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Panel 1: Merger Enforcement Around the Globe

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MS. FEINSTEIN: I'm really thrilled to be moderating this panel, although I don't think the moderating job will be much work. I could really just say "interesting topics in merger enforcement,

discuss" and this group could probably go for half a day. But I'll try to keep it a little organized.

Let me first start with the introductions. To my far left is Howard Shelanski of Davis Polk and Georgetown University Law School. Next to him from the European Union is Carles Esteve Mosso, who is the Deputy Director General at the EU Commission. Next to me is Bruce Hoffman, the Director of the Bureau of Competition at the FTC. To my right is John Davies, a Partner at Freshfields.

We are going to start off with a variety of topics. We'll try to leave a little bit of time at the end for questions.

Bruce, let me start with you. Cases are often brought on unilateral effects and there have been questions about whether or not there has been a resurgence in coordinated action theories in merger enforcement. Did it ever really go away? I wonder what your perspective is on how often that coordinated interaction arises in cases in the United States.

MR. HOFFMAN: Thanks, Debbie. Let me start by saying a couple of things.

First I'll give the standard disclaimer that anything I say doesn't necessarily reflect the view of the Commission or any Commissioner or the Bureau of Competition or anybody.

I also wanted to note, following up on Commissioner Ohlhausen's talk a few minutes ago, I want to thank her for hiring me as Acting Bureau Director, and of course to the current Commission for making me Bureau Director. But I wanted to note how much of a privilege it was to serve under Acting Chairman Ohlhausen and to reiterate some of the things she said about the activity of the Commission during her tenure there. I think it was a really exciting and interesting time at the Commission, for obvious reasons, but also a very and successful one, as she noted. Some of the things that we're going to talk about today - many of them actually - had their genesis in that period.

Also, knowing that Debbie is going to be moderating, I brought an entire book of things that I could say in response to the questions I might get. My first plan was to just read all this out to everybody, but I decided that wouldn't be a lot of fun, so I'm not going to do that.

On coordinated interaction, first of all, has it ever gone away or is there a resurgence? I would say it has never gone away and it's unclear to me that there is a resurgence, but certainly it's an issue that's a live issue and something that we think about quite a lot.

I think as a number of folks here know, and as Commissioner Ohlhausen mentioned earlier, two days ago we won a preliminary injunction in a merger case the primary theory of which was coordinated interaction. Now, the decision on that is not yet public. It will be coming out. It is going through the usual redaction of confidential information process. When that decision comes out I think it will

have some things to say about this topic.

But I would say this on coordinated interaction. I think it would be fair to say that while it's something that we look at a lot, it's probably not alleged as frequently as unilateral effects in the investigative stage and when we ultimately go to remedies it's not as common.

I did some casual empiricism on this. One of the things I noted was since 1996 the FTC has litigated twenty-five preliminary injunctions to decision, and out of those eight of them involved coordinated interaction theories.

Out of those twenty-five cases also the FTC's win/loss record is eighteen wins and seven losses. But its win/loss record in the cases where coordinated interaction was alleged is five wins and three losses. Now, there's a law of small numbers problem here, but certainly statistically that shows a higher loss rate where you're bringing a coordinated interaction case.

When you're thinking about these theories that obviously could suggest some cautionary notes when you're considering is this a viable case to challenge; is there a viable theory here that we have that we could persuade a court to block a merger on?

I think part of the reason for that is there are some inherent difficulties with coordination – not so much in terms of the way we think about it necessarily, but in terms of how the thinking about coordinated theories might translate to courts. I'll give you three examples of that.

The first is I think some courts struggle with the distinction between price fixing, an actual anticompetitive agreement, and coordinated interaction. So they tend to sometimes think: *Well, if the merger isn't going to allow people to actually fix prices, if they're not going to get in a backroom somewhere and fix prices, then it can't be a problem.*

Whereas I think our view of coordinate interaction – certainly the Guidelines are clear on

this – is what we're concerned about primarily are cases where that's exactly what's not going to happen. If people do that, if they get in a room and fix prices, then the Department of Justice is going to go and put them in jail. So we're not as worried about the conduct that is going to put you in jail. What we're worried about is a merger that is going to allow you to achieve a similar outcome without doing something that's going to put you in jail because there's no obvious solution to that problem once you have allowed it to come into being.

But I think courts struggle sometimes with price fixing (Sherman Act Section 1) versus Clayton Act Section 7 coordinated interaction, and they think if you can't show the one then you can't show the other.

Second, I think courts can struggle with the complexity of some of the models that are out there for coordinated interaction. For example, the kind of canonical Cournot model which you might use to predict

coordinated effects produces some results that a court might find counterintuitive, such as if you run a basic Cournot model what it will show is that a lot of mergers are just unprofitable on their face if you look at variable costs.

So then you can go to the judge and say, "Well, the model they're using would say that this entire merger is unprofitable. If that were true we wouldn't do it. Therefore, the model has got to be wrong." That's a challenging thing for a district court judge to try to figure out.

Third, in cases where you bring a coordinated interaction theory, you might as a matter of general assumption believe that those markets are inherently likely to be less concentrated. By the way, that's not necessarily the case, but certainly there would be a lot of scenarios where a coordinated interaction case might involve five-to-four mergers, those sorts of things, where there's some reason to think that the structure of the market will facilitate

coordination afterwards, but your Herfindahl-Hirschman Index (HHI) numbers are going to be lower, and so you may be further away from the thresholds that have been established to get presumptions and so forth, and so there is an inherent challenge from a litigation standpoint there.

MS. FEINSTEIN: Carles, what's your perspective? Does coordinated interaction come up a lot in cases in Europe?

MR. ESTEVA: I think the term you used before, resurgence, is a good one to describe the situation in the European Union. After the judgment of the Court in *Airtours* in 2002 we saw really very few cases being brought on the basis of coordinated effects in Europe.

I think probably there are two explanations for this. First, the high bar that the judgment set up for this type of cases. Also the fact that after the change of the test in our Regulation in 2004 we have more flexibility to use unilateral effects to

look at issues in oligopolistic markets.

In the last few years we have seen a number of cases being brought on the basis of coordination, very often on the top of unilateral effects concerns. This can be explained first by a renewed focus of the Commission on coordinated effects, but also by the availability of different types of evidence and in particular on internal documents. None of these cases have reached the Court. One was abandoned and the others have been solved by remedies. But I'm confident that in all these cases we would have convinced the Court that the *Airtours* criteria were met.

