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Plenary Networking Event and Fireside Chat

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Panelists:

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JAMES KEYTE: Hi, everybody, and welcome to our first virtual Fireside Chat in Fordham's first virtual conference. I think most everybody knows who we are going to have the chat with today — Barry Hawk and Bill Kovacic — but, just in case, I will give a very quick overview.

Barry Hawk founded the Fordham Competition Law Institute forty-seven years ago. I think he

probably had a ponytail at the time.

BARRY HAWK: No. The ponytail was later.

JAMES KEYTE: Barry has always been known as an incredibly creative, interesting free thinker in antitrust, and a great professor.

Skadden Arps, where I ended up at one point actually, in 1989 hired Barry basically to start the Brussels office because he was better known in Brussels than most people in Brussels to the European Commissioners and the Member States. He did a great job expanding that office for Skadden.

Barry has written many articles, several books at this point, one of which we will talk about, and he is a close friend and mentor.

Bill Kovacic – I don't even know what to say – also I consider a close friend and mentor. Bill is just iconic in our industry. I have never really looked up what that means, but if I did, Bill would be all those things.

Bill has also become iconic in other

countries, where they have approached Bill and asked him, "Please help me write or rewrite my antitrust laws." What could be more confirmatory than having countries do that?

Bill has written extensively. He was Chairman of the FTC. He also speaks in full paragraphs that are beautiful, so you never have to do any editing of anything that he has said.

With that, let's have a chat.

I want to start with Barry and ask you to tell us briefly about the book you just finished. What is it? Why did you write it?

BARRY HAWK: Just quickly on the book, *Antitrust and Competition Laws* is a history of antitrust and competition laws – I use these terms interchangeably – over the centuries.¹ I'm interested in history because I like stories – I read mystery stories, so I read history and like to write about it. The book has chapters on laws around the world

¹ <http://www.jurispub.com/Antitrust-and-Competition-Laws.html>.

before 1880 (including Athens, Rome, India, China, the Islamic world and medieval/early modern Europe), the United States, the European Union, and then post-1990 jurisdictions. So the book brings antitrust history up to the present. The book offers some thoughts on the present debate about antitrust which was not my intention when I started.

You asked why I wrote it and whether it's relevant at all. Well, Mark Twain said, "History does not repeat itself, but history rhymes a lot." Twain captured many things very well. He certainly described the gist of history in one sentence.

I found a lot of rhymes, not surprisingly, because history deals with human beings: history changes and it changes for a variety of reasons; it's rarely a single reason.

And that is true of competition law. It has changed, I would argue, for three sets of reasons, and the importance of each set varies during time periods and societies: (1) changes in economic conditions; (2)

developments in economic theory or economic thinking (what had been called political economy before modern economics); and (3) politics or shifting political interests – I am using “politics” in a neutral sense. So economic conditions, economic theory, and politics.

The history of cartels is one example.

Beginning in the 19th century, the Europeans tolerated cartels, and that toleration ended after the Second World War. That roughly one-hundred-year toleration was an historical aberration. Before that, Europeans pretty much had legal prohibitions on cartels. The reason for the century of toleration and the ending of the period after the war was a political decision rather than changes in economic conditions or economic theory.

Another example of a preindustrial combination of conditions, theory, and politics is the European medieval and early modern bans on forestalling. Forestalling was going to a farmer and buying grain from the farmer rather than letting the

farmer go to the local village market to sell his grain.

Forestalling bans are found throughout Western Europe. They end during the 19th century, because economic conditions changed as agricultural markets become less isolated. And starting with the French thinkers (the *philosophes*) and ultimately Adam Smith, economic theory developed to believe that middlemen and free trade improved supply and demand.

Third, it took a hundred years under English common law for the people who were benefiting from free trade to have the political power to finally overcome the resistance of English courts to get Parliament to repeal the ban to enforce the law.

A modern example in the United States of politics, conditions (usually economic conditions), and theory started with what I call the expansionary period of U.S. antitrust law, which started in and ends sometime in the late 1970s. When I listen to a lot of discussions today, it's like nobody was born

before 1980; it's like everything started in 1980.

Well, from 1937 to the end of the 1970s was clearly the most expansionary period of U.S. antitrust law — you can't argue about that. For example, vertical and horizontal mergers with market shares under 10% were condemned. Numerous section 2 challenges were brought against large successful U.S. firms.

Why? The launch of the expansionary period owed more to politics than changes in economic conditions or developments in economic theory. Franklin Roosevelt in his first term wanted cooperation to combat the effects of the Depression. He reversed course after he was reelected in 1936. President Roosevelt was very pragmatic — concluding that if cooperation is not working, then the U.S. should try competition. He hired Robert Jackson, then Thurman Arnold — boom! All of a sudden, antitrust, which had been very quiet since 1921, became very aggressive.

Politics started this, but after the Second World War economic conditions and economic theory reinforced this aggressive or expansionary antitrust.

If you forced me to pick one economic condition which is maybe the most important, it is the prevailing assumption or belief about the persistence of market power. For several decades after World War II, if a firm like General Motors or duPont had a lot of market power, they faced little to no foreign or potential competition; therefore, it was reasonable to assume that their market power would persist absent antitrust intervention.

You also had economic theory – Donald Turner, Carl Kaysen, Joe Bain. These were highly respected and influential economists who advanced the so-called structuralist paradigm which held: “If you’ve got concentration that leads to bad performance.”

JAMES KEYTE: Barry, I’m giving you thirty seconds to wrap this point up and then I am going to

turn to Bill, but it is a key transitional point.

BARRY HAWK: That's fine.

Then what I call the retrenchment era begins in the 1970s, which is the present era. You've got a change in economic conditions — only a minority now thought that General Motors was going to continue have dominance --- given the introduction of foreign competition. The economic theories changed with the challenge of the structuralists. And you have one new thing that may be unique in history — that's what I will call a worldview or *weltanschauung* which reflects an inhospitality toward the application of antitrust law, resting on concerns about the cost of the system and assumptions about economic conditions like market power.

Fine. I'll stop.

JAMES KEYTE: All right. As all of us who know Barry know, if I didn't stop you, Barry, you would go on — and everything is quite interesting — and we will get back to these same points after we

hear a little bit from Bill.

Bill, I have a pretty broad question for you. It seems that antitrust is in kind of a new inflection point where people are anticipating something really coming from antitrust – whether it's in Big Tech, mergers, the digital economy – but there sometimes seems to be a gap between what is aspired to and what can be delivered, whether it is in enforcement in courts or elsewhere.

I want to know, do you think that's right; have you seen it before; what has been your experience; and then relate it to where we are today?

BILL KOVACIC: First, James, thanks for the chance to be part of this chat, especially with Barry, who is one of the handful of people who created the community that we call the global community of competition policy people with Fordham as the hub, and it is wonderful to watch you continