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FORDHAM COMPETITION LAW INSTITUTE**

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ANTITRUST LAW AND POLICY**

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**Morning Session
Keynote Remarks**

MR. KEYTE: Good morning. Welcome to the second day of the Fordham Conference, the third day for those who participated in the Economics Workshop.

We had a long but I think very productive and interesting day yesterday. A few years ago we decided that Friday will not be a long day, and so we will continue with our kind of long half-day for our panels and presentations.

Today Deb Feinstein of Arnold & Porter will lead a panel on merger enforcement around the globe with leading enforcers and practitioners. It should be quite interesting.

While there is a fair amount of convergence in the merger area, as has been discussed earlier yesterday, things are still moving. There's a lot of interest obviously in vertical mergers. There's minute interest in what at least I used to call conglomerate mergers. Even portfolio effects - God forbid - may come back. That should be quite interesting.

Then Sharis Posen of General Electric is going to lead our in-house counsel roundtable. This year we thought we'd do something different. We're always looking to do something a little different. We'll have two enforcers and two general counsels as well as Sharis have a dialogue about multijurisdictional investigations. I'm not looking for fisticuffs, but I think this should be quite interesting.

As you saw from the program, at the end of the day Bill Kovacic has graciously agreed to close us out with his observations. I think it's just great.

I will always take Bill over myself for some closing observations about the state of antitrust in the world.

First we'll start with our two keynote speakers.

Andrea Coscelli, Chief Executive of the Competition and Markets Authority, also has a Stanford PhD in Economics in the pocket, which brings a much different and interesting perspective to enforcement and policy. I think we all really want to know what is going in the United Kingdom. We always hear about the United States, we hear about the European Union. Where does the United Kingdom fit in? What are their priorities? How are they dealing with Brexit as it unfolds? So we look forward to that.

Then Maureen Ohlhausen, who we heard a little bit from at lunch, will give us her perspective on the state of play of antitrust in an environment in which the consumer welfare standard itself is being questioned and has significant implications for how

enforcement decisions are made. As her time period winds down, and she will eventually be on the Court of Claims, she will give us her perspective on U.S. enforcement and antitrust globally.

And then, of course, we will have again – and I want you to be more proactive – a question-and-answer session for twenty or thirty minutes. Please think about some questions. This is the time that you often don't get, frankly, at other conferences. So let's take advantage of that.

Andrea?

Andrea Coscelli
Chief Executive of the Competition and Markets Authority

MR. COSCELLI: Thank you, James, and thanks for inviting me. It has been a very interesting couple of days.

I have prepared some remarks which are slightly more for a general audience, so what I thought I would do today here is just focus on some highlights and then also try to weave in some points from the discussions over the last couple of days.

The main thing I want to talk about – I was trying to represent a bit the situation in the United Kingdom, and obviously there are significant overlaps in the debate with what's happening here and what's happening around Europe. Obviously, there are significant differences from an institutional point of view, history, things we have discussed over the last couple of days, but I think there are very significant similarities as well.

The first point I want to make is if we go

back to first principles – again, as James referred, I am an economist, so in many ways I was trained to think about the materiality of impacts. I have now been working in antitrust and regulation for the last twenty-five years.

If I try to distill the key learnings in my mind, I think at the end of the day what we are trying to do here is to try to create an environment that fosters dynamic competition in a sustainable way.

We know that there is the very robust finding that in the medium to long term if we have sustainable dynamic competition where there are enough businesses competing that are allowed to experiment with new business models, innovate and launch new products and services, we know this works. So how do you get there?

Obviously, a core component of it is what [FTC] Commissioner Chopra last night was referring to, a sort of case-by-case adjudication – what in the UK we refer to as competition enforcement or consumer

enforcement – the decisions in cases, which is obviously most of what we do.

But the other part of it I think is what in the United States you call rule-making, which I call regulatory oversight, so any forms of regulation or legislation which create the rules of the game.

When I think about what we try to do with the sort of expertise that we have at the CMA, we are doing a bit of both. Now, we do some rule-making directly ourselves, but that is probably a small part of it. But we do spend quite a bit of time as an expert adviser to others, to make sure that when rules are imposed or updated there is a very strong learning from competition coming in.

If I look at our interventions over the last five to ten years, obviously very often we are the party that comes to the discussions with a strong deregulatory focus. I think that is clearly in the DNA of competition authorities and it's very important and it's the right answer in many markets.

But I have increasingly become a bit more agnostic about it. I think there are other markets where we can achieve a much better result by updating regulations or introducing new regulations. At the end of the day, every single market of importance has some regulation of some sort. So, the question is what kind of regulation is there, as opposed to a binary discussion between competition and regulation.

If I look at some of the discussions we are having with the wider community, if I think about discussions in Parliament or the wider debate in the United Kingdom, I find myself often going back to examples where we know that the vast majority of people believe that competition has delivered.

If we go back to things like aviation in Europe or telecommunications, over the last twenty or twenty-five years these sectors have delivered for consumers. Pretty much every consumer immediately and instinctively gets the point: prices are lower, there is more capacity, quality is higher. This has been

achieved through a combination of essentially procompetitive regulation, privatizations in the case of Europe, liberalization, and competition enforcement.

Obviously, the regulated sectors are an important part of the economy, an important part of I would say the ecosystem in terms of outcomes, because it really matters for consumers, almost by definition, and trying to get good outcomes there is very important. So, in the United Kingdom we spend quite a lot of time working together with the sector regulators to try to make sure that there is the right mix of rule-making and enforcement in the specific sectors to achieve that.

In the United Kingdom the key regulators have had a very significant infusion of competition thinking over the last fifteen to twenty years. I spent part of my career in the telecoms and media regulator Ofcom, which has a very strong competitive bent in the way regulation is applied. A lot of the

rule-making there is about creating the conditions for competition.