A good example of this type of concerns has come up in mobile telephony cases. As Andrea mentioned, we have been busy challenging a number of four-to-three mergers in mobile telephony in Europe, and in some of them on top of unilateral effects we could establish also coordinated issues.

The Italian case is a good example. After

the merger there would have been a market structure with three players, three network operators, with very symmetrical market shares, very symmetrical cost structures. The merger would have eliminated the company that had played more a maverick role in this area. On top of this, through internal documents we could identify that in the past there had been very clear attempts at coordination on this market and after the merger these attempts could become much more successful.

Here the focal point of coordination would have not been pricing. In mobile telephony you have very different pricing offers that make them difficult to compare. But, on the contrary, it would have been easier to coordinate on the basis of the market shares of the parties.

One last point on this case. This is the first case in mobile telephony that was resolved with a structural remedy. Through a divestiture of a number of assets - spectrum communication towers and

communication equipment – we facilitated the entry of a fourth network operator with incentives to behave quite aggressively in the first years. Actually, what we have seen is the entry of Iliad, the fourth player in France, who had successfully challenged the incumbent operators in mobile telephony in France. They announced their launch at the end of May and in July they had already more than a million subscribers. I think that this remedy is proving a successful one to restore competition and maybe even to go further than the level of competition that we had premerger.

MS. FEINSTEIN: John, is it your sense that when advising clients there is good guidance about when the European Commission is likely to look at coordinated interaction and what arguments they will accept in deciding that coordinated actions are unlikely, or is there some lack of clarity about that issue?

MR. DAVIES: It's a really important and difficult question. I think my role on the panel is

to give a view as a practitioner.

Carles referred to resurgence in cases. He kindly didn't mention one case that he'll remember we had a discussion once, which was the *AB InBev/SABMiller* global beer merger, where the Commission identified a risk of tacit collusion. It was resolved in Phase I with some extensive remedies. I recall Carles saying to me what he just said, which was he was confident that he would be able to find a resolution if it had to go all the way. Obviously, when you're dealing with one of those cases you have to make some judgment calls about whether you wish to challenge that or not.

But I think there is a point there for the Commission. We're still talking about a small number of cases. Apart from the beer case, there was a small number of telecom cases. I think that the Commission has to be very thoughtful, particularly when it is looking at internal documents, because in the particular matter I was referring to I think that we

had a somewhat different view as to what the relevance of those documents were. We didn't get the opportunity to discuss it more carefully.

It's quite interesting what Bruce said in his opening comments about in the United States the relative likelihood of success before a judge in coordinated cases.

Going back to your question, I think it's very difficult to be able to give reliable and consistent advice to clients, particularly if, for example, you are not able to assess the documents beforehand. Very often, at least in the European Union, it is very difficult to get your clients to allow you to review all the documents beforehand so you can help make a judgment on that particular aspect. You may have a better view on the market conditions which might give rise to coordination.

Personally, as a practicing lawyer, I do find it very difficult to be able to make reliable judgments, and I'm hoping that the resurgence is

limited.

MS. FEINSTEIN: Howard, at a simplistic level unilateral effects theory assumes that the merged firm can raise prices even if nobody else follows, whereas coordinated interaction assumes that everybody will raise prices, they'll be able to work together. You sometimes see cases where both theories are alleged. Do you think there is conflict and tension, or can both theories coexist together?

MR. SHELANSKI: That's a great question. I do not think that there's a tension necessarily between a coordinated and a unilateral effects theory. I think that it will depend very much on the facts and circumstances, but there are many such cases where both can very consistently and clearly be raised.

I'll give you an example. If you are looking at a merger between two close competitors in a differentiated product market, you would naturally start to think about a unilateral effects theory. But lots of things happen in terms of repositioning, how

you might move the acquired firm's products closer to the buying firm's products, leaving the remaining firms in a market frankly in a better position to engage in coordinated interaction amongst themselves because they may be more closely aligned with each other in terms of the kinds of products they're putting out there in the market, and what was disrupting their coordination could have been the acquired firm that in terms of the product space lies between them and the buying firm.

So what you have is unilateral effects between the buyer and the target – they'll raise price, differentiate maybe even further. The other firms are less concerned about the intermediately located firm disrupting their market and they are in a better position to have coordinated effects.

You then wind up with a market that has both unilateral effects and coordinated effects post-merger. That's just one of many scenarios one could come up with.

I think the 2010 Guidelines made clear that these were not alternative theories, that these were theories that could both be brought. So I don't think there's a necessary tension.

The only other thing I want to add generally on coordinated effects is I just think historically it's sort of remarkable that we're here asking the question "Do coordinated effects matter?" If you just go back to, say, the period from the mid-1980s to the mid-1990s, go back to *Hospital Corporation of America* and Judge Posner writing that "the sine qua non of all merger enforcement is collusion and coordinated effects."

So what happened? Why are we now in a position where coordinated effects theories succeed less often, seem less front and center, and we more often bring unilateral effects? I think that's a very interesting story.

I would just note that I think what happened was intuition ran ahead of theory back in the older

days; there was a strong intuition that we could understand collusion. But then there was a whole lot of research that showed the conditions under which collusion can hold are actually relatively slim. So we saw coordinated effects going out of fashion.

When they came back into the 2010 Merger Guidelines, it was a case of theory getting ahead of intuition. What we said in the 2010 Guidelines was tacit collusion is okay; you should think about kinds of coordination beyond collusion. That is, as I think Bruce said, kind of a hard thing for courts to grasp, it's kind of counterintuitive, and so we are kind of at this point now where we are trying to bring back a more sophisticated form of coordinated effects, and I think it's a difficult thing to prove.

MR. HOFFMAN: Can I add a couple of things to that?

One, a good example in some ways of the point that Howard just made coordination, where you have a unilateral and a coordinated theory, and it has

to do with repositioning to a certain extent, is

CDK/Auto/Mate.

You had a market there with two very large competitors and then several smaller competitors. One possible issue that could arise is the small competitor would not only eliminate a nascent rival, an innovative rival, as Commissioner Olhausen talked about, but also one that presented a real threat to the possibility of coordination between the two larger existing firms.

Another example where you could have these theories fall out in the same case: If you look at the complaint in the *Tronox* case, there are coordinated effects theories, as I mentioned earlier, and there is also a unilateral theory having to do with unilateral capacity reductions. The intuition behind that is simply it's a "have your cake and eat it too" type scenario, where it's unilaterally profitable for the merged firm, under the assumptions and what we alleged, to reduce its output or to produce less post-

merger than otherwise the firms would independently. It would be profitable for the merged firm even if the other firms responded by increasing their output, but it would be even more profitable for everybody if they didn't, if they chose to withhold output. Those things are not inherently in tension. There is good reason to think that this can actually happen.

