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Panel 1
Antitrust and Populism

Moderator:
Eleanor M. Fox
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Panelists:
Herbert Hovenkamp
Professor of Law, University of Pennsylvania Law School and The Wharton School

Frédéric Jenny
Chair, OECD Competition Committee;
Professor, ESSEC Business School

Mario Monti
President, Bocconi University

Joseph Stiglitz
Chief Economist, The Roosevelt Institute;
University Professor, Columbia University

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MR. KEYTE: Everybody knows Eleanor Fox, who is an iconic figure in antitrust. This is a fantastic topic and panel that she will lead. I really look forward to it.

PROF. FOX: Hello. Good morning to everyone. Welcome to the panel on Populism and Antitrust. Thank you very much, James.

For this segment of the program we have a most amazing group of speakers, none of whom need introduction, but I'll give a very short one for each of them, and then we will talk for just a minute about what is the populism problem, if there is one, and then turn to our panelists for what will be very short initial interventions. After that, we will have a panel discussion, and then we will definitely leave time for you to ask your questions or give your comments.

For the panel members I will start with my immediate right.

Herb Hovenkamp is the James G. Diamond University Professor at the University of Pennsylvania Law School and the Wharton School at the University of

Pennsylvania. He is often called "the dean of American antitrust law." He is co-author, with Philip Areeda and Donald Turner, of the most famous, well-regarded U.S. antitrust treatise, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*. He writes extraordinarily widely in the field.

To his right is Frédéric Jenny. Frédéric is Professor of Economics at ESSEC Business School in Paris. He is what I call "the chairman of international antitrust," meaning in particular he is of course the Chairman of the OECD Competition Committee. He was the Chairman of the WTO Working Group on Trade and Competition. He was a member of the French Supreme Court, Economic and Commercial Chamber, the first and only economist to be a member of that court; was Vice Chair of the French Competition Authority; and is from time to time my colleague at New York University as Global Hauser Scholar.

To his right is Joseph Stiglitz, who is a university professor at Columbia University and a Nobel Prize winner in Economic Science. He was Chief Economist of the World Bank, and he was Chairman of the U.S. Council of Economic Advisers. One of his very famous books is *Globalization and Its Discontents*, which I think raised the consciousness of the world about the discontents of globalization.

To Joe's right is Mario Monti. Mario, we're very happy to welcome you back. You know Mario at least from the time when he was Commissioner at the European Commission, first in DG Internal Market and then in DG Competition. He is President of the Bocconi University in Milan. He is a Lifetime Senator in Italy. He was called upon, as Silvio Berlusconi was stepping down as Prime Minister of Italy and Italy was in great financial crisis and turmoil, to pull Italy out of the turmoil; he was Prime Minister of Italy.

That is our wonderful stellar cast.

To kick off this session, Joe, I'm going to quote from you in your article "America Has a Monopoly Problem — and It's Huge."

"There is much to be concerned about in America today: a growing political and economic divide, slowing growth, decreasing life expectancy, an epidemic of diseases of despair. The unhappiness that is apparent has taken an ugly turn, with an increase in protectionism and nativism. ... There is a widespread sense of powerlessness, both in our economic and political life. We seem no longer to control our own destinies."

In this article Professor Stiglitz goes on to say that the U.S. antitrust laws were based upon a concern that "concentrations of economic power inevitably would lead to concentrations in political power. ... It was really about the nature of our society and democracy."

This is the subject of our panel today: Is there a huge problem that we should be concerned about and do something about — and, of course, since we are antitrust people, we are asking the question specifically in the context of antitrust; or is the populist outcry simply false complaints by people who don't understand that they are helped by trade and competition; we should try to teach them the truth, but if they can't understand it is too bad for them? That is the question.

We are going to start out with Frédéric. Frédéric, would you say a few words to put this all in context? Is there a problem? What is the problem? How has it emerged? Of course, you don't have very many minutes for your first intervention, but to the extent you wish, is there a solution and what is the solution? We'll come back to solutions later.

PROF. JENNY: Thank you very much, Eleanor, and thank you very much to Fordham for inviting me to be on this panel.

I would like to address the issue of the crumbling consensus on liberal market policies from the point of view of the relationship between policy and what I see as economic theory.

To be technical and not political, I see that there are areas where there have been either a misuse or an ignorance of economic theory, which may explain why it is that we see that more and more people both in Europe and in the United States feel that the elite is corrupt or pushing policies that are for the self-benefit of the elite and not really for the benefit of the people, which is one of the definitions of what populism is.

Let me start with a very well-known theorem, the Stolper-Samuelson Theorem in international trade, which basically says that when a country trades, and if they don't completely specialize, the factor which is the scarcer in one country is going to suffer because of the competition from the other country and because that factor is more abundant in the other country.

Now, what that means is that in the process of globalization there are going to be people who are going to be displaced. When one hears about globalization, about trade liberalization, it is very seldom that a public policymaker ever mentions the fact that in the process there are going to be people who are going to lose out.

If you look at the United States and Europe, and if you look at the factors in a rather aggregated way, we have comparatively more capital than many other countries that we trade with, we have comparatively more skilled people than many other countries, but we have comparatively fewer unskilled people, and they are, according to the theorem, precisely the people who are going to be hurt. Should we mention that? Should we plan when we push the idea of free trade, which is certainly a positive in general, but should we allow for the fact that some people are going to be displaced?

The basic answer that I find both in trade theory and also in competition law is that we don't need to worry about them because there is a process of reallocation of resources. So, some of the firms are going to go out of business but the capital and the labor are going to be recycled elsewhere, and because you have a very large labor market, people will find another job elsewhere.