If you think about interventions in mobile, like some occasional caps for spectrum auctions or agreements among particular operators to share costs to increase investment, these were procompetitive rule-making interventions. I think in terms of materiality and the positive impact, these have been very significant, very positive interventions.

The focus has always been to create a sustainable level playing field. In the UK mobile market there are four players, and the regulator and ourselves strongly believe that this is the right number and that this is working well for the UK market.

There was an attempt [in this market] to merge to three players a couple of years ago, and our friend Carles [Esteva Mosso] and some of the people here helped us block that particular merger, which again we think was the right decision. Interestingly,

in relation to some of the recent four-to-three mobile mergers in Europe, we now have institutions like the OECD and others saying that was a mistake and something should be done to fix that particular problem [for instance in the German market].

If I look at the financial services sector, again a sector where in the United Kingdom there is a very strong competitive focus, when the fintech companies started expanding in London over the last two to three years, the regulator took a very procompetitive approach and proactively engaged with the fintech companies to try to change the rules to make sure that they created a level playing field between the incumbent operators and the new players. Again, in terms of creating sustainable, dynamic competition, I thought that was a very positive intervention.

When I look at what we do, we do a number of things. I have three examples here that I think highlight some of the things I have been saying.

The first example is heat networks, which are essentially this ecofriendly-form of heating that we believe in the United Kingdom is going to be a key component for decarbonization over the next fifteen years. This is a sector that grew very quickly with very limited regulation.

So, when we started looking into it we found a number of problems. What we concluded in our recent study was that there should be the same level of regulatory oversight in this sector as there is in traditional energy and gas networks and that the sector regulator should acquire the powers to regulate this sector. So again, from our point of view this is a procompetitive intervention to ensure that this sector is sustainable and grows, but in the short term we think it requires more regulation.

Secondary ticketing is a sector that has created many headaches for myself and my predecessors. There are a number of companies that have been very aggressive commercially in the UK market. We have

been looking through our consumer protection lens at some of these commercial practices. We recently announced that we are going to go to court to try to get interim orders to stop one of these companies, called Viagogo, from continuing to engage in some of their current commercial practices.

Again, this is an area where we are not very happy with the outcomes. We are working through our enforcement powers. If we don't succeed through our enforcement powers, personally, I am quite relaxed about potentially the government introducing some form of legislation or regulation for the sector because at the end of the day if after a number of years the outcomes don't improve, I think it is our responsibility to make sure that things change.

The final example is an area that most of the people in this room have engaged with over the last two or three years, which is the disruption brought by a number of app-based taxi services. Obviously, we have had various rounds of discussions

in the United Kingdom, like in other countries.

But what I want to say is that in the last few months the government decided to set up a working group with us, the regulator, government itself, and some of the key commercial players to essentially update the rules, the licensing conditions, in a more procompetitive way while keeping some of the basic safeguards that are very important for passengers. I personally think this is the right approach.

Technology has moved on. Clearly there is dynamic competition. Clearly the existing licensing conditions were not appropriate to create a level playing field. I think this is the best way to update them while taking into account the various concerns.

If I look at the debate in the United Kingdom, which as you know is a country that has always had a very strong focus on competition and growth and innovation, almost every day there is an article in the media about the lack of a level playing field in a number of these sectors.

There was an article yesterday about Amazon and bricks-and-mortar bookshops. There have been articles about Starbucks and coffee companies. There have been various discussions about Airbnb.

I think the common denominator in the discussion is really the point about the perceived lack of a level playing field. I think if most people perceived the presence of a level playing field between these various companies, consumers would not worry as some of these sectors (such as cafes) are quite competitive. The key concern is whether there is a level playing field today.

That is obviously a very complicated question. There are lots of issues about employment legislation, about taxation, things that we as competition authorities are not particularly focused on for very good reasons.

But at the same time whenever we are involved and whenever we are asked, I think it is very important that we bring this focus on the level

playing field to the discussions and try to help with our expertise move things along.

In terms of what we are doing directly, I just want to refer to a few things quickly.

We are spending obviously a lot of time on digital markets, like a number of our fellow agencies. We are focusing increasingly on vulnerable consumers in the United Kingdom. That is either vulnerability per se or vulnerability in particular situations. For instance, we are doing some work at the moment on the funerals market. We did some work recently on residential care homes.

We also like to use our tools flexibly, again as many agencies do. So when we do our merger control work sometimes we pick up concerns about competitive practices and we open sometimes Competition Act cases on the back of it.

We did last year a market inquiry into price-comparison websites, what we call digital comparison tools, and we got some direct enforcement

cases coming out of it, both on consumer protection and on competition grounds.

You know the UK Government has recently published a document on consumer protection, a Consumer Green Paper, trying to think about changing some of the legislation, and we are actively involved in that debate, trying to bring our expertise to that.

At the same time, and again in common – Bruce Kobayashi was talking a couple of days ago about merger retrospectives at the FTC – we are also very interested in the current debate about merger enforcement, whether we are exactly in the right place or whether things need to change. So we are quite active in that. I just have a couple of examples here just to suggest some of the things we are doing at the moment.

Obviously, there is a debate about acquisitions by digital platforms, whether authorities have been too lenient over the last ten years or so. I recently went back and I read our decision on

Facebook/Instagram in 2012. Obviously, we are now looking at it with the benefit of hindsight, but it does look a bit naïve. And certainly with hindsight you think the level of knowledge within the agency at the time compared to the level of knowledge that probably a core group of executives at Facebook had about the opportunities potentially coming out of the acquisition, when you read our decision you think probably there was a gap there. There will always be a gap. The question is whether you can reduce the gap somehow, if you can try to bridge it, by increasing our knowledge in-house, by learning from past decisions.

Obviously, on *Facebook/Instagram* we will never know what the alternative would have been. In a sense, we will never know for certain what the counterfactual is. Clearly, Instagram today is what it is because of the ownership by Facebook and the combination of assets. We will never know what the independent path would have been.