But I also do think this issue about collusion versus coordination, as I mentioned, is one the courts have struggled with. If you think back, *Arch Coal* is an example of this. In *Arch Coal* I think the court struggled with this issue. Also again, as part of sometimes theory running ahead of maybe at least the courts if not the facts, in that case the court said the FTC is pursuing this novel theory that the firms are going to coordinate on output as opposed to price. I just remember reading that and thinking *This is not a novel theory*. In fact, in half of the price-fixing cases out there is actually coordination on production because that's a heck of a lot easier to

monitor and enforce than price collusion, which is actually often quite difficult to monitor.

So there are a lot of strange things about that decision, but I think it underscores that these kinds of theories are sometimes less intuitively easy to grasp than the unilateral effects theory, which is if you have a firm that ends up really large, as is the case in most of those, people intuitively get the idea that that could be a problem.

MS. FEINSTEIN: I also think there might be something in the fact that the economic tools to determine whether unilateral effects are likely and the amount of data we have resulted in the increased use of unilateral effects theory. For example, you can now use scanner data to determine what is likely to happen with retail pricing in a merger.

Often when I was at the Commission and I would talk to economists, they would say, "Okay, the theory here is that coordinated interaction is going to occur because the two companies are now going to

look more like each other.”

You go, “Okay, great. How do I demonstrate that?” There’s silence in the room because you just don’t have the same economic tools to show that the way you do unilateral effects. I don’t know if others agree, but I think that may be some of it.

MR. HOFFMAN: I completely agree with that. I mentioned earlier that one of the problems is basic Cournot models and some of the outputs that they generate when you run them through.

But also, if you think about what is the model that’s in the Guidelines that talk a lot about coordinated interaction? It talks about the plus factors and so forth and the caselaw on collusion.

And then you look at subsequent developments on that, and there is literature – Bill Kovacic has written about it, and Leslie Marx and some others – on plus factors and super-plus factors and how some of these plus factors really are almost totally irrelevant. Others appear to be highly predictive, or

at least more or less predictive. There's just a lot of difficulty.

With some of the basic models you run you get very different outputs for coordination if you assume differentiated products in Bertrand versus Cournot, and then when you're trying to explain that to a judge it could be really challenging.

MS. FRIEDMAN: Great.

Let us turn for a minute now to vertical mergers. They have certainly been in the news in the United States, largely because of one case. There was a litigated merger this year, which hadn't happened in fifty years, where one had actually gone to court. There had certainly been challenges, mergers that didn't occur or where there were consent decrees. And certainly vertical merger enforcement is nothing new at all in the European Commission, and they have put out quite clear guidelines on the issue.

Howard, are vertical mergers getting more in the news because there are more of them; and, if so,

why? Or is this just a blip because one of them actually went to court? What's your perspective on that?

MR. SHELANSKI: I think it is a mix of things. I do think that the *AT&T/Time Warner* case going to court was a dramatic development because it was unexpected. It looked like we were going to run the playbook of a deal that had happened just seven years before and that had resulted in elaborate but fairly routine kind of conduct remedies. I think that's what was expected.

As a theoretical matter about the theories of harm, there was really nothing terribly novel about the *AT&T/Time Warner* case. One way to look at what was happening is that the whole litigation was driven by a new theory of remedy, a theory of what works as remedies and some experience with previous remedies that at least some allege might not have worked very well; and also just an intellectual commitment to not having antitrust agencies become long-term regulators

and overseers of a firm or an industry, so a preference for structural.

When an impasse was reached everybody wound up in court. We could say that this was sort of a one-off or driven not so much by a theory of harm difference but by a remedial difference, but I do think there's something else going on here.

There were certain ways we always used to look at vertical mergers and certain efficiencies and benefits of vertical mergers that were really taken as given. So the elimination of double marginalization, which is to say the reduction of a level of profit taking in the vertical chain that would happen through the merger was usually taken in every model would suggest as a good thing. So the sort of implicit credit that you would give a vertical merger for bringing efficiencies was fairly high, and then the theories of harm – foreclosure, raising rivals' costs, and things like that – were fairly hard to prove. So against the efficiency motivation and the difficulty

of showing clear incentive and ability to foreclose, there wasn't a lot of incentive to bring cases.

I think that what has happened is there has been some development in the machinery of analyzing vertical mergers. Now we have vertical GUPPI analysis, upward pricing pressure analyses that are moved into the vertical context of the kind that Steve Salop has developed, and bargaining theory, bringing Nash bargaining theory more to the forefront in thinking about vertical mergers – not just thinking about foreclosure, not just thinking about raising rivals' costs, but thinking about ways in which the threat point in a bargaining negotiation between the acquired firm in the hands of the acquiring firm, or vice versa, will change after the two are combined.

That was obviously the theory that the government brought the *AT&T/Time Warner* case on.

I think that actually is something a little different than just a remedial motivation; there is also some shift in the theory. When you see a shift

in theory or an expansion in the number of theories that might generate a theory of harm in a case, you are likely to see more cases.

I actually think that vertical mergers are going to be – we are not going to see a sea change, but I think one should not be so presumptively assuming that these are going to go through.

I would just note when Makan Delrahim before he was Assistant Attorney General was asked about *AT&T/Time Warner*, he said, “Well yeah, it’s vertical.” But then when he got into the job and was focusing on the facts and got deep into the investigation, he began to see something else clearly in authorizing the case. So I think that we will see more cases.

MS. FEINSTEIN: John, one of the debates in the United States is whether or not we should have Vertical Merger Guidelines. They existed back in the 1984 Guidelines. They have never been updated. There have been speeches by enforcers laying out the basic theories – incentive and ability to foreclose, the

bargaining model – that explain vertical foreclosure theory in two or three pages.

The European Commission has obviously gone further and done much more detailed Guidelines. Are the Guidelines useful or do they raise as many questions as they answer, such that simply saying, “Here are the three theories that might raise vertical issues” would give you as much guidance as you think would be useful in helping advise clients?

MR. DAVIES: I think they have been very useful. They certainly set the debate and you have a clear understanding of the way in which the European Commission will set about examining a case.

We’re all very familiar with the question of ability to foreclose, incentive, and then the overall assessment of effect on competition.

I think in my experience, acting both for notifying parties in vertical mergers and quite recently acting for a party bringing a complaint, is that frankly, notwithstanding the framework, you never

quite know what the outcome is going to be. By which I mean I think it is very difficult for the agency to come to a conclusion and it is very difficult for the notifying parties to know how much risk they have.