This I think is a misuse of economic theory, because we in fact know that labor markets are not very deep, are not very competitive, and are not very flexible. There are plenty of reasons why, particularly for the people who are displaced because of competition — I am talking about the low-skill workers — are going to have a lot of difficulty reallocating themselves in activities that are a better fit for the environment.

Some of those have to do with the fact that everybody has a family, there are several people working in the family, and it is not all that easy to pack up and go where there is another job. So geographical mobility may not be very high. People own houses, and very often when they are in industries that are depleted because of competition the value of their houses goes down, the value of lodging in places where there are jobs is very high, so that creates a second type of problem.

And in many countries — certainly in Europe but from what I've read also in the United States — the programs to retool people, to give them new skills, the skills that could be usable when they start from a low level of skills, are not terribly effective. They are not terribly effective, among other things, because of the digital revolution and the things that we have heard about the evolution of technology.

Therefore, the labor market is in fact very fragmented and there is a lot of immobility or lack of flexibility, as a result of which the people who are going to be directly hit by competition or international competition are not going to be able to react or to find another job.

It's quite striking to look at the data for the United States on people who migrate to find a job. There have been statistics since 1999 in the United States, and you see that the number of people who migrate to find a better job has oscillated between 2.8 million and 4.5 million, but there is a continuing decrease in the trend, even though the U.S. population has increased by more than 20 percent during that time. So clearly the lack of flexibility becomes even more pronounced now for some of the reasons I have mentioned.

Now, should we ignore that? What we do when we talk about competition is we assume that there is not going to be any labor effect of competition, so therefore the only effect is going to be — I don't know — lower prices, better quality, so that is going to work. But, in reality, when people are displaced at the same time, certainly the system does not necessarily work very well for them.

The third dimension, and the last one, which

I want to mention, which I think is important and has been consistently ignored in the area of competition, in spite of the fact that two eminent economists got the Nobel Prize in the last fifteen years for this, is the teachings of behavioral economics.

We work on the assumption that the satisfaction, the welfare, of people is directly linked to what they can consume or what they choose to consume, goods and services.

If we look at what Daniel Kahneman and Richard Thaler tell us, they say basically there is another argument in the utility function of people, which is some concept of fairness.

Now, fairness is a big vague; there are dimensions of fairness — horizontal fairness, vertical fairness, procedural fairness — but it's quite clear that people are willing to trade off some physical welfare coming from the goods and services that they have for a fairer system, or a system where they have the feeling that it is more fair.

When you put all those things together, you end up with the idea that we have a system where we promote competition which would be fine if there was no labor implication of competition, but which is not fine when there are labor implications because there is a large segment of the population for which the mechanism will mean that maybe they will have lower prices and new products, but also they will either no job or a job which is paying much less than they had before, and therefore it is not clear to them that their welfare has increased. We don’t talk about it. We don’t do much about it.

I will finish with one thing, which is a very interesting set of studies that has been done by the Bruegel Research Institute in Europe looking at a very disaggregated level at the votes for Trump in the United States and for Brexit in the United Kingdom. What is absolutely clear is that the correlation between the proportion of votes for what I would call, in a very rapid and probably simplistic way, some kind of populism is directly linked to (a) the Gini coefficient of inequality and (b) poverty, and those two themselves are correlated together.

So, from one place to another it has nothing much to do with immigration, a very weak relationship with immigration, but a very high relationship with inequality.

We do have a system of competition where capital is very mobile, so no problem either nationally or internationally to get other opportunities. A segment of the population is hurt by it, with no realistic prospect to find a better job or to find a job that pays as much even though they work as hard, because of policies that have in fact implicitly chosen to sacrifice them for other benefits.

If we don't deal with this issue — and we'll see when we come to the remedies — it means that there is a segment of the population that is going to be hurt and another segment of the population that thinks that the system is unfair. I think that's the heart of the problem.

PROF. FOX: Great. Thank you.

That was a very interesting presentation of why people feel that they are left out of the system and it doesn't work for them.

Joe, could you amplify and give us a larger picture on the question: is there an economic problem? Does America really have a monopoly problem, what is it, and how related to it is competition and competition law?

PROF. STIGLITZ: First, let me just make a couple of brief comments in the beginning.

I don't like the word "populism." Our society is supposed to help ordinary people. I would rather talk about antiestablishment — in the Brexit vote, and it was very clear in both the United States and in Europe in the Le Pen vote in France.

The second point is that you said that policymakers had misused theory. I was Chairman of the Council of Economic Advisers. We pointed out to the administration that freeing trade, the Stolper-Samuelson Theorem — every economist knows that — and that it would in the best of worlds lead to more inequality if markets worked well, and if markets didn’t work well it would actually lead to increased unemployment.

It was why many of us said that you can’t just take down trade barriers, that you also have to accompany that by other policies, trade assistance; and that if you didn’t do that, you would be betraying the workers of America, making our society not only more unequal but actually less efficient, because if you were basically throwing out large fractions of the labor force out of the labor market, you are actually destroying American efficiency.

I think you have to see what happened in terms of the politics of power, that there were some groups who benefitted a lot from globalization and they didn’t want to share the benefits with those who were being hurt. It was a distributive battle in which some people won and some people lost. So it wasn't just lack of knowledge, it was a real battle.

You see it even worse in the investment agreements, which give more property rights to, say, American firms investing abroad than they have here in the United States in terms of issues of regulatory takings. Therefore, we actually shaped our trade laws to weaken the bargaining power of workers.

The reason all this is relevant is I do think we have a monopoly problem. It's not only a monopoly problem; it's a problem of imbalance of market power.