Another case I just want to briefly mention is a decision we took last year on a merger of two platforms in the United Kingdom, two food delivery platforms called Just Eat and Hungryhouse. It was an interesting decision because there was a judgment to be made about essentially a merger that from a static point of view looked pretty problematic. The platform Just Eat got up to around 80 percent of the market after the acquisition. We cleared it on the back of an entry-and-expansion story by rival platforms, particularly Uber Eats and a large player in Europe called Deliveroo.

Interestingly, the day after we announced the clearance the share price of Just Eat went up by 10 percent, which indicated that the market didn't quite believe our judgment on entry and expansion. Since then some of this entry and expansion has materialized and the share price has corrected.

The reason I am referring to this case is because I think it is important that we do some kind

of formal monitoring on some of these cases. This is a reasonably easy case to monitor because a number of the key players are listed companies. I am also keen that internally we use information from the public markets to do a little bit of tracking of some of our decisions to continuously inform ourselves.

As I said, we are doing quite a lot of work in digital markets, quite a lot through the consumer protection lens. Again, I think that is unsurprising. A number of these markets have a fairly large number of players so the concern is unlikely to be about concentration. But these markets have expanded very quickly and I think it is quite important for us to do a degree of policing of the markets to make sure consumers receive the protections they are entitled to.

We are currently looking at hotel online booking. We have spent quite a lot of time on online gambling jointly with the sector regulator. We finished recently work on online dating and cloud

storage.

Hotel online booking again is, I think, an example of what I am talking about, in the sense that this sector has been under quite a lot of scrutiny by ourselves and a number of the other agencies here for a number of years through different lenses.

If we go back four or five years, there were a number of competition enforcement cases around Europe mainly focusing on some of these restrictive clauses, wide MFN clauses and in some cases the narrow MFN clauses between the platforms and the hotels. There were commitments offered in Europe by these companies. A number of national parliaments decided to go further in Europe and essentially ban all of these MFN clauses.

We recently went back looking into it on the back of various complaints we had received using a consumer protection angle, and the case is ongoing. Interestingly again, linking it back to merger retrospectives, [hotel online booking] is a sector

that, differently from the other digital markets I referred to, is heavily concentrated and there is a history of acquisitions here as well. So, again, it is probably quite interesting to go back and look at this history of acquisitions and again think whether with hindsight these clearances were always the right decisions.

Just to finish off, a couple of points.

One point is, as I said, we are very keen to be an expert adviser to government and to regulators. I think we are a center of expertise. We have resources. We spend quite a lot of time looking at specific markets and markets in general. I think we can achieve significant results by helping others when they work through policymaking in specific areas. So this is an area I am personally spending quite a lot of my time on.

The final point, again which is very much relevant to this conference, is when I look across our portfolio the international connections are clearly

extremely strong. The CMA has always been a significant player in the international context.

As you know, we are in the midst of Brexit. We don't know exactly the form that Brexit will take, but I think under many assumptions we will end up doing a lot of parallel work with our international colleagues. We certainly are very keen to continue to invest a lot of our time and efforts in joint work with others.

Those are the key points I wanted to make today. I am very happy to take any questions later on after Maureen's speech.

Thank you very much.

Maureen Ohlhausen
Commissioner, U.S. Federal Trade Commission

MS. OHLHAUSEN: Thank you, Andrea, for getting us off to such a good start this morning and so many interesting topics.

I'm delighted to be here. It's nice to be back again. I attended the Fordham Conference on several occasions, and this event is always one of the highlights of the calendar. So as my time at the FTC draws short, I think it is perhaps particularly appropriate that one of my last public appearances as a Commissioner will be here at Fordham.

James, you talked about the in-house counsel panel that's coming up later this afternoon. I was very pleased to see that my cousin, John Blood, the GC of Anheuser-Busch, is going to be on the panel. John and I grew up around the corner from each other and, with all the cousins and a big gang of neighborhood kids, we always had sports teams, whatever the sport was in season, when we were playing in the street. So

it's nice to know, I think, that the Cedar Sluggers had a particularly good lineup and we continue to play in the big leagues together.

As many of you know, I am rounding out what has been six incredible years as a Commissioner at the Federal Trade Commission. I have had the honor of serving across two presidential administrations, three different Congresses, and with ten other Commissioners.

My service has been very rewarding because through the FTC's truly bipartisan efforts we have advanced the knowledge and the tools needed to protect consumers and promote competition in our free-market economy.

Although I will focus most of my remarks on recent enforcement today. Since I'm in a position where it's a little hard for me to forecast the future, I'm going to be a little bit backward-looking necessarily.

But my work at the FTC has encompassed so

much more than just enforcement. For example, as the Acting Chairman, I led an initiative to promote Economic Liberty, which has helped to spotlight unnecessary or overbroad occupational licensing, which often disproportionately harms those near the bottom of the economic ladder and burdens people who have to move a lot, like military families, in the United States.

It was very interesting that during the discussion yesterday Fred Jenny was talking about what are things causing problems with labor mobility. I think in the United States you can look to things like occupational licensing, where back in the 1950s only about 5 percent of jobs needed an occupational license at the state level and now it's close to 25 or 30 percent. So I think there are a lot of different factors we need to look at as we look with some of these bigger trends that are affecting antitrust even if they're not caused by antitrust.

Excessive occupational licensing in the

United States does remain a big problem, but our efforts are starting to pay off. Already a number of states have made some early moves towards reform. The Secretary of Labor, Alex Acosta, got very interested in this issue. I've talked to him about it. While there's much more to do in this space, these early signs are encouraging, with state legislators and thought leaders increasingly interested in the issues.

The problems we sought to highlight with the Economic Liberty Task Force don't end at our borders. It's not just a U.S. issue. This domestic initiative has already drawn interest from some overseas enforcers who similarly recognize the potential harmful effects of excessive and unnecessary occupational licensing on their citizens.

Speaking of international engagement, we have also been continually engaged with our counterparts overseas through both direct and bilateral meetings with individual enforcers and through the International Competition Network and the

OECD.