For me it centers around the question: What do we mean by foreclosure? At what point does an impact on competition become anticompetitive foreclosure?

So we have the framework, but we still have a very difficult judgment to make. I think that's probably the reason why in the European Union we see very often conduct remedies being agreed, particularly in Phase I merger cases, as a way to resolve the matter.

I would say that clearly people would think *Conduct remedies are a lot better than divestment*. But in practice, as you indicated, they can be challenging, complicated to negotiate, particularly if there is a third party that's very actively seeking to protect its position.

And, of course, they often lead to long-term monitoring. We see that in *Qualcomm/NXP*, where the Commission sought a range of remedies. One licensing remedy would last for eight years.

The last thing I'd say is I think it's important to recognize there is in practice a very important difference between the U.S. approach and the EU approach. The European Commission has to make sure that it can survive an appeal to the court. The U.S. agencies don't have to worry about that in the same way. Very often we find ourselves being put to task – appropriately – by Carles and his colleagues to make sure that they have the necessary information in the filing, for example, to clear a case. So that can be a very onerous processes.

MS. FEINSTEIN: Carles, I've heard you say before that the European Commission has a preference for structural remedies even in vertical cases but you will take conduct remedies when they are appropriate.

So a couple of questions. Do you have the

sense that the conduct remedies you have taken have been successful and workable? Is there guidance you can give on when you might consider a conduct remedy rather than a structural remedy in a vertical case?

MR. ESTEVA: Our preference for structural remedies goes across the board both for horizontal and vertical cases. Our practice shows that in a number of cases with vertical concerns divestitures have been the best solution, certainly in mergers where we have vertical and horizontal concerns in the same case. But also in a number of cases where there was only a vertical issue that could be solved by a divestiture without necessarily affecting the rationale or the efficiencies in the case, then we went for a divestiture.

But our Guidelines also say that if you have a conduct or a behavioral remedy that can have the same effects as a structural one that can be implemented effectively, properly monitored, and that will allow another player to remain in the market or

to enter into the market – that is, that it is not simply a promise to behave in a certain way by the merged entities but it will have an impact on the structure of the market – it can be accepted.

That's why in a number of vertical cases you will see that we have solved them via access remedies or in conglomerate cases via interoperability remedies that basically achieve the same.

It is important, when looking at these types of solutions, to examine how the industry is working. If you see that in the industry in question companies are already protecting themselves from risks of foreclosure through long-term contracts, I don't think there is any problem with an authority replicating this either by ensuring that the parties will renegotiate their existing contracts with companies at risk of being foreclosed or adding on top of it a conduct remedy that guarantees access. This is the strategy that we have followed in a number of cases.

Talking about *AT&T*, we have also applied

similar theories of harm in a number of mergers leading to integration between content and telecoms providers. A case that we had recently in Belgium, *Telenet/De Vijver*, is a good example of this approach.

MS. FEINSTEIN: Bruce, what's your perspective? I know you said the same thing, that you prefer structural remedies. There was a case and the discussion in the United States about why you used a conduct remedy in that case, and I'd like you to talk about that for a minute. But also I can think of a number of cases, like Pepsi and Coke buying their bottlers, where the remedy was to ensure that there was an appropriate firewall. Those were not cases that could have been resolved by divestiture because the divestiture would have been of the very assets they were buying. So are we going to see cases like that with no remedy, or are we going to see going to court way, way, way more on vertical cases to deal with all those cases that in the past have been remedied by conduct remedies?

MR. HOFFMAN: I hate to say "way, way, way more" because, as I mentioned earlier, we are talking about relatively small numbers here in the sense that vertical mergers where we conclude that there is a competitive problem that needs to be remedied are still fewer than horizontal mergers where we reach that conclusion for the reasons that everybody mentioned earlier. I spoke about this previously so I won't go into great detail on it.

On these larger questions, also I want to put in a plug for the hearings that we have coming up. We actually have a hearing on vertical mergers coming up in the near future, I guess a couple weeks from now. We are looking for comments, if people want to provide comments to us. I want to underscore that we are going to take comments very seriously. We are really looking for input on all of these questions. So things may change as we go forward here. That's actually the purpose of having hearings on these issues.

But more broadly in terms of vertical mergers and remedies, I've said previously, consistent with what Carles has said, that we prefer structural remedies. That is so for the simple reason that structural remedies change incentives whereas behavioral remedies change abilities. Those are very different things. If you change incentives, then you don't have to worry anymore about whether people are going to find some way to act on their incentives – the incentive is gone. If you are just imposing remedies that affect people's ability to act on their incentives, then you have to worry perpetually about whether they will find some way to get around the remedy you put in place and act on those incentives. So there is an inherent difference in enforceability.

Having said all that, we had a remedies study, as you know, and the remedies study looked at, I think, four vertical merger remedies and concluded that all of them had actually worked.

We have a recent vertical merger remedy that

is a behavioral remedy, I guess, that's nonstructural, and I guess you could say that provides really good precedent the next time you have a transaction in which the customer is the Department of Defense and the product market is missiles, and beyond that it probably doesn't do you a lot of good. But I think it does show that in cases where the vertical merger creates some real benefits, you can't attain the benefits with a divestiture, with some kind of structural remedy, and we have reasonable confidence that whatever behavioral remedy we put in place would actually work and be something we could actually do, we certainly haven't ruled that out.

MS. FEINSTEIN: Terrific.

Switching gears just slightly, the European Commission, John, sometimes talks about conglomerate effects. Can you talk about how that differs from traditional vertical theories and your perspectives on advising clients about conglomerate effects in Europe?

MR. DAVIES: Thanks, Debbie.

Talking to a large U.S. audience on the issue of conglomerate effects is a risky venture. Unfortunately, I drew the short straw. So please bear with me.

We're talking here about mergers between companies that have complementary products in neighboring markets where through a range of possible practices – tying, bundling, or other exclusionary actions – there can be a material foreclosure effect.

I've heard Americans say, "There is no theory of harm," and I have to say I disagree with that. The EU Guidelines set out what the theory is. For me the real issue is predictability and how prepared the agencies are to look further down the road from an immediate potential efficiency through bundling, which might reduce prices, to a potential marginalization of competitors – of course, that's what *GE/Honeywell* was all about – and in my experience the U.S. agencies are much less willing to look further down the road, whereas the European Union will

be prepared to seek to balance out effects over time.

