truncated analysis and how?

MR. LAITENBERGER: I think when it comes to the standard and the methods for an effects-based analysis the most recent guidance in Europe is the European Court of Justice's *Intel* judgment. I think indeed that this judgment has given us very solid ground to stand upon.

Even if it is related to a specific type of behavior, exclusivity rebates by dominant firms, and even if the specifics of the behavior cannot be transposed mechanically to other conduct, I think when

it comes to general principles the *Intel* judgment offers very precious guidance.

What does it say in a sense? It reconfirms an earlier jurisprudence of the European Court of Justice that says that a certain type of behavior is capable of restricting competition unless otherwise proven.

So in a sense, we have a presumption. But that is rebuttable. We can say as a starting point that there is a concern. But if the firm or the firms concerned rebut this presumption, then we need to show that there is the capability of restricting competition in a specific situation.

I think what is also very important here is that when it comes to the evidence that we need to look at, the Court is very clear we need to take into account all the evidence; but it is equally clear that we need to take into account all the *relevant* evidence.

So this is not in the rebuttal, if I may say

so, of the presumption a question of having abstract arguments. The starting point is there is a concern. If this concern can be dispelled, then it's all fine, there is no case. But if this concern cannot be concretely dispelled, then there is a problem.

I mentioned the first test case, so to say, of our reading of this judgment, which was the *Qualcomm* exclusivity payments decision earlier this year. What have we done here? I think we have built a very clear effects-based analysis based on qualitative evidence showing that there was indeed the capability of foreclosing competition. At the same point in time we have also looked at the price/cost test that was submitted by the party, and we found it wanting and not something that would have invalidated the qualitative analysis that we have put forward.

So this is one illustration of this principle, and I think in this sense the *Intel* judgment has given us clear, practicable, and a fully fair standard of looking at evidence and effects.

MR. DELRAHIM: In the United States, regardless of how you label it, vertical restraints is I think a good example. Not directly on point in what you were talking about, and without commenting on any specific case whether in Europe or elsewhere, for a number of reasons, as a matter of general policy, I'd look at the U.S. government's brief in the *American Express* case as far as that test, particularly for two-sided markets.

We took a very conscious position with vertical restraints, as opposed to horizontal. We have Supreme Court precedent as far as when you apply the rule of reason, the procompetitive justifications of a particular restraint. You look at *Professional Engineers* and *NCAA* in the Supreme Court, where it's not cognizable, and you look at when you apply the test.

There was a lot of effort and some discussions, and perhaps prior briefs, even in that same case, in the *American Express* case, where it said

in a vertical restraint you apply the rule of reason; however, the procompetitive justifications are non-cognizable, which as a matter of policy – first of all, it wasn't mandated by the Supreme Court; and, as a matter of policy, I thought that would be a wrong policy to set for our economy.

So we advanced a test that said in a two-sided market you should recognize you apply the rule of reason, as long as it's constrained by interdependence of the markets, and you should recognize that and you should recognize the procompetitive justifications in a vertical for a number of reasons, because the effects it would have in the market would be different than in a horizontal restraint. But I would say that that should animate as far as where our position is going to be from an enforcement standpoint.

And we look at the exclusionary effect: is there a particular conduct that excludes the competitors from that market? Sometimes – it depends

– payments could be exactly what the market calls for because with those rebates and payments you are competing on that level. So you have to take a look at the effects it would have to exclude a new competitor that would challenge the position, if there is a position of dominance in that marketplace, by that incumbent who might be engaging in it.

MR. KEYTE: Another question?

QUESTION: David Sutcliffe, Sports Technology.

There are a lot of books and articles written about the “winner take all” economy. When we have Amazon hitting a \$1 trillion market cap, that would tend to tell some of us in the audience that there seems to be a monopoly situation.

So I’ve got a two-part question. One is, when will the Justice Department look at breaking up Amazon; and when will the European Commission look at taking more aggressive action against the platforms, such as Google and Facebook, for dominating the

digital economy? I don't think that the consumer wins by having Amazon paying \$9.75 an hour with no benefits because you get 10 percent off on your next purchase.