The competitive model that has sort of framed a lot of thinking about antitrust is now pretty discredited in economics, and anybody who relies on that is really using a model that just doesn't describe a 20 percent economy. Lots of evidence of this in terms of the distribution of income cannot be explained within a competitive model. The share of what are called rents that can't be explained by either return to labor or return to capital has gone way up. While there is some dispute about this, I think there is a broad consensus that there has been a significant increase in rents.

The explanation for it is somewhat — to what extent is it technology, market structure, anticompetitive practices, lack of enforcement of antitrust laws, innovation in creating new anticompetitive practices — Microsoft we talked about in the first session and Google, but there are other companies that are at the frontier of innovating and developing new anticompetitive practices.

The way to understand what is going on is to see that the competitive model which has been the framework for antitrust is really not a good way of understanding the economy.

What is particularly important is what Frédéric emphasized, the lack of competition in labor markets. If you talk to labor economists and you talk about competitive markets, they laugh at you. The work of, for instance, David Card and Alan Krueger about what would happen if you raised the minimum wage — standard theory says it should have large effects on unemployment; it doesn't. But there are lots of other studies that have now been done that make it very clear that labor markets are not well-described.

Let me put it more broadly. Markets don't exist in a vacuum; they are shaped by our laws. Our laws on competition shape product markets. Our labor laws shape what goes on in labor markets. There has been a change in the nature of those laws which has disempowered workers, in particular vis-à-vis corporations.

As a result, you have these two effects going on at the same time: weakening market power of workers, partly because of trade policy but also because of changes in the National Labor Relations Board (NLRB) regulations and so forth, and a recent Supreme Court decision; and, on the other hand, an increase in market power for a whole variety of reasons.

All of this relates to what Eleanor said in the beginning. If we could go back to the origins of antitrust, it didn't have to do with economists worrying about distortions in a competitive equilibrium model. That was not what Teddy Roosevelt was talking about. The model wasn't even formulated at that point. It wasn't fine-tuning to make sure a competitive market really worked better; it was about political and economic power and the effect economic power was having on our political system.

I think that we are at a similar juncture today: a sense that there is inequality, that many of the reasons for this inequality have to do with the way the rules have been formulated; the way the rules have been formulated has to do with our political system; the political system is affected by money; and money is affected by monopoly power on the one hand and lack of effective power on the part of workers.

Once you see it this way, you begin to understand why the standard arguments — just focusing on, for instance, consumer welfare — do not have purchase. So, for instance, if a worker has no job, the fact that goods are a little cheaper doesn't make him feel very good. He has no purchasing power, so a little cheaper doesn't make any difference. That's in the context of trade theory.

But if the exercise of monopsony power leads to lower wages in the labor market and that is passed on partly to consumers, it's still not a good thing. It's a distortion in our economy. The fact is that the consumer has been a little bit better off but the bulk of the benefits went to the corporation is a sign that something is wrong.

Some of our big companies have clearly market power, and the fact that they can share that with their customers isn't a statement that the system is functioning well. In some areas, like finance and banking, large banks have a further advantage because of the implicit guarantee of "too big to fail," and so you can get large not because you are more efficient, but because you are taking advantage of these other things, like "too big to fail," monopsony power.

So the usual concern: We are not against size, but we are against size when it arises from abuse, anticompetitive practices on the one hand and the use of market power on the other.

Now, let me just talk about the pervasiveness of market power is actually having many of us believe macroeconomic effects. One of the startling things about the U.S. economy today — and to a lesser extent in Europe — is that profits are reaching as a share of GDP an all-time high, and yet investment is not.

Normally, in a normal model, you would have thought "If things are so profitable, why aren't they investing?" The simple answer: If there is lack of competition, there is a discrepancy between the marginal return on investment and the average return;

and the more market power, the greater that discrepancy is. Thus, you can have high profits and yet low marginal returns and low investments, and there is an increasing understanding that this may be one of the reasons for the weaknesses in our overall growth performance.

I want to make very briefly two more points.

When you recognize the pervasiveness of market power, it also affects a variety of other ways in which you look at issues of competition policy. Traditionally, there has been a lot of focus mostly on horizontal mergers. In the presence of lots of pockets of imperfect competition, vertical mergers can also have severe anticompetitive effects. In some sense, in a general equilibrium model you may not even need to distinguish between horizontal and vertical; those are just ways of organizing what is going on. But a merger can increase market power, and that should be really the test that you want to apply.

The second point I want to make, a final point, is that there has been a lot of innovation in exercise of market power and there have been changes in the structure of our economy, and in both areas I'm not sure that antitrust has kept up with what needs to be done. On one hand, the issues raised by artificial intelligence and access to big data and the use of data seems to me an issue that will be important going forward.

The second one is the two-sided markets. I gather you had a discussion yesterday of some of the two-sided market issues. It is clear in my view that the Supreme Court got it wrong. Whether in those particular cases there was a two-sided market, how you think about two-sided markets is clearly more complex than the Supreme Court understood. The contract provisions, which short-circuit use of the price system, is an example of what I think of as an anticompetitive practice which takes what would be a market power that arises out of network externalities and amplifies the consequences of it.

So that as we have, as was discussed in the previous session, network externalities, some technological changes, we have to be even more cautious about the innovation in anticompetitive practices that we have been seeing.

PROF. FOX: Thank you. That was provocative on so many points, and we'll pick up on your provocations at the panel discussion.

At this moment we're going to turn to Mario Monti. Mario, could you say some words about both political populism, especially as related to Europe, and its relationship to markets and competition?

PROF. MONTI: I'll try.

The curious aspect to that is that populism and competition policy have a semantic but also substantial point in common — that is, trust. Here we are dealing with a triangle which has populism generating and linked to a huge mistrust in society and in institutions.