I can say from recent activity U.S. corporations are very happy to engage with the European Commission on the conglomerate theory of harm in relation to other people's mergers where they can see that they might be affected over time. This predictability issue and the question of standard of proof in relation to foreclosure is very challenging, but I don't accept the idea that there is not a theory of harm.

A little bit of history. I mentioned *GE/Honeywell*. Very little happened for a number of years in the EU arena after that. Then the 2008 Guidelines set out the theory of harm. But again, there was little activity.

James in his introduction mentioned the expression "portfolio effects" as if that was some kind of evil spirit that he raised. But I would say to you that there has been a resurgence again of EU activity in this area. There have been probably at

least half-a-dozen cases in the last couple of years involving a range of different markets – *Dentsply* in relation to dental markets; *Worldline/Equens* in the financial markets; a major Phase II case, *Essilor/Luxottica*, which was ultimately resolved without issues but was a major exercise for the European Commission; and *Qualcomm/NXP* also had conglomerate issues in it.

So I would say that there has been a resurgence. Indeed, I can quote from the Commission's own Competition Merger Brief of July in relation to *Qualcomm*, where the Commission said, or at least the Commission officials who wrote the piece said: "When reviewing transactions combining complementary products in highly technological sectors, the Commission does not shy away from carrying out conglomerate assessment. Conglomerate mergers may warrant careful scrutiny, particularly when the Parties hold significant market positions in relation

to complementary products.”¹

Now, having said that, I probably need a bodyguard to be taken out of the room here because I’m sure that a number of American listeners aren’t so happy about that.

I would say the issue is alive and well. For me the challenge for the Commission goes back to the point I made in relation to vertical mergers: How do you resolve the issue, and is there a way that you could possibly filter the cases more quickly?

In the United States I know that the relevant investigating team can very quickly dismiss a conglomerate issue without any further analysis. I don’t think we’ll ever get to that point in the European Union.

But I do feel that there must be some scope for avoiding the burden of time and cost that, for example, parties like *Essilor/Luxottica* are put through, where I think the evidence was obtained from

¹ <http://ec.europa.eu/competition/publications/cmb/2018/kdal18001enn.pdf>

4000 retail opticians. I think there has to be a means to filter those cases so that there are fewer situations where companies feel, particularly at the end of Phase I, that they are obliged to come up with some kind of remedy, again which is likely to be a behavioral remedy, in order to be able to move on with their transaction.

MS. FEINSTEIN: In the United States I know that often when companies want to complain about conglomerate types of theories the agencies will say, "Look, if there is illegal bundling or illegal tying come to us after the merger and we can remedy that as a conduct matter. We don't want to block a merger simply because the company might do that with multiple products when there's no real evidence that they would."

I can honestly say that I don't believe I heard the word "conglomerate" in the four years that I was at the Agency as a theory that anybody wanted to pursue. I don't know, Howard or Bruce, if you want to

offer perspectives from your time at the Agency as to whether or not that was an issue and something that the United States should be thinking about more.

MR. SHELANSKI: I'll pass it to you and then I can follow up.

MR. HOFFMAN: Okay. So I've been volunteered to take the first swing at this from the U.S. perspective.

I think there's a couple of things. First of all, with respect to pure conglomerate theories, if you think about product extension or things like that, we've been there and done that. We had *FTC v. Procter & Gamble*. There's a history of cases – and this is to some extent where the United States has the luxury of having done this for a really long time so we've made every mistake in the book.

We had a series of cases that involved these theories, which have been roundly pilloried in the subsequent academic literature as having basically all been completely wrong. So we went down this path, and

then the professors told us we were wrong, and the courts then said, "We agree with the professors and you guys were wrong." So we didn't tend to go down this specific route.

But when you get into what today is called "conglomerate effects," I think there's a couple of things.

First of all, a lot of what people call "conglomerate" I would actually call "vertical," or even in some cases "horizontal" or "potential competition" type theories. We really do look at those kinds of things.

That then leaves a fairly small bucket of what you might think of as true conglomerate effects that really aren't vertical and really horizontal, and then the problem that you run into is most of those actually look like procompetitive benefits. They tend to look like the merged firm will be a more efficient competitor, or it will have a lower cost of capital, or it will have better efficiencies, or it will have

better bargaining power as opposed to leverage. So there's a lot of things where it is very difficult *ex ante* to say "this is bad versus good" and a lot of the things that are left look good.

Then that gets to the point, Debbie, that you made, and to go back to something I said earlier. One of the things that we think about a lot in merger enforcement is merger enforcement, particularly when you are stopping mergers before they have been consummated, is aimed at preventing firms from getting into a position where they could cause anticompetitive harm in a way that it would be very difficult to do anything about. Coordinated interaction is not a Section 1 issue typically, as just one example.

That's not true for these kinds of theories. These kinds of theories, as mentioned earlier – bundling, tying, those sorts of things – if in fact they are done and in fact they are anticompetitive, we can reach under Sherman 1, Sherman 2, and the FTC Act.

Also, if you go back and you look at Michael

Whinston or other literature on this, it's true that you could show bundling can be anticompetitive and tying can be anticompetitive and so forth – that's absolutely true – but there have to be a lot of conditions that have to be met for those things to be true.

So when you're looking at it *ex ante* and you're saying, "Okay, do I have real confidence that I can demonstrate that all the conditions required for this to be anticompetitive are going to exist at the point in time when the merged firm will have the ability to act on it as opposed to these other potential procompetitive benefits?" – that's a very tough call to make *ex ante* and one that where we do have tools to do it *ex post* it is much more challenging to do.

MR. SHELANSKI: I'm glad I ducked and let Debbie's question hit Bruce because I agree completely. I think that was a great answer.

I don't think I ever heard the term

"conglomerate effect" or "conglomerate merger" in my time at the Agency. That wasn't a label that people put on a theory of harm or a reason that we should investigate.

What you did hear were some of the things Bruce talked about: potential competition; or that the product market might change, that what might have been products that were sold in partial lines would now be pulled into full lines of complementary products – getting back to what John was saying about complementary product mergers.

Now, just for ease of convenience for the ability to price lower and without great theories yet in the market – at least when I was at the Agency; there are some now – but for judges to avail themselves of to come after the bundlers, there was some concern that what you were really creating was a full line as a product and that partial-line competitors wouldn't be able to come in against them. That wasn't really labeled "conglomerate" at the time.

Now that we've got *Dentsply*, we've got *Cascade/PeaceHealth*, we have other ways of thinking about bundling, I do think you can go after those cases under Section 1 and Section 2, but I think that conglomerate effects relabeled might get at a number of things that we do recognize here in the United States and that it's not quite as alien as some make it out to be.