On all of these fronts we've continued to press for greater convergence and transparency in due process around the globe. Makan Delrahim talked a little bit about some of these efforts yesterday.

In early 2017 the U.S. agencies issued Joint Guidelines for International Enforcement and Cooperation, an effort that I was closely involved with, and I certainly commend those Guidelines to all of you. I think they have some very important updates but also kept a lot of things the same.

As global trade has spawned more and more global markets, we've been focused on the extraterritorial reach of competition enforcement and providing the necessary protection to intellectual property that is needed to spur future innovation.

By necessity, the great bulk of the FTC's international work is quiet and it generates few headlines in the press. But that doesn't make it any less important.

The process of building a baseline of common legal and procedural norms around the world is never going to be easy, and there are always going to be setbacks and challenges along the way. But with that said, I am ultimately an optimist about our ability to move these issues forward over the long term. I'm heartened to see how countries with little or no history of competition enforcement, or even market-based economies, are increasingly coming to recognize the importance of sensible competition enforcement, and I'm very proud of the efforts we made under my watch to continue, and hopefully even strengthen, the positive and constructive working relationship the FTC has enjoyed with many of our counterparts overseas. It has been so nice to be at Fordham and see many of you in person again.

Finally, before we start talking about specific cases, I want to take a minute to address how the FTC functioned during a very unusual period, when as the Acting Chairman I ran the agency with just one

fellow Commissioner for almost a year and a half. Not to belabor the obvious, but when there are only two Commissioners and one of them is a Republican and one of them is a Democrat, no case goes forward unless there is bipartisan consensus.

Now, some Washington pundits and members of the bar assumed that the composition of the Commission during my tenure was a recipe for inaction, and occasional stories reflected such assumptions without necessarily examining the underlying facts.

How, honestly, I didn't have a lot of time to read such stories because I was occupied bringing cases and coming up with creative ways to deploy a ready, busy staff and stretch a tight budget to pay for expert testimony in all the big cases we were pursuing.

Here are some of the facts about that.

During my time as the Acting Chairman, the FTC identified a total of thirty-two proposed mergers with significant competition concerns. Of these the

agency accepted a consent agreement to protect consumers in nineteen cases, with the balance of these deals either abandoned in the face of our challenge or contested in litigation.

That made for a very full litigation docket. At one point we had ten competition matters in active litigation at the same time with three more on appeal, which approaches historic levels. Several of these contested matters are still pending.

We also brought and won a litigate challenged to the *Wilhelm Wilhelmsen/Drew Marine* merger, which I'll discuss in more detail shortly.

In addition, Walgreens substantially restructured its proposed acquisition of Rite-Aid due to Commission concerns.

And the work we did during my tenure continues to pay dividends. Earlier this week we won a PI challenge to Tronox's acquisition of Cristal. That was a merger challenged last fall.

And the action didn't stop at merger review.

We also brought forward nine different conduct cases, including several challenging anticompetitive behavior by drug manufacturers. I was very pleased that I did inherit a nice full pipeline from the previous administration and I think we were able to capitalize on that.

Overall these numbers actually reflect a slight uptick in the case of enforcement from what prevailed during the previous administration. This is just life, and I don't mean to overplay that, but it certainly didn't show any decline.

So far from being hamstrung by having two Commissioners who needed to cooperate, our impressively bipartisan record managed to keep the Bureau of Competition quite busy.

But we also got some help from the well-developed state of the law. Today the caselaw in the United States generally reflects the contours of a broad bipartisan consensus that antitrust should be used to protect consumers and that our enforcement

work should be well grounded in modern economic analysis.

Now, despite some criticism at the margins – and we've heard some of that in the Conference – that consensus remains alive and well and it continues to govern much of the routine decision-making within the agency.

The principal drivers of that consensus are unlikely to change anytime soon. For example, we know that mergers creating durable market power do not serve consumers well. Thus, it really should not be much of a surprise that the pace of merger enforcement at the FTC in recent decades probably varies more on the basis of overall economic activity than on who won the last election.

Consistency in enforcement improves the predictability of government action, allowing all of you in the private bar to counsel your clients more effectively, while also ensuring that enforcement does not chill procompetitive business activity

unnecessarily. This is all for the best, and frankly it should not be a great surprise to anyone when the FTC stands up in court to challenge a problematic acquisition.

On the other hand, when antitrust enforcement becomes more of a political exercise instead of a dispassionate and apolitical law enforcement matter, predictability is lost and the actions of government can appear arbitrary.

In turn, injecting politics into antitrust enforcement undermines public trust and confidence in the entire exercise. Now a frequent topic of discussion among competition enforcers around the world is the importance of stripping away political preferences from what is, and ought to be, a fairly predictable and routine exercise of government's law enforcement authority. I'm very proud of the fact that during my tenure leading the FTC the agency practiced what it preached in that regard.

Now I'd like to address some of the specific

cases.

In *Wilhelmsen/Drew* we challenged the merger of the two largest suppliers of certain specialty chemicals to the marine industry. Our investigation ultimately showed that although the chemicals sold by the parties were widely available, fleet customers traveling all over the world needed consistent access to a precise formulation at virtually every port where their vessels docked as changing chemical suppliers from port to port is highly problematic and inefficient for customers.

We also learned that the parties had the only viable global networks of supply points around the world that could meet this critical need for so-called global fleet customers. As we showed in court, this is how both the parties' own executives and their customers saw the market. And we also demonstrated that price discrimination against these global fleet customers was possible, leading to a high risk of anticompetitive effects.

Proper antitrust analysis requires a careful evaluation of actual conditions in every market we investigate and sophisticated economic analysis. This case principally stands for the importance of that kind of careful deep dive. This is very much a case where the once-over-lightly answer and the deep dive yielded markedly different conclusions. The parties eventually abandoned the transaction after we successfully won a preliminary injunction in federal court.