Thank you.

MR. DELRAHIM: Thank you for that question as we alternate on these.

We chuckle, but it's a very important question. Why is it an important question? For two reasons.

The first may be not so important, but when we would engage in an investigation or something, when would we do that? The most important thing is, can we get clearance with our friends at the Federal Trade Commission? We have two agencies and we have to see if there is a particular conduct. So that's the whole clearance issue. We don't know. Our friends maybe at the Federal Trade Commission — like they did in Google — but different agencies would look at the conduct.

But let me get to the issue of exactly what you said about Amazon. Why do I say this? I go back

and I'm inspired. I don't know how many times I've read that speech in 1940 in the Great Hall of the Justice Department, to the Second Conference of the Federal Prosecutors given by Robert H. Jackson.

Why? Because he said it's really important for us as law enforcement agencies to pick cases based on conduct, not based on the subject, of wrongdoing. Where you have credible evidence of anticompetitive conduct, a violation of the law, it's just as important whether it's here or a violation of a computer crime or a violation of a drug law.

Why is that? Because the prosecutor has more control over every one of ours, including businesses, but individual liberties.

Why is that? Because even in 1940 – that's eighty years ago – he said there are enough laws on the books that if you targeted a single individual or company with the force that the federal prosecutor has, there's anybody, virtually anybody – and back then the federal laws were probably this big

[indicating] and now the federal laws are probably three volumes of this depth – you can find a violation of the federal laws by anybody. Not a single person in this room if they were targeted would escape liability I would submit.

Something – Wire Act. You were still at work and your wife says, “Are you on your way?” “Yes, honey, I was.” Is that a fraud? Some prosecutor could come up with that – maybe not Jim Comey, but others could. [Laughter]

But let me mention why is that important? Because you don’t just go after companies. There should be a standard. There should be credible evidence of a violation of the law.

Now, if there are – and we won’t talk about any individual investigation – but we have not been shy at the Justice Department about bringing cases, whether it has been against powerful political interests like Microsoft, or even more powerful political interests like AT&T.

If there is credible evidence, I've invited folks to bring it to us. Just because somebody is big does not mean they have violated the laws, nor should we in any condemn them because they have succeeded.

MR. KEYTE: I think Johannes pretty much addressed in his remarks the answer to that question. But let me ask a fairly technical follow-up actually to that question – and it will be our last question – which relates to the subject of network effects.

A lot of what we're talking about here is the digital economy platform competition where consumers benefit and like the product so much it creates what everybody recognizes as a network effect.

You have different laws in the United States, where even if that does in some sense deter entry, make it difficult to enter, arguably it's not conduct that is exclusionary in any way.

My first question for Johannes on this is: How do you in the "as-efficient competitor" test – which we really don't deal with in the United States –

deal with network effects, where they get the benefit of the efficiencies of the network effect? How do network effects match up with that test, if that's the right question?

MR. LAITENBERGER: I would like maybe to make, first, a more fundamental point. Obviously, the preceding* question betrays a deep concern, and I think it's a concern that many people share all over the world.

This being said, I would also like to underline that size and success in themselves are not a competition concern. The question is always how size and success come about. So our EU law standard is not that dominance is in itself an issue; the abuse of dominance is. That indeed raises specific analytical issues in fields where direct network effects, indirect network effects, network effects through learning by doing, may create certain dynamics, for instance of lock-in, which then in turn, and in particular, if there is a tipping point from

where on the market is not really open anymore, or at least the barriers to entry become very important, could put an incentive to anticompetitive behavior.

But of course, we need to look at all times at is there an abusive conduct that we can show. I think we have done so in the cases that we have identified – in the *Google Shopping* case, in the *Google Android* case, in other cases.

Now, what does the “as-efficient competitor” test mean intrinsically? It means that we have to look at whether a competitor with the same costs could in the same conditions enter the market. I think we have looked at this also in the context of the cases that I have mentioned, and that we have found indeed that a competitor with the same cost structure under these circumstances and faced with this behavior could not penetrate the market successfully.