MS. FEINSTEIN: And perhaps because of our system where we have to go into court to prove a case and where the law on bundling is a bit unclear, I think probably the parties are more likely to be able to engage in something that may raise these concerns where the law is a little unclear and that could be a reason why you are less likely to see this brought in the United States than you are in Europe, even if there is perhaps some concern that the company might engage in tying or bundling.

Carles, you have been very gracious to come across the ocean. If you'd like to say something on

conglomerate mergers you're welcome to, but I'm not going to put you on the spot if you don't want to engage in the debate and defend the position.

MR. ESTEVA: Let me react. I'd like to make three different points.

First, let me give you some figures on our enforcement to put this into the proper context. I have detailed figures for the last three years, actually three and a half years because they go until the end of August of this year. In this period we have intervened in eighty-six merger cases, in which we have identified anticompetitive concerns; of these only in thirteen cases we have raised non-horizontal issues; and of these five were conglomerate cases, mergers between complementary products that led to foreclosure theories. In all of them we applied our now well established assessment framework, described in our non-horizontal guidelines from 2008.

What type of issues did these five cases raise? Mostly they raised risk of foreclosure through

what we could call technical tying. *Dentsply/Sirona* is a good example: you have a company that has a very strong position in dental chairs and is acquiring a supplier of complementary medical equipment; the risk is that in the future these dental chairs will not remain interoperable with other medical equipment. For these cases an interoperability remedy doesn't prevent technical integration; it simply ensures that the company will maintain the same practice that it had premerger, that is to allow other competitors to interoperate.

We could challenge this behavior under Article 102 *ex post*, certainly we could, but sometimes it might be too late to preserve the position of competitors. Merger control is there to do an *ex ante* analysis and to avoid anticompetitive outcomes.

Second, when we are discussing differences among us, I think it is always useful not only to look at substantive law but also at the institutional system. John made a comment that I share.

Probably our most clear institutional difference is that in the United States agencies go to court when they want to challenge a merger, but when they decide not to challenge there is no such judicial redress, or it is much more complicated; while on our side every decision that we take, either prohibiting or clearing, can be appealed.

In the EU there are appeals by third parties arguing that the Commission did not justify why there weren't non-horizontal concerns, like in *Liberty/Ziggo* where the court concluded the Commission had not properly justified why one possible foreclosure theory in one submarket would not arise. When you are confronted with this, authorities do not have the luxury to say, "Well, the evolution in this market is too uncertain in the future." We need to come with arguments of why the market will evolve in a way that would lead to foreclosure or non-foreclosure, of the most likely outcome. This institutional setting ensures a balanced approach by the EU authorities and

can also contribute to explain some of the differences across the Atlantic.

Third, we need to put these differences into context. Let me come back to the figures that I mentioned before. All the issues that we are discussing at this panel are at the margins of enforcement. At the EU we had four cases on coordinated effects, thirteen cases of non-horizontal concerns, but the bulk of our enforcement on both sides of the Atlantic is on unilateral aspects, on short-term impact on prices, on ensuring that we have remedies that eliminate these concerns.

The fact that this panel doesn't feel the need to discuss all these issues shows that on most of the fronts we have a broad consensus. The message today I don't think should be that we have a disagreement on conglomerate issues but rather that there is so much agreement on all the rest that we don't even feel the need to discuss it.

MR. HOFFMAN: I ran the numbers. Your

number is 5.8 percent of your enforcement actions involve conglomerate -- that's pretty small -- and 94.2 percent didn't.

MS. FEINSTEIN: But these are the issues that often get discussed in board rooms and elsewhere -- whether or not there is convergence or divergence.

Speaking about another term that hasn't come up as much in the past but has suddenly been discussed a lot, particularly in the popular press is monopsony, particularly in labor markets but more generally.

Bruce, I wonder if you could start us off by describing monopsony and explaining the debate between whether or not it is the symmetrical opposite of monopoly.

MR. HOFFMAN: This is a pet topic of mine so I'm going to have to restrain myself from going on indefinitely here, as you know. We talked about this a few times.

Monopsony involves the exercise of buying power, market power by a buyer that results in an

output reduction so the buyer purchases less than the socially optimal or the economically optimal output from its upstream suppliers. That's a complicated way of describing it, but it's actually really important for a reason I'll get back to in a second, because there's a huge confusion in the popular press about what is monopsony versus what is buyer power.

Legally I think it's quite clear that monopoly and monopsony are symmetrical. The caselaw and the Guidelines actually are quite clear that there is no distinction in how the courts or how the enforcement agencies view the legality of conduct or transactions that result in monopsony versus monopoly power.

Now, I don't think that's actually necessarily true from an economic standpoint. There are a couple of differences between monopoly and monopsony that could have implications for how you actually would allege a case, for example, of what you might look for.

One is monopoly cases involve the demand curve primarily, and we think and there is good reason to believe that demand curves are virtually always downward-sloping, with the exception of Giffen goods or Veblen goods, which are really outliers and not really material for the purposes of most enforcement decisions. I can talk about those things if people really want to get into it, but I'll skip it for now, unless somebody has a desire to delve into really arcane things.

In order for monopsony to exist – there's a bargaining theory of monopsony that doesn't require this condition; it's a little more complicated – but in the standard monopsony theory you have to assume that supply curves are upward-sloping. We don't know as a matter of theory or empirics whether that is as uniformly true as is the case with demand curves.

There's a number of supply curves that you might think would be flat. There's some that could be downward-sloping – for example, where you have returns

of scale or efficiencies, lower cost of production, you actually might have a downward-sloping supply curve. Labor supply curves are arguably U-shaped. So the theoretical framework in economics for treating monopoly and monopsony as symmetrical is not as robust as the legal framework is.

Having said all that, I think it's certainly the case that this is an issue that we are thinking about a lot.

One other point that I wanted to touch on in the popular press is there is a confusion between buyer power and monopsony power, but I think it's actually relatively easy to resolve. The popular press hasn't done this, but it's easy to resolve if you think about it this way. When you have a concern about a possible exercise of buyer power, the critical question or the first question you can ask is: What are the suppliers going to do?

When the buyer exercises his power, typically in the first instance by reducing the price

it is going to pay, then you say: Will supplier A say, "That price isn't very good so I'm going to actually produce less because it's not worth it to me to continue producing as much as I'm producing; or am I going to produce more because I want to get that revenue back, and so in order to get the same amount of revenue I'm just going to increase my output?"