Another perhaps surprising case to some outsiders was our challenge to the proposed merger of Smucker and Conagra. In *Smucker/Conagra* we opposed a merger between the Crisco and Wesson brands of cooking oils that would have given Smucker control of 70 percent of the grocery market for branded canola and vegetable oil. The parties eventually abandoned the transaction in the face of the FTC's complaint.

The entire case turned on just one issue: do the private-label house brands meaningfully compete

with the branded products in this market, or is their effect likely to be so de minimis that we should exclude them from the market? If the private-label brands were in the market, there wasn't much reason for concern; but if they were excluded, the transaction was very problematic.

It turns out when you really look carefully at the question the narrower market definition is the correct one. So when you're making your grandmother's recipe for the holidays and that faded, stained index card in your recipe box calls for Crisco, many people are just going to have a lot of interest in buying the cheaper house-brand alternative that might not work the same way. Most consumers buy this product infrequently, and when they do they tend to be fairly risk-averse.

We also had very good data here, and the empirical work all pointed towards the narrower market being the correct one. So we followed where the facts and the economics led in this matter, even though they

ultimately brought us to what was a rather surprising conclusion.

Now, I would caution all of you to be careful about generalizing from this example to other retail markets. What I would say is that you should expect that once we inevitably figure out the right question to ask, we will put in the time and effort necessary to make sure that we get to the answer best supported by the facts and economics. We're also not going to be dissuaded from a conclusion that is firmly supported by the weight of the record evidence even if it might seem contrary to many people's initial assumption.

Next I'll talk briefly about *CDK/Auto/Mate*. This is a case where the FTC ultimately blocked a proposed tieup between the providers of specialized software used by automobile dealers.

The fact pattern was essentially a large, established firm with a substantial share of the market buying a relatively small upstart that had

enjoyed some recent success and appeared poised to challenge the market leaders more aggressively.

The market was concentrated and barriers to meaningful entry were substantial. To be sure, there was some current competition between the firms, but the greatest concern we identified during the investigation was the likely future competition that would be lost should Auto/Mate be absorbed by CDK.

Some have questioned whether the existing antitrust paradigm can ever reach this kind of behavior, where a big player squashes or absorbs a promising upstart before it can ultimately grow into a more substantial competitor. I think our action shows that the Commission can and will take these issues seriously.

I will also note that Auto/Mate had certain clear advantages, particularly reputational, that other smaller providers lacked and that it would have been exceedingly difficult to replicate rapidly. This gave us greater confidence that the loss of

competition from Auto/Mate was unlikely to be replaced rapidly by another small firm. I think that was an important part of the analysis here and likely to be an issue that will arise frequently in cases where there is substantial evidence that the current market share understates the likely competitive significance of the transaction.

In the face of our challenge the parties ultimately abandoned the deal, and shortly thereafter Auto/Mate referenced the FTC's action to protect competition prominently in its marketing materials while announcing that it was "Back to doing business differently than giants do. And the big guys? They're back to shaking in their boots." It's not often we get such a quick and definitive affirmation of our analysis.

Finally, I want to talk just briefly about a case we did not print. When Amazon decided it wanted to buy Whole Foods we did not intervene. At the time this was not a popular decision in some quarters and

we were criticized for not being sufficiently aggressive. Now, I obviously can't talk about the details of a case we decided not to bring. However, I do want to talk about what happened since that transaction occurred.

A year after the transaction Whole Foods continues to operate largely as it has previously while prices have either remained the same or fallen for many products at Whole Foods. Consumers have more alternatives for purchasing Whole Foods' products even in markets where there was no Whole Foods location previously. And more importantly, we are seeing rivals adjusting to this new reality, beefing up their own home delivery offerings and investing in the modernization of their own supply chain to defend their existing positions from a new, nimble, and well-heeled rival.

Competition remains robust and in some ways seems to have become even more intense since this transaction. In fact, the March 2018 issue of

Washingtonian magazine had a cover story calling this "The Golden Age of Grocery Shopping," and I've put that one in my scrapbook.

When you embrace competitive markets you also embrace change and the need for firms to constantly improve or risk being left behind. These are all things that the antitrust laws exist to foster, not prohibit.

In conclusion, it's clear that the FTC pursued a robust enforcement agenda during my tenure as the Acting Chairman. We executed what I believe was a sensible, balanced merger control program deeply anchored in modern economic theory, and we also brought conduct cases, tried to advance economic liberty, and engaged in lots of consumer protection enforcement.

As I prepare to leave the FTC, I feel proud that I've passed on to its next set of leaders an agency in excellent shape. It's a bit tired out from litigating quite so much.

So this little agency, with its comparatively tiny budget, punches far above its weight on so many fronts, and has long done this. It's a wonderful place to work, chockfull of very smart, hardworking, dedicated professionals many of whom could be making a lot more money elsewhere. And U.S. consumers are lucky to have the FTC in their corner, just as I was lucky to have had the privilege of leading it.

Thank you very much and I look forward to the discussion.

MR. KEYTE: Thank you, Maureen and Andrea, for extremely informative presentations that do highlight a lot of issues, especially in relation to what we had yesterday on the program, for example, Antitrust and Populism.

I'll start off with a question and hopefully we'll get some more from the audience.

There has been a lot of discussion about the objectives of antitrust enforcement and the consumer

welfare standard. I think, Maureen, you're pretty clear where you stand on the consumer welfare standard.

So, Andrea, I want to ask you. Do you have similar views? Do you think there should be some flexibility, whether to broaden it and in what ways? Is that something that you've had to address or think about?

MR. COSCELLI: I think my position is I'm pretty comfortable with where we are. There is an issue, obviously, about priorities in enforcement and burden of proof. But there is clearly more debate around now than in the last twenty, twenty-five years about changes in legislation. I would expect to be part of that debate in the United Kingdom, but it is ultimately for Parliament to decide whether to change anything.