Competition policy is of course to a large extent antitrust, and our problem is: can antitrust help in turning back into trust a situation of mistrust which plagues our economies and societies now?

Looking at this particularly from the perspective of Europe, I would wish to say first of all that the Europe Union is in my view more vulnerable than other countries or jurisdictions to populism.

Why? Because populism has common aspects wherever it manifests itself, but when it manifests itself in an integrated system of countries, then populism can be a powerful factor for disintegration because populism generates, and is in turn generated by, mistrust in politics, in political institutions, in the elites, and the narrowing of the horizon of national political decision-making that goes with populism.

That is, a shorter and shorter time horizon and narrower and narrower geographical scope of decision-making in politics when populism prevails has the consequence that the first victim of populism is integration, is international integration generally. We can see that in the last few years both at the global level within the WTO, in individual countries, but above all in an articulated system of countries like the European Union.

In Europe, of course, competition policy (antitrust) was historically brought about by European integration, exactly the reverse of what we have seen more recently concerning monetary policy. There we had national central banks in Europe, and then much more recently the emergence of a system comprised centrally of the European Central Bank and of the national central banks.

If we go back to the history of competition policy in Europe, we see competition born in 1958 in Germany and in the European Union, whereas there were no competition laws or competition authorities in any other country in Europe. That was very much under

American influence, by the way, the creation in Germany and in the European Union of competition policy and laws.

To the extent that the advent of populism may weaken the progress of European integration, may bring some aspects of disintegration, this may weaken the vector of competition policy into the European system as a whole.

Populism in its extreme forms in Europe may even lead to the bringing down of the European Union. I do not believe that populism in the United States, for the time being at least, is susceptible of bringing down — maybe some actions by the American President may contribute to some U.S. disintegration, so far more forcefully than he has contributed to the declared objective of favoring European disintegration. At any rate, a weakening of the European Union in Europe would mean a weakening of competition policy, whereas populism can hardly bring about this in the United States.

Now, it is amazing how late, how slow, the political system in Europe has been in recognizing the phenomenon of populism, which is now a number-one phenomenon. If you ask somebody about what is the main concern about the elections for the European Parliament next May, most European governments will tell you that is populism.

But I want to give you simply an anecdote that tells us how blind Europe's politicians were to the emergence of populism. That has been visible for ten years already.

In 2012, in my brief time as Prime Minister of Italy, and therefore a participant in the European Council where the heads of government sit, I was impressed by the total lack of any political discussion on Europe. All the time went to the Greek crisis and similar topics, nothing to the first signs, which were very visible already, of populism and what implications that may have for the process of European integration.

I proposed to the President of the European Council, Herman Van Rompuy, to hold one specific session of that Council for a political discussion on this emerging populism and nationalism. He said, “What a great idea. We will do that.”

Two days later, one of the most forward-looking European politicians, Chancellor Merkel, kindly called me and she said, “Herman told me of your idea of having a discussion on populism. I think it’s a good idea, but I think it would be more appropriate if we delay this discussion until the complete solution of the Greek crisis is achieved.”

They haven’t had this discussion yet, although populism —

PROF. STIGLITZ: Or the crisis isn’t resolved.

PROF. MONTI: No.

Well, this says something about European governance, but also about the delay in perception. If you are inside, then you should be more interested than ever about this phenomenon.

My last but one point I would like to make is about inequalities. We all know that populism has been fed largely by inequalities. And here in the case of the European Union the process of European integration has been biased, we must recognize, because the strong weapons in the hands of the integrator — i.e. the European Commission — have been the policies on the Single Market and the policies on competition, whereas policies which could have accompanied integration with actions to take care of the temporary losers from integration remain largely in national hands, fiscal policy in particular. It is a valid criticism that the process of market integration in Europe has brought about greater inequalities in favor of capital and companies and against labor, particularly the non-qualified labor.

But it is interesting to note that although it is extremely difficult to make progress in tax coordination — because of the unanimity requirement in the Council, all Member States have a veto — and tax coordination is needed if we want that market integration does not bring about this negative side effect of bias in the distributional income against labor.

Nevertheless, there is one exception of an area that we can call taxation, which is comprised in the European definition of competition policy. You know that the main difference between the European Union and the rest of the world is that in the European Union, because of its supranational nature, competition policy comprises also state aid control. One of the feeders of populism is the perception — real or not real — that the rich, the big, have a greater easiness in evading and eluding taxes.

The European Commission has gradually built a doctrine, which has been upheld by the European Court, that some state aids taking the form of tax privileges incur into the rules on state aids. Therefore, a major case, like the case two years ago of the European Commission asking the Irish government to ask back of Apple some €13 billion euros of tax advantages may help a lot tackle one of the issues which are the basis of populism. Here I think there is a potential for the European Commission to act even more.

Last, a quick point on the digital platforms. We all look with enormous interest — and this morning in the previous presentations that was an important part — to the application of competition policy and antitrust to big tech and the digital platforms.

For a number of reasons, the European competition policy being rather more solid, certainly less politically cyclical, than competition policy is in the United States, can be expected — and maybe is already — to display greater incisiveness in this new area as well.

Here there are two sentences in one of the recent speeches by George Soros. He applauds the actions of Commissioner Vestager in this area. He says: "In the US, the regulators are not strong enough to stand up against [the big tech companies'] political influence. The European Union is better situated because it doesn't have any platform giants of its own."[1]

In this asymmetry I see a very central point of concern for the next few years. We know that — even more generally, look at the Data Protection Regulation — the European Union becomes more and more specialized in regulation. Unfortunately for Europe, it is not equally strong in developing within Europe digital platforms. But if the European Union is to conduct its competition enforcement vigorously, it will statistically hit much more than proportionately companies that are based in the United States. We here all know that there is no industrial policy, no protectionist, tilt to that, but it will should be watched very, very carefully.