If the answer is you are going to produce more, then you probably have a procompetitive, or at least neutral, situation where, for example, effectively the buyer's price cut might really be the equivalent of volume discounts; or it could be offsetting existing market power on the supplier side.

There has been some empirical work on insurance mergers, for example, where the post-merger insurance company reduced price for healthcare providers – this is health insurance – and the response of the providers was typically to increase their output, which suggests that in those cases there was preexisting market power by the healthcare

providers that the merged insurance company offset.

On the other hand, if the suppliers cut their production, if it becomes not valuable enough for them to make those next units under the new pricing conditions, then you have a monopsony problem, and there is no reason why we wouldn't try to deal with that.

Now, as a practical matter – I don't think this is a necessary condition but it's a very common condition – in order for there to be demonstrable harm from monopsony you also typically have power on the sell side, so the firm with the monopsony power also has some measure of monopoly or market power. In a lot of our cases what has happened is we have determined that we can remedy that and by doing so we also fix the problem on the buy side.

You could question – and I have questioned and others have questioned – how true that always is, but certainly that has been the case in a lot of our thinking about this in the past.

MS. FEINSTEIN: Carles and John, do you see monopsony cases in Europe and do you have a sense of why not if you don't?

MR. ESTEVA: This is an area where we have very limited case law and very little practice. It is area where European merger law can still evolve.

There is no doubt that the Merger Regulation would allow us also to look at the impact of mergers on the upstream markets if the merger leads to the creation of a monopsony. Where there is less certainty is under which conditions the Commission should intervene.

We have looked at this issue in a number of cases normally affecting mergers between supermarkets. We have never concluded that these mergers would have led to sufficient market power upstream to be concerned.

We had recently an interesting case concerning a merger of slaughterhouses in Ireland. The market downstream is the sale of meat across Ireland,

while the market upstream is basically the acquisition of live cattle in narrower geographical areas. The concern was: would this entity after the merger be able to lower prices to acquire cattle?

We concluded that even if the merger entity would have a quite important market share on the acquisition of cattle, around 40 percent, it would not be able to lower prices because other slaughterhouses remain there with excess capacity that could be used to acquire.

But if we had found that they could lower prices, would that be enough to intervene? I think the general wisdom in Europe is that probably this is not enough, that it's not enough to say simply because prices upstream will be lower you have a competition concern.

We would probably need to establish that this price reduction would have an impact on the market in a way that output would be reduced and finally customers would be harmed.

But I say all this with all the safeguards needed because we have never had to establish this in a case and we have never gone to court on this matter.

MR. SHELANSKI: I don't have a lot to add to this discussion. I would just note that I think the key distinction that drives why there was not much attention in the popular press in the 1980s and why there might be attention now is the distinction between buyer power and monopsony.

I think a lot of what we hear about — particularly with regard to wages, as you mentioned, Debbie — is about buyer power and reallocation of surplus from workers to the owners of capital. It is not about inefficient reduction of supply under the traditional monopsony kind of model. So I think it taps into a lot of things that have a lot greater resonance to people than the fact that supply curves are presumed upward-sloping and if you price too low people won't find it profitable to produce the next increment so they won't.

We haven't seen a lot of monopsony cases over the past century for a good reason. That's very often a self-correcting kind of situation because as a buyer of that output you don't want to sub-optimally consume what you need, especially if it's an input market – and this often comes up in agriculture – so you are going to raise your price just to the level that you need to to get that level of output.

The antitrust authorities look at this and say, "Well, this is great. This is just squeezing down costs, which expands ultimate product output to consumers. This is a good thing."

So monopsony has a redistributive effect that comes through some of the efficiencies that often prevent us us from bringing monopsony cases. So it's really bargaining power that I think is driving a lot of the current debate.

It's a very important topic. Whether it's an antitrust topic I think is a harder question.

MS. FEINSTEIN: Yes. I think Howard made a

really important point. At another conference there was an interesting discussion about is it enough just to have the condition of monopsony or is it self-correcting?

Most of the lawyers in the room said: "The way we think about the caselaw and the consumer welfare effect, we have to show not just that they would have few enough buyers that they could extract this; we have to show the next couple of steps, that in fact there would be reduced output as a result and prices to consumers would end up going up; otherwise all it's doing is lowering cost. And it's something that the buyers can control so why should we worry about this?"

There were a number of economists in the room that were adamant it should be exactly symmetrical and that simply if you can show that the conditions for monopoly exist because of a merger or the conditions of oligopoly, that the reverse ought to be true: simply the conditions of monopsony, the

conditions of oligopsony, that you shouldn't have to take those next two steps.

It will be interesting to see if there is the right kind of case that allows this to play out.

I think we are nearing the end of our time. Unless anybody really wants to talk about common ownership, I think I might turn it over to the audience and ask both if there are questions. And if the enforcers from any of the other countries want to weigh in with respect to perspectives from their jurisdiction, we would also welcome that. I open the floor up.

QUESTION [off-mic] [James Keyte, Fordham]: I have one for Bruce because it sounds like this is one of your pet areas for monopsony.

QUESTIONER [off-mic] [Mr. Keyte]: Bruce, in terms of a monopsony situation where you have a more competitive downstream market, is it your position that you would still have to show an effect on ultimate consumers, even where there is a monopsony

effect upstream?

MR. HOFFMAN: I don't know what a court would say about that. I think that's an issue that's kind of out there waiting to be addressed.

One thing I would say about that is if you truly have a monopsony, then even assuming the downstream market is competitive – and you're not going to be able to show the sort of standard "Okay, I've got a monopsony on one side, a monopoly on the other, and I'm going to suppress output and suppress input," which is the easy case – but assuming you don't have that, nevertheless one of the effects that can occur in that kind of scenario – or take the slaughterhouse type scenario where you have the slaughterhouses but then the downstream market is the sale of beef; that's more competitive – nevertheless you could assume that in most situations where that would occur the result would be that while there would be no reduction in output overall, the output would move to a less-efficient configuration because *ex ante*

the configuration would by assumption be the more-efficient one; otherwise it wouldn't exist.

So there is a net efficiency loss in that scenario, and from my way of thinking about things, if that's the case, I'm not worried about a false positive; I would consider bringing that case. If a court were then to say, "Well, you haven't been able to show enough downstream harm, then so be it, but the economics of that are I think fairly unambiguously harmful.

QUESTIONER [off-mic] [Mr. Keyte]: And does that go to the debate of whether it's consumer welfare, total welfare [inaudible]?