My personal view is I'm very much in the camp that I think we are in a pretty good place in terms of laws and it's about enforcing. But there are

more and more people who worry about the outcomes they observe.

MR. KEYTE: My own follow-up to myself: We hear – especially from Europe and from the United Kingdom, and we heard it from Johannes as well and we see it in the speeches – the phrase “leveling the playing field,” wanting to level the playing field.

For practitioners and enforcers in the United States – or at least the caselaw in the United States is – that doesn’t really appear to be the objective because it has a tendency, at least in the U.S. law, to potentially protect competitors over competition.

I want both of you to address – maybe starting with you, Andrea – what do you mean by “leveling the playing field,” and how does that fit in with concepts like “competition for the space,” the Schumpeter idea? How does that fit in with making sure you’re protecting dynamic competition as opposed to competitors if you are trying to level the playing

field all the time?

MR. COSCELLI: It's definitely not about protecting competitors per se. I think it's pretty clear to me and to I think most of the commentators that it's not about particular companies or particular business models.

I think the discussion is in many ways linked to the regulation. I think there are two types of problems in the debate. One is the traditional one that we are all very familiar with, which is when new business models emerge often the existing rules and regulations are not appropriate for the business models or can be used strategically by the incumbents to frustrate entry. That is, I would say, something that through advocacy competition authorities have been very good over the years at dealing with.

The other angle, which I think is a slightly more recent angle which is coming to us from a number of commentators, is that sometimes the new disrupters are taking advantage of some regulatory loopholes,

which when you go through them and you think about it, you think maybe something should be done about that as well. I think that in my mind is what people refer to as a level the playing field.

Without going into international taxation, which we all know is a very complex topic, and it's not really for competition authorities, there is a popular perception that a number of well-run, efficient businesses in the United Kingdom are at a disadvantage to companies that are engaged in aggressive international tax planning because they can't do that just because they are not international companies. Now, I'm not saying that's right or not, but that's an important input into the overall debate I think.

MR. KEYTE: Maureen?

MS. OHLHAUSEN: I agree with Andrea completely, particularly on the competition advocacy point. Are there regulations in place that are restricting competition one way or the other and

should they be updated to allow more competition in the market while still having some of the protections in place that were the reason for having the regulation to begin with? I think that is a very valuable role for competition agencies to play because we can bring that perspective to the table that the industry-specific regulator may or may not have, or in the United States state legislatures.

I think one of the other things that I see as what is leveling the playing field – I wouldn't really use that term, but I would say what we want is to be sure there's competition on the merits. Is this behavior competition on the merits, and you can win by being the best competitor because you offer consumers the best deal, all those different factors of the deal that consumers value?

But where there are cases where there is not competition on the merits – so, for example, I want to talk about the *McWane* case that the FTC brought a few years ago, where you had a manufacturer that had about

90 percent of the market share and it went and locked up all the distributors, and the distributors were key in this very exciting market of water pipes for big construction projects. There's a lot of money there but it's not very exciting. It's not high-tech, but the principles of that case do apply very much to the high-tech industry.

If you're locking up the distributors and there's no efficiency justification, that's not competition on the merits. You are not providing the best service to consumers and winning that way. So I would say that's the kind of thing where there wasn't a "level playing field" there, that the player with the very strong market power was preventing competition on the merits from occurring.

MR. KEYTE: Questions?

QUESTION: David Sutcliffe, Sports Technology. I just want to raise a couple of points.

One, when you go back to the financial crisis, where Wall Street packaged up a lot of garbage

and sold it around the world and took down the global financial system, you had a situation where the companies were basically deemed "too big to fail," and therefore the people at the Justice Department under Eric Holder backed away and did not prosecute any individual whatsoever, and that resulted in the book that you've probably read, called *The Chickenshit Club*.

MR. KEYTE: Let's get to a question.

QUESTIONER [Mr. Sutcliffe]: I want to jump to the online business where you have terms and conditions of agreement, terms of service, where it's in six-point type, it's three pages long, and consumers don't read it, and even if they did read it they wouldn't understand it. I'm wondering if that's an area for regulators to step in and say shouldn't the platform operators make the terms clear, visible, and readable?

MR. KEYTE: Thank you. Maybe not antitrust.

MS. OHLHAUSEN: You stole my punchline

there, James.

That is a core consumer protection issue, and that's the kind of thing the FTC has looked at across industries. Whether they're big companies or small companies, whatever the company is doing, if it has some term that consumers may not expect, like they're collecting information that might be particularly sensitive for consumers, we have required them to be clear about that.

One of the other things that I have found – and it has been really interesting because I have been in this game a long time – is seeing how terms and conditions – we've had that for years. But one of the things that on the flip side of our fast-moving online, very connected society is objectionable terms and conditions in consumer agreements get surfaced a lot more quickly too. You have a lot of consumer groups or advocates or academics who do delve in and read those things and say, "Hey, wait a minute, this stinks, that's not good." I've seen that cycle.

There can be a beneficial side too of this, that these kinds of problems do get surfaced more quickly.

The FTC has brought enforcement actions where apps were collecting sensitive information about consumers without giving them notice that they were collecting and that was going to be used or shared in a certain way.

MR. KEYTE: Eleanor?

QUESTION [Prof. Eleanor Fox, NYU]: I want to return to your question, James, on leveling the playing field because I think that's very provocative and because it's a very important focus.

I think you have both brought out that there can be anticompetitive leveling of playing field and there can be procompetitive leveling of playing field.

Where I'm going is on the procompetitive leveling of playing field do we need a better term that "consumer welfare?" You both mentioned instances in which increasing mobility – it could be for workers across a long range – of people to contest the market

is procompetitive, and yet it doesn't fit within a narrow definition of consumer welfare.

I noticed that you, Andrea, in your talk did not talk about consumer welfare but you talked about "creating the environment for robust competition." So do we need a term that seems more dynamic and more robust and not be too afraid of saying, "Yes this helps a producer, but it helps the producer in a procompetitive way"?