[1] George Soros, "The Current Moment in History," Remarks Before the World Economic Forum, Davos, Switzerland (Jan. 25, 2018), *available at*

In the limit, suppose that measures to cope with the excessive market power of these digital platforms may require breakups. Can we imagine the European competition authority has permission to make such a decision concerning a U.S.-based digital platform? I think this would pose very interesting problems.

We saw what could be called a virtual breakup, namely the non-authorization of a merger that had been already authorized in the United States, *GE/Honeywell*, creating remarkable shocks. I think it will be politically extremely problematic to have structural remedies in this industry unless a new, very high consensus is developed, first of all, in this family about how to proceed about that without any suspicion of protectionist or industrial policy elements.

PROF. FOX: Thank you, Mario, for those very provocative remarks.

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https://www.georgesoros.com/2018/01/25/remarks-delivered-at-the-world-economic-forum/

As you will have observed, we are taking on two elements that may seem disparate. One is political populism. Extreme political parties have been winning elections all over the world. They may take nativist political positions and their systems may lack due process and lack rule of law. They are fueled by sentiments that underlie antitrust populism – discontent with growing inequalities, a feeling of being left out, believing that the system works for elites and not for the people.

Herb, I am going to ask you to take us back to a narrower internal-to-competition debate. How does populism — or, as Joe says, anti-elitism, anti-establishmentism — how does that play into competition law? The panel has raised real concerns. But do they relate to competition law and should we bring them into competition law?

PROF. HOVENKAMP: Thank you.

I'm here as an American antitrust moderate, and so far the populists haven't pushed me off that point, and that’s the perspective I’ll speak from.

I believe in the consumer welfare principle. I believe it needs some tinkering, but I’m not deterred that it was a bad idea.

First of all, I think one of the things we need to hope for at this point is a soft landing. Populism comes and goes. I think it is practically unquestionable that there are going to be effects of this populist movement and that the problems that the other panel members have identified are very real. I think the worst thing antitrust can do is stick its head in the sand, like the proverbial ostrich, and pretend like they are not there.

Now, we had one experience which did produce, I believe, a soft landing, and that was the transition from the Sherman Act in 1890 to the Clayton Act in 1914. The Sherman Act was very much a populist-driven measure. It was quite agrarian, fairly rural, and quite anti-intellectual.

However, over the next twenty-five years the rise of progressivism became more urban, more educated, and the result of course was not nationalization of the railroads, as some people in the Gilded Age proposed, or some other form of socialism.

Rather, it was a set of provisions that were more explicit about what they covered. They continued to use economic language "where the effect may be substantially to lessen competition or create a monopoly." They created an effects test in all of the substantive provisions of the Clayton Act that more or less invited economic analysis in.

Antitrust took a somewhat more aggressive turn in the wake of the Clayton Act, as it should have, but it didn't throw American's mixed capitalist economy off the rails. I think that's a worthwhile thing to keep in mind.

The other thing to keep in mind is that among the various economic problems we have been talking about this morning antitrust is not by any means the only fix. Yes, wages are too low, wages are stagnating, there's a growing maldistribution of wealth in the country. Those are all problems that need to be addressed.

But antitrust is not the exclusive, nor even the predominant, tool for doing many of those things. And here, particularly in the case of U.S. antitrust law, we have a set of provisions that are enforced very heavily by private plaintiffs, and if damages are being sought, as they usually are, it means jury trials. As a result, we always have to keep a bit of a restraint on policymaking through the antitrust laws because it's so easy to lose control of where antitrust can go.

Now, what are the changes I think we need to make?

First and foremost, I think we need to change our basic presumption about efficiencies. Robert Bork believed that efficiencies were incapable of individualized proof, but he simply presumed that the vast majority of actions challenged as anticompetitive, other than naked cartels, were in fact motivated by efficiencies.

Well, our measurement tools are much better today, particularly thanks to decades of merger enforcement. I think that presumption needs to be weakened very considerably, and that means a couple of things. That means that we need lower standards for prima facie cases, particularly with respect to exclusionary practices and mergers. And then, if efficiencies are required — that is, if a prima facie case has been met — then we really do have to put teeth into the requirement that efficiencies be proven.

I think the error of *Ohio v. American Express* was that the Court was way too lenient with respect to making out a prima facie case, because I suspect that if the burden had ever shifted, AMEX would not have been able to document the efficiencies that it was claiming.

Secondly, we need to take the labor problem a whole lot more seriously. I think everybody on the panel has acknowledge it in some form. Wage growth has not kept up. There are fixes we could be making.

First of all, I think the consumer welfare principle needs to be rethought of more as affecting output rather than price; that is, the goal of the antitrust laws should be maximum output consistent with sustainable competition, and that should serve to squeeze down the margins between prices and costs. It also solves the problem that of course laborers as sellers of labor are not really consumers, but they are certainly under the umbrella of groups that we want to protect under the consumer welfare principle.

More specifically, are there things we can do with respect to labor? Yeah. One of them is to go more aggressively against mergers that have a negative impact in labor markets. Mr. Delrahim has already suggested that possibility. It has been bandied about quite a bit.

I have had quite an education myself in the last ten years about both the size and the mobility of laborers and labor markets. Concentration in labor markets is higher, with higher concentration in many product markets, and as a result we should be using antitrust more aggressively to go after mergers that tend to reduce the opportunities of labor and in the process suppress wages to infracompetitive levels.