MR. DELRAHIM: It’s an important issue and why we continue to need to study the network effects on the competition area. I agree, and I’m glad to

hear Johannes talk about convergence.

Big is not bad, but big behaving badly is bad. Just because you're a tech company, you're not per se illegal. But if there is conduct that you are engaging in – again *Microsoft* is a relatively recent but good example of how the U.S. laws approached that, despite many arguments made by the company.

The network effects of some of these platforms is a fascinating issue, partly because the consumer has been benefitting from having that network, and that's why they gravitate to it. As much as I dislike the amount of time my wife spends on Facebook, there's a lot of people, billions of people, who seem to like it. I'm not on it. But it is one where they enjoy that interaction.

But we also must not forget that for every one of these upstart companies there were upstarts, there were others. They displaced somebody less-efficient. For a Facebook there was a MySpace, if somebody in this room might remember what they were.

For a Google there was an AltaVista and, God knows, seven or eight search engines before they came about. In fact, I was reading a book about their investors by John Doerr. One of the big challenges of investing in Google, in those two young Stanford guys, was the fact that there were already seven folks in the marketplace, and how could they overcome the competition. I guess there's this little thing called Bing as well. But they have dominated.

Now the question is: What should antitrust policy look for based on what we know now? What we need to know now and what our enforcement efforts should focus on is making sure the incentives are there for that upstart that challenges those folks. There would be nothing better for the market than if there was a new, more-efficient search engine. I have yet to see it. I don't particularly care about any particular company – I don't know about you guys – but I probably go to Google a dozen times, and some of that is just because I'm too lazy to put in a

particular URL, so I just go to Google, it does that, and then it clicks through, and they're probably making money for every ad that's displayed to me through that laziness. But it would be great for another company.

What we need to make sure are two things, and we need to be very specific about that. Do we have and preserve a place and the policies in place to allow for that incentive for that next company to come in?

Second, are they doing anything – is any of their conduct in any way limiting the ability of that upstart to challenge their market position in that market that they're dominating? Not necessarily others, but there the challenge – and that's what I think the great opinion in the D.C. Circuit taught us in the *Microsoft* case – is there a challenge to the innovation that is coming and are they keeping and stifling that competition? Some of the facts in the *Microsoft* case showed that it wasn't because they were

necessarily big; it was that they were threatened by the challenge to the network effects of the application programming that was created, you could only write to the operating system of which they had 90 percent of the market share; and the Internet browser was creating now a middleware, that the applications no longer were enslaved to the operating system, but now you can write to multiple browsers. Sun at the time and Netscape had created that, and they took a number of actions to prevent that specifically with the intent to maintaining that monopoly.

That's always a good example for us to follow and make sure that these companies, which might have a lot of market share and dominance – whether it's search, whether it is in shopping – is that next competitor that can displace them there and are they taking any action to prevent them from being able to compete with them.

MR. LAITENBERGER: May I just make one very

small additional remark?

I'm sometimes puzzled that the discussion on the benefits and the efficiencies of network effects stops at the very early level of analysis, namely at a level of analysis where people can show there is a benefit there.

The question may also be: Are all the benefits there? Do we live in a world where just because in a certain place network effects lead to certain outcomes, this is the only or the best possible outcome?

I think here we need to keep the space open, as also Makan has just said, for innovation, for alternative solutions, for better solutions.

But, of course, then it is not because there are network effects around a certain product this is in itself the problem. The problem would be if the network effects pose incentives for anticompetitive behavior and then there is engagement in this anticompetitive behavior.

But as much as I would urge against a presumption that big is necessarily bad, I would also urge against a presumption that tech is necessarily procompetitive and never anticompetitive. To really go to the bottom of it we need the evidence, we need the effects-based analysis, and we need to keep all of this administrable – but that is another discussion for another panel at another day.

MR. KEYTE: Thank you very much.

For those interested in this exact debate with different names, go read the Schumpeter-Arrow debate, because that's what we just had.

Please join me in thanking our keynote speakers for a wonderful discussion and presentations.

Let's come back in ten minutes to talk about Antitrust and Populism.

[Break: 10:58 a.m.]