MR. COSCELLI: Yes. I think this reflects a bit the overlapping or slightly different discussions here and in the United Kingdom.

The way I think about it I'm comfortable with "consumer welfare" for us, and I think quite a lot of the heavy lifting can be done by other rules and regulations to create the environment for that sort of "competition on the merits," which actually is a phrase I'm very comfortable with because in many ways it represents what I was trying to say with "level the playing field."

MS. OHLHAUSEN: I don't know about having a broader term. But I do think, Eleanor, the way I like to think about this is: first of all, people often say, "Antitrust, markets, you're only concerned with price – price, price, price." Price is the easiest thing to measure. But competitive markets offer a whole lot of other values that consumers care about. So I think that would be helpful.

The other thing is when we're talking about dislocation – and Fred talked about this in a very interesting way yesterday – we shouldn't overlook the fact that a lot of these online markets have allowed people to compete across geographies that you previously couldn't compete in.

My husband has a small business. He works out of an office in our house. Before the Internet it was very difficult and now it's very easy, particularly because noise doesn't carry over emails, and when our kids were little and they were screaming and he would try to be on the phone with a client, he

would have to close the door and throw M&Ms under the door to keep the kids quiet. Now he can just email. So I've seen it in my own house.

I'm not saying everything is perfect, but sometimes I think we look at the changes that technology has wrought in terms of dislocation without necessarily also weighing some of the new flexibility and new virtual mobility.

QUESTION: Hi. My name is Michael Stein. I'm from Manikay Partners.

A question for Andrea. As you hinted in your speech, after Brexit I think you're probably going to be a bit busier. Can you talk about how that transition is going to go? Are you ramping up staffing? Maybe talk a little bit about some areas where CMA differs or has different priorities than the European Commission? Also, are notifications going to be similar to the way it has been working at the EC with a very lengthy prenotification period, or is it going to be a slightly different process?

MR. COSCELLI: Lots of questions.

A significant part of my job is Brexit preparations. As people know from reading the papers, it's a very delicate phase as there's a lot of uncertainty.

There is a scenario where there is an agreement that is approved by the UK Parliament, and there is an implementation period, so in many ways things would not change until essentially January 2021. There is a scenario where there is no agreement and everything changes essentially at the end of March next year. We are preparing for both scenarios.

As some people here might know, we have been asked by the government also to be the state aid authority for the United Kingdom. That will be very much to have a sort of lockstep regulatory system with the European Commission. That's a significant change because obviously it's taking on a new function.

We are spending quite a lot of time recruiting and expanding. As I said, the main

complexity is really in the next few months to try to see of these two main scenarios where we are going to head. Obviously, as we get closer to March 2019, companies that want to merge and serve the UK market will have to start thinking about notification strategies. We will be obviously talking to Carles [Esteva Mosso] as things evolve and we will try to do our best to plan and help and support the companies. But the uncertainty at the moment is there, so we can mitigate things but we don't have a complete full roadmap.

QUESTION: Pallavi Guniganti from Global Competition Review.

With regard to the *Facebook/Instagram* merger, there have certainly been suggestions that if agencies feel they got that wrong or that there were developments in the market since then the way to deal with that is to go back and break up the merger that happened, to undo the merger. In the United States we generally would only do that very proximately after a

merger has been consummated. So far as I know, there isn't a law prohibiting it from happening later. I'd be curious to think from both enforcers what they think of that – not necessarily just about *Facebook/Instagram*, but in general the potential for doing that, given rapid developments in markets.

MR. COSCELLI: I did use that just as an example. I'm nowhere near suggesting any of the things you are talking about.

I think it is just a reminder to all of us that we just need to do retrospective assessments and learn from past mergers. There are certainly some parts of the economy where things have changed quite quickly, and so these are the parts where I would really need to learn a bit more.

As I said, no one will ever know what the counterfactual is to that particular transaction. So that particular transaction clearly has happened and nothing is likely to happen to it at this late stage.

But there is a policy question – and I think

Maureen referred to that – which is when there is quite a lot of uncertainty in dynamic markets and someone has a strong position in the market and there are upstart competitors, what is the right policy in terms of merger control, which is clearly very much case-specific, but also it is important to think a bit broadly across categories of cases to make sure we are in the right place.

Obviously, there is a fairly active academic debate in this area. Again, it is quite important for the authorities to keep track of it and to see whether any brilliant ideas come from that particular debate.

MS. OHLHAUSEN: Two answers to your question, Pallavi.

The first one is obviously, as I think you mentioned, we have challenged consummated mergers. We have one, *Otto Bock*, in litigation right now, but that was very soon after. One of the challenges, and why we have the whole Hart-Scott-Rodino premerger notification, is how do you unscramble the eggs? To

go into court ten years later and say, "Oh, on second thought"

My experience with courts is they're very pragmatic. You're asking them for some remedy. They don't want to be regulatory. They don't want to take over a business and have to make those kinds of decisions. So I think on a practical level that's very difficult.

But then secondly, to build on what Andrea said, and why I thought the *CDK/Auto/Mate* decision was so interesting, often we hear these concerns: "Okay, you've got a big player and they want to move into a new functionality, and there's ten different current players who are doing that. If they pick one, why is that problematic, because otherwise they could just do it organically; these things they can figure out?"

So why would we want to say, "Well, we're going to try to stop that, but we can't stop the organic growth." You would need to say why was that one particularly well-positioned that that was going

to be the one that was going to actually come up and be the giant killer down the road such that it is actually squelching competition.

The interesting thing about *CDK/Auto/Mate* was the facts and the economics and everything really came together to show that when you have that situation the antitrust law – I mean they ended up abandoning so we didn't have to litigate, but I felt very confident about that case, that we had the kinds of evidence you needed to show that that would be a problem.