That, by the way, means that we will go after certain mergers that don’t look horizontal because we’re so fixated on product markets. For example, just about a year ago, the California State Attorney General got a consent decree against a no-poaching agreement between eBay and Intuit.

Well, eBay and Intuit don’t compete in any product markets to speak of, other than eBay selling an occasional copy of TurboTax or something. But they agreed with each other not to hire or poach one another’s computer engineers.

Well, we think of a relevant market as a collusive group. What that tells me is that when we start looking at mergers we need to spend some time in addition looking and asking the question whether a merger is horizontal. We want to know not only where and what products the company sells; we also want to know what kinds of people it hires. We need to be more conscious of that.

The other area is noncompetition agreements. We have always had this high theory about employee noncompetition agreements. They are used to protect trade secrets, customer lists, and things like that.

Two recent refusals-to-dismiss complaints — I think one was a summary judgment — were against Jimmy John’s and McDonald’s. The Jimmy John’s one made kind of a feeble attempt to say “Well, there were some trade secrets here because our employees cut the head lettuce in a certain way” or something.

But the fact is these were global with respect to those firms’ anti-noncompete agreements that effectively forbade the franchisers of those companies to hire one another's employees. Of course, the result would be lack of employee mobility and reduced wages. I think that's another area where we could get much more serious.

Finally, we need to deal with the concentration problem, although I would add an important caveat that most of the people at Open Markets, for example, have not added. That is, we need to continue to try to establish links between concentration and performance. That is, we don't go after concentration for its own sake; we go after concentration when it results in lower output, higher prices, or some other effect that we can brand as noncompetitive. That may mean that in certain cases we do allow fairly large firms, but we do need to take the concentration problem more seriously.

I think the worst thing antitrust policy can do today is just stick its head in the sand and say, "We're going to ignore these problems." I think some compromise and working out will give us the kind of soft landing that the Clayton Act gave us a century ago.

PROF. FOX: Thank you all.

There is a certain amount of consensus on the panel. There are losers from competition that aren’t taken well care of within competition law or even society as a whole. Another theme of the panel has been that our competition law in the United States is based on premises about market power and efficiencies that may not be true.

I want to do two things right now. First of all, I want to ask the panel: are there solutions you want to propose that you have not yet proposed?

Then, second of all, are the proposed solutions likely to satisfy the people who identify as populists, or are the solutions marginal; working within the system and just making our competition law a little better? Will that satisfy the people who say, “We’re really left out; the markets aren’t working for us?”

Frédéric, maybe you can go first on any proposed solutions that haven't been mentioned yet.

PROF. JENNY: Yes.

First of all, I completely agree with what Herb said. I think that there are two things to avoid. The first one is to ignore the problem completely.

The second one I would say is to jump to the conclusion that the antitrust standard has to be changed, that fairness has to be included in it. The reason for this is that I think that the populist or the antiestablishment perspective is not so much to be against the principle of competition, but more against the fact that the way it has developed it is seen as unfair. That is what we have to fix. It's not so much the theory; it's more the practice of it.

On what Joe Stiglitz said — concentration, common ownership, increasing margins, etc., etc. — I think we have to be a bit careful. There is a lot of interesting work which is being done. Whether that can be translated into a rule of law — at this point it's a bit premature. There is quite a bit of controversy on, as you mentioned, whether the margins are very high or increasing because there is more technological innovation or because there's more naked abuse of market power. It is still not very clear. So I would be cautious there.

But it seems to me that competition authorities, if they want to regain the trust of people and stop meeting with each other all the time everywhere to reassure each other — this is what they do, and I participate in this — I'm absolutely struck by the fact that they have a very limited notion of the scope of the advocacy that they give.

It is quite clear that if there is anything that will make competition work better for consumers but is not directly the implementation of competition law — such as, for example, increasing the mobility of people by having a more-efficient educational system that will give better skills to people, or having a system that will allow people to not lose all their investment when they have to move from one region which is depressed to another, etc., etc.

I don’t see that competition authorities address in their advocacy function a number of things that might make competition much more acceptable. I think that we have the duty, or we should have the duty, to expand the scope of our advocacy.

The second thing — but Herb has talked about it so I am not going to go through it — is to give more attention to the labor implication of mergers or others.

From that point of view — I will come back to it in a second — it is clear that South Africa is an interesting experience. For some mergers — if you think about the *Walmart/Massmart* merger, for example, in South Africa — one of the ideas which prevailed was the fact that “Well, there are a lot of people who might be displaced. I am going to put conditions which are going to facilitate the transition (a) by the creation of a fund, (b) by having Walmart commit to securing from the local producer for a while before they change." I am not discussing the wisdom of this. But the spirit of it is to say, "Okay, competition in this case will mean that there is going to be a labor problem, but maybe there are remedies that I can think of that are going to make this labor remedy more acceptable."

The third one — I'm sorry to come back to this because it fell on deaf ears — reading the literature of behavioral economists is extremely interesting on the area of fairness. In particular, when you read the work of Kahneman and Thaler, you see that through experiments they are able to get to the kind of fairness that people have in mind.

You find that one could use this — competition authorities could use this — to pick among all the possible anticompetitive practices or transactions that they have in front of them those that appeal more to the sense of fairness of people.

If we are going to have prioritization, in any case we have to find criteria for picking the cases which are both anticompetitive, without changing the standard, but which also seem to be particularly unfair.

I'll give you just one example. One of the interesting things that comes out of this work is the fact that people in general, the vast majority, find that an increase in price by suppliers following an increase in their own cost is not necessarily unfair, but an increase in price which is not justified by an increase in cost is mostly seen as being unfair. Okay.