MR. HOFFMAN: Well, there's consumer welfare loss there; it's just that it's very, very difficult to quantify. In the monopoly context it's easier. But in the scenario that I described you've got an inefficiency problem where I've now substituted a less-efficient input, so presumably that is going to cause an effect where everyone is worse off.

I'm not an economist at all; I just play around with this stuff and stay in – what is the old saying, "I slept at a Holiday Inn Express last night?" – so I hesitate to go too far down the road of addressing the total welfare-versus-consumer welfare framework in terms of how you would characterize that.

But to me there is both a net loss and you would assume that some of that at least would be translated to the consumer level. I just think it's hard to quantify than is the case with the more classical "I have a monopsony problem and I have market power downstream." That one is easier.

QUESTIONER [off-mic] [Mr. Keyte]: That will be an interesting case.

MR. HOFFMAN: Those are the best ones.

QUESTION [Michael Stein]: Speaking of things that are difficult to quantify from a harm perspective but might also be in the press a bit soon, do you think there has been any movement on predatory pricing? Is that something we can see a renewed

interest in?

MR. HOFFMAN: Was that to me or is that to Carles?

QUESTIONER [Mr. Stein]: To anyone.

MR. ESTEVA: Can you repeat the question?

QUESTIONER [Mr. Stein]: Really the question is about predatory pricing, like the idea of pricing so low that you drive competitors out of business. Up to a very fine line it's generally pretty procompetitive. It is a topic that has been in the press lately here.

MS. FEINSTEIN: We have a Supreme Court case that lays out pretty clearly what the standards are for predatory pricing cases. I think that's the way the agencies and private plaintiffs will think about it. I don't think there's a lot of room for change there any time soon.

MR. HOFFMAN: I agree.

MR. ESTEVA: We have also a pretty clear legal situation in Europe on this.

QUESTION [Pallavi Guniganti]: I have a question following up on the comments from the head of the French Competition Authority yesterday about the incoming legislation in France for agricultural producers and their interactions with food retailers.

With the concern that was shown by the legislature there about how forcing down prices on food producers was potentially hurting quality – and that’s presumably from a competition aspect also a relevant part of consumer welfare – I was curious as to how that is seen with the monopsony situation.

MR. HOFFMAN: What I would say about that is when we say “price” we mean that as a shorthand for price/quality/output. We would certainly be concerned about a monopsony case where the exercise of monopsony power took the form of driving down quality. That’s the case as well on the other side when we’re looking at standard monopoly-type or selling-side cases where we try to look at quality.

It’s inherently harder to measure so there

are more challenging issues that arise when you are trying to assess those kinds of effects. But we certainly would be open to that.

MS. FEINSTEIN: And I think it raises the same questions that Howard raised, which is if you're the purchaser are you going to pay so little that you are going to drive down the quality; and, if so, why would you do so? And, if there was then room for somebody with a higher-quality product, are the conditions for entry such that they couldn't enter, and say: "Wait a minute. There are people who are paying less but they're getting a really bad product. Why don't I basically come in with a slightly higher priced product but with better quality, if there in fact is a market for that?"

MR. SHELANSKI: I agree with this, although I think there is an important caveat, which is it's not just that quality is harder to measure; very closely related to that is that it can be harder to observe. There are things that are done in the

production process that reduce quality, reduce healthfulness. This is part of the legislative concern that we have seen in a number of jurisdictions.

That's not going to be observable by consumers. They are going to pay their price, they are going to get whatever the product is that they're getting, and they may not know that there are things that have gone into the production of that product that are less healthy, that actually do reduce the quality, in ways that are hard to observe or that are observable only after a very long term.

So what you get there is an effort to correct what is a potential market failure in the inability to let price be a sufficient statistic for everything that you want to know about what you are consuming. There is a very coherent theory behind doing that kind of legislation.

The only important thing to recognize is, though, if the market structure is static and you give

that larger payment to the people who are producing, why would they not still take the same shortcuts if the quality is unobservable? That's the hard question that has to be answered. It has to be coupled with some kind of quality monitoring.

MR. DAVIES: If I could just add, I think in the agricultural area that would just open an extraordinary Pandora's Box in terms of assessing quality. I imagine a number of agency heads in the room would not particularly welcome that task. I certainly wouldn't welcome it from the other side of the table.

QUESTION [Cecile Lohrs]: Thanks very much for coming and taking my question.

I attended the *Time Warner* trial every day. I thought it was really interesting that DOJ's economist acknowledged that there would be no foreclosure after the merger happened. The whole theory of harm was based on the fact that there would be a slight increase in leverage, in bargaining, on

the Time Warner side, but they have never gone dark in the past with any of the companies who they negotiate with.

I'm wondering what kind of proof you might need to make such a big jump from foreclosure always being the problem to being now the problem is this amorphous bargaining leverage issue. You're wrinkling your forehead, Bruce.

MR. HOFFMAN: I don't think it's very amorphous. I think the bargaining theories are very clear.

Think about it this way. You don't have to have a war for the threat of war to have an effect, right?

QUESTIONER [Ms. Lohrs]: Absolutely.

MR. HOFFMAN: And so when you look at bargaining leverage models, what those models do is they say: Okay, how do the payoffs to the two sides change based on the outcome if everything goes bad?

It is obviously going to be in the parties'

interest to not have everything go bad, because then everybody suffers and the only question is who suffers worse.

When a merger changes that dynamic, then you have a very predictable – it's harder to show what the actual effect is going to be, but directionally you've got a very predictable change in the likely outcomes.

I don't think there's anything controversial, or even particularly novel, at this point. Ten years ago maybe this was a little more novel, but today to treat this as novel or something unprecedented or say that actual total breakdowns of bargaining are a necessary condition for this theory to be valid I think is just not correct.

QUESTIONER [Ms. Lohrs]: So what kind of evidence do you actually need? Clearly I'm not the judge, but I was there and I was listening. I'm wondering about what kind of evidence you would actually need.

MR. HOFFMAN: I should say that was a DOJ

case and I don't want to speak for their cases.

But what I would say is what you look for is how do the different participants in the bargaining view the outcome if things go wrong and how do they think about the likely change. There are mathematical tools you can apply to that, but also you can look at what has happened in the past, what documents show, and those sorts of things. I think showing that the transaction is going to change those payoffs and is going to change bargaining leverage is and should be enough.

Of course it is helpful if you can show that at times in the past things have broken down, but I don't think it's necessary.

MS. FEINSTEIN: On that note, I want to thank the panelists for a great discussion. Please join me in thanking them.

MR. KEYTE: Thank you very much.

[Break: 12:15 p.m.]