But, Andrea, I think you mentioned it's hard to go back ten years later and say, "Was this player that was purchased so successful for competitive or anticompetitive – was it because they got the infusion of capital and they were the one who made the best new version of that product because of the support of the big company? That's not necessarily anticompetitive.

QUESTION: Robert Vidal, Taylor Wessing.

There's an issue that came up yesterday and

I'd be interested in your views. It's to do with "winner take all" markets and network effects. This is in the context of a recent decision in the United Kingdom, *Just Eat/Hungryhouse*, where the CMA appeared to accept that Just Eat had effectively won that market and it could therefore take over its only competitor because it accepted that the competitor would inevitably exit that market in the future at some point because of these network effects.

It just seems to me that we don't really appear to have a grip on this kind of network effect issue. Is there a solution to this? There are certainly these dynamic markets where once you've got that network effect, that first-mover advantage, you're unassailable. So what do you do in that situation?

MR. COSCELLI: I'm not sure it's a perfectly correct characterization. The reason we cleared that case was because of entry and expansion by other platforms. I think it would be an odd decision by a

competition authority to essentially just accept a monopoly absent specific reasons. There might be some cases where you are very confident that the threat of entry is sufficient to discipline the monopolist, but it is not that common.

I think the issue with the network effects is a valid one, which is that sometimes there are efficiencies from being very big. We were talking [yesterday] about taxis, and obviously in the very short term you would like to have a very dense service for taxis because there are lots of drivers and lots of passengers.

The question you have to ask yourself as a competition authority is "What next?" Maybe you like it in the short term, but maybe in the medium to long term the industry is not going to evolve in the best possible way.

So I think it's a valid issue and I think it's one of the reasons why competition authorities have accepted a significant reduction in the number of

players in a number of industries. But going down all the way to a monopoly I still think is pretty much an exceptional situation to accept that.

I think in a number of cases where you have a dominant platform buying a weaker competitor we usually like the competition anyway because in a sense it's the only competition left.

I'm not sure that showing up in front of us or another competition authority saying, "By the way, I'm competing with an incumbent who has a 70 percent market share, I have 30 percent, I don't like my position, so my best exit now is to sell to the owner of the 70 percent market share," I'm not so sure we would particularly like that story.

But it's always case by case in mergers. You do deep dives. In the context of the way that competition works, the network effect is clearly one of the factors that you look at in the assessment.

MS. OHLHAUSEN: I agree with everything Andrea said there.

But I also want to mention a challenge we brought to a merger last year in *DraftKings/FanDuel*. There was an interesting argument that the parties put forth, which was: "Well, eventually there's only going to be one of us who wins this battle. It's an online platform and eventually only one of us is going to be the winner. So let us fast-forward to that and one of us will buy the other one because that's the inevitable outcome." We challenged the deal and they eventually abandoned it.

The really interesting part about it is it's so hard to predict where things are going. So you talk about the first-mover advantage or something. A lot of the big companies that you talk about weren't the first mover in those spaces. There were social media platforms before Facebook. There were search engines before Google or Bing. But it's very hard to predict where things will go.

To bring you back to *DraftKings/FanDuel*, one of the issues was its legality was challenged in a lot

of the U.S. states – was this online gambling? Then the Supreme Court came out with a decision that was more favorable, and so there has been this huge explosion. So I thought *Wow! The idea that we know the future and we know that only one of them is going to win – we really need to approach that with caution because, as Yogi Berra said, it's difficult to make predictions especially about the future.*

MR. KEYTE: I'm going to ask the last two questions.

Andrea, I understand the network effects and the merger issue. How about network effects and what we call over here essential facility? Somebody organically gets a monopoly-like position with a network effect. They're not engaging in traditional exclusionary behavior, and new nascent rivals think they need access to some resource because they can't get to a tipping point. Do you have a doctrine in the United Kingdom like essential facilities and does it apply in a network effects situation where the larger

company is not necessarily doing anything wrong?

MR. COSCELLI: We do. I think the bar for intervention, quite rightly, is quite high in this. Obviously, the history of why you end up there matters. If you look at a lot of the European cases historically where there was access given to facilities, most of these cases were about state-owned enterprises and facilities. I think historically both the agencies and the courts in Europe have been very careful not to interfere with companies that acquired those positions through innovation.

This is not to say that at some point after a number of years, if you really worry that the outcomes are poor and you think the shareholders of the company have had quite a lot of joy for a number of years, maybe you think on balance that some form of intervention is appropriate.

But it's a complex tradeoff and I think we all fully internalize the concerns in terms of the signals that you are sending for investment and

innovation. So I think if you look around the landscape there have been very few cases of this sort in Europe.

The United Kingdom I would say is probably a halfway house between other European countries and the United States. I think our courts tend to take a fairly negative view of intervention on the back of successful innovation unless there are very good reasons to intervene.

MR. KEYTE: Maureen, since it's coming to a close, I wanted to ask personally in your long tenure what accomplishment are you most proud of at the FTC?

MS. OHLHAUSEN: That's a hard one.

One thing that I would say I'm most proud of is that I really think — it's twofold. One is being able to run the agency and keep up the mission of protecting consumers so effectively during a really unprecedented time for the agency. So I felt very positive about that and really good about it, and that's why I highlighted it in my speech.

The second thing that I really feel proud of is the work on breaking down barriers for just the average person who wants to start a business and enter the market. Economic Liberty means a lot to me because I think about individuals – the hair braider, the food truck owner, the little guy.

We talked about populism yesterday. I think a lot of things that are driving this is this feeling that the system is too onerous and too rigged against the little guy and you can't even get in and some of that is from government regulation. Even well-meaning government regulation is making it too hard for people to pursue their dreams in the marketplace when they're on the lowest end of the economic ladder.

Fighting that battle and turning a spotlight on it I think is one of the things that I feel proud about.

MR. KEYTE: Thank you very much.

Please join me in thanking our speakers.

Let's take ten minutes or so for a break and

hop into the mergers panel.

[Break: 10:37 a.m.]