What does that tell us? Well, if we have two cases, a case of a cartel to pass on an increase in the price of gas or something and another cartel which is a naked cartel to increase prices, between the two one of them is going to be perceived as "really unfair and it's good that the competition authority went after it," and the other one as "maybe it was anticompetitive, but it's not so valuable from the point of view of fairness."

This is one tiny example, but there are a number of practical implications of the concept of fairness that people have in mind. Without changing the metrics but by using prioritization principles to make competition work for consumers, or to make competition seem to work, one can choose first the cases that are most problematic.

From that point of view, I would say that the European Commission does that. Mario has already mentioned the *Apple* case. One thing about the increase in price of medicine by hundreds of times, this is typically the case where you have a naked increase in price that doesn't seem to be justified by any cost consideration, and which seems to be particularly unfair. The treatment of Mr. Shkreli in the United States shows that clearly people thought that he was being unfair.

There is value in choosing the anticompetitive practices which are unfair.

PROF. FOX: Thank you. Provocative again.

Time is running short, so I want to ask Joe a short question and then turn to the audience.

Joe, you gave us some very specific practical ways that antitrust law could, let's say, be rejiggered. But your big point was huge, to really move the envelope in a big way for reconceiving what is market power. Is that possible? Or is it just a fanciful idea given where we are?

PROF. STIGLITZ: Yes, I think it is possible, although I don't think one should necessarily keep away from aspirational ideas either. But I think it actually is practical.

If you go back to the kind of idea that's in the Merger Guidelines, the power to raise price — can you raise the price over marginal cost — and you ask any change in merger acquisition, whether it's vertical or horizontal, you could ask — it may be hard to answer but you could ask — does it affect the power to raise price?

To conclude, I really like what Herb said: it's not only the power to raise prices, but the power to depress wages. It's market power in any of its dimensions. It's the power to impose a contract provision that would not be in the individual's rational interest to accept other than as a result of market power.

So, I think it is an idea that can be implemented.

This goes back to a remark that was made. We've always used market share as an indirect indicator of whether there is that market power. But now we often have the case where we can actually ascertain whether there is market power and we shouldn't necessarily have to filter this through the lens of market share.

I want to make one other point very briefly, which is much of the analysis in economics in antitrust is very static in nature and is not dynamic, and yet society is really concerned with the long run.

You see these concerns arise in fairness and they question whether the competition authorities are promoting competition.

If Walmart had come into South Africa without the compensatory measures that they took, there would have been less competition. At least South African producers would have been driven out of business, they would have been able to buy the goods from China using their monopsony power, and an ordinary person looking at this would ask, "How is this promoting competition when it is driving out South African producers?"

The same thing. There is an increasing concern, I think, about preemptive mergers in the tech field. They look at the conditions today and they say, "Well, this little pipsqueak today is not really changing market share as it is today." But if every time somebody who has the potential to come up is bought in a preemptive merger by Google or one of the other tech giants, there never will be competition.

I think we have to think more explicitly about the dynamics. That, of course, was what Microsoft was trying to head off in some of its measures. But there are new techniques now for trying to avoid competition in the future.

PROF. FOX: Let's turn to the audience and see what questions and comments you have. Who would like to be the first to intervene?

QUESTION: Maxime Fischer-Zernin from Axinn, Veltrop & Harkrider.

I have a question for Professor Hovenkamp. You talked about shifting the consumer welfare standard from price to output. I was wondering how you would define the welfare standard as it is used today in the courts and what do you think would be the effects of that shift towards output and whether it can be done in the current framework?

PROF. HOVENKAMP: First of all, the modern consumer welfare standard as we use it today looks only at the welfare of consumers, not of producers.

That’s the difference between the current version and Bork’s version forty years ago.

Focusing on output rather than price is kind of a rhetorical issue because when output goes up price goes down. But it meets this objection that you so often hear from the Neo-Brandeisians, that a consumer welfare standard doesn’t protect labor because laborers aren’t consumers; as laborers they’re sellers.

If you think of the consumer welfare standard in terms of output, you want markets that are competitive on both the buying side and the seller side so that every unit of either labor or product is being sold for its marginal productive value. I think that gets you closer to an articulable goal.

Now, I’m not saying it’s going to be always that easy to apply, but at least we want markets that are competitive on the labor side as well as the product side.

PROF. FOX: Would that do it, Joe?

PROF. STIGLITZ: First of all, output has to be properly defined. So, for instance, if you have a set of arrangements that allow effectively a tax on cash transactions to subsidize credit card transactions and you narrowly define output as credit card transactions, credit card sales could go up, but it's not the total number of transactions that has gone up, and you have distorted the market in a very important way.

One of the problems in some recent decisions is that they have looked at output in the wrong way. There are broader what we would call general equilibrium effects where, for instance, if you drive down wages from monopoly power and the result of that is that people work harder and as a result of that output goes up, that's not a good thing.

So, output needs to be understood in terms of a very broad welfare construct.

PROF. FOX: Panelists, would you confine any changes to price or output. What about labor? Do your solutions take in the big concerns of the losers? Is antitrust more than price and output?

PROF. STIGLITZ: I think you have to look at how the overall economic system works. Now, this goes to what you might say is the difference between when I said aspirational and actually implementable.

I think that it ought to be of concern that if you had an economic arrangement the losers of which are poor people, then I think that's a consideration that one ought to take into account.

PROF. FOX: And that's distributional to poor people?

PROF. STIGLITZ: That's right. It reinforces — I don't want to say it's the only thing, but I think it should be a factor that tilts the balance in how you are looking at how this competitive system is working. Because it's not a competitive system. We are changing the balance as bargaining powers, and when the outcome of this is not only lower output but also more inequity, I think we should be more compelled to take action.

PROF. FOX: I'm going to call on Mario now, but if anyone wants to make a comment or ask a question, just go up to the microphone. We'll have time for one more, maybe two more.

Mario, go ahead.

PROF. MONTI: We heard a number of ways in which competition policy could address populist concerns. I have a question for the rest of the panel. To me, Fordham, which I first attended in the year 2000, has been and is the symbol of convergence.

Are we perhaps heading to a situation where there will be some conflict between two worthwhile objectives (1) addressing concerns raised by populists and (2) international convergence, further convergence in competition policy?

Some of the solutions we heard seemed to be rather country-specific, social system-specific, structure-specific. Much of the progress in convergence over the last twenty years was achieved as we moved — and certainly from the European side we had to move quite a bit — towards a more abstract and general principle, that of consumer welfare.

So, are we going to have to make a choice between a more populist, resilient competition policy and a more globally coordinated competition policy?

PROF. FOX: Great question. Are there tradeoffs; how big are the tradeoffs?

Before your answers, let's take the last question from the floor. Then I want to give each of you only one minute to say what you wish. It can be in response to Mario's question, the new question, whatever. We only have four more minutes.

QUESTION: My name is Michael Cragg. I'm Chairman of The Brattle Group.

I'm curious what the panel's view is in terms of U.S. competition policy whether the Supreme Court's decision in *AMEX*, which emphasized indirect network effects and the economics of platforms, provides sufficient impetus to examine the dynamic effects that Professor Stiglitz spoke to and whether it addresses the new economy in a way that allows for regulation or abuses; or does Congress have to take action to provide more guidance as to how we think about the digital economy?

PROF. FOX: Thank you.

Herb, let's start with you and go down the line.

PROF. HOVENKAMP: On *AMEX* or on anything?

PROF. FOX: On *AMEX* or anything.

PROF. HOVENKAMP: One sentence on each.

First of all, I am very frustrated when I read things like Barry Lynn of Open Markets — I agree with him that there are many, many economic problems in the country regarding distribution of wealth, the plight of laborers, and so on — but very little recognition that antitrust has any institutional limits. He seems to believe we can use antitrust to kind of rewrite the economy without having any more explicit judgment.

AMEX is such an economic nightmare that I don't think it is going to be a useful guide for anything, although I do fear it is going to cost thousands of hours of litigation deciding when to put both sides of a platform into the same market. So, I hesitate to predict so much.

My guess is that *AMEX* is going to go the way of *Image Tech v. Kodak*, if you all are familiar with that decision, which is that the courts bent over backwards in the subsequent ten years to construe it as narrowly as possible in order to limit the amount of damage that it could do. The result was that *Image Tech* never had all that much traction in the antitrust courts. I hope and pray that that ends up being the case with *AMEX* as well.

PROF. FOX: Frédéric?

PROF. JENNY: First of all, I'm extremely happy that I don't think that anybody on the panel said we should just ignore the problem as we have done in the past. Everybody said, "Well, the distributional impact of competition may have some importance.”

In answer to Mario, I would say that among the things I suggested there are some that don’t create the possibility of a conflict. If it’s a question of advocacy for the competition authority or the way it prioritizes cases, that’s entirely its freedom, and it doesn’t necessarily raise an issue.

Once one gets into taking into account the labor implication of a merger, there is more risk there. But I think that the important step is to say, “Well, maybe we’re not quite ready to go there at this point.”

First of all, the experience of South Africa has shown that at the time there was a lot of anxiety over the *Walmart* case, but ex post everybody seems to say it was a pretty good idea. So, time will help us solve those problems.

I think where we would really have a problem — and is kind of the thing which is agitated by some —

is to say, “Let’s include fairness as one of the criteria of anticompetitive practices.” I think that we are nowhere near that and that we stay away from this, but this doesn’t mean ignoring the problem.

PROF. FOX: Thank you.

Joe?

PROF. STIGLITZ: First, on the Supreme Court, I think it illustrates that economics is more complicated than a lot of people understand and giving what was a very difficult economic case to a particular jurist may not have been a good idea.

The economics literature actually has only addressed how two-sided markets work in the presence of monopoly. It actually hasn’t really addressed competition in two-sided markets. So, they didn’t really have a lot to draw upon, but what they had to draw upon they clearly got totally wrong.

The underlying economics — it’s sort of like some legislatures in the United States have legislated that pi should be 3.0 because it’s too complicated to remember that it’s 3.1416. Well, if you make law like that, you’re going to have trouble squaring a circle.

There are certain things where if you don’t get the economics right you are clearly going to get the law wrong.

PROF. FOX: Mario?

PROF. MONTI: It’s impressive to be here after so many years. It’s so many but it’s not that long. In the year 2000 we didn’t have any beginning of the International Competition Network (ICN) yet; we just commented on the statements of Joel Klein one week before about the possibility of some multilateral initiative. We didn’t have in Europe a distributed system like the European Competition Network (ECN) now.

Maybe the family of competition should slow down its recent progress because it is too difficult to follow.

PROF. FOX: Thank you all. We’ll think seriously about the 3.0 effect and populism in general. I'm sure we'll have many more conversations.

Join with me to thank the panelists.

MR. KEYTE: Good job. Thank you very much.

I'll make the one observation that if you actually read Article 102, it has the word "fairness" in it still.

PROF. FOX: Yes.

MR. KEYTE: So maybe they need to do something there. But I think the common-law tradition in the United States might require some statutory changes for these very important objectives.

Let's come back in a little over an hour, an hour and ten minutes or so, and we'll have a panel on "Vertical Restraints — Convergence or Divergence?" — just an incredible panel, and highly, highly topical.

Thank you so much.

[Adjourned: 12:40 p.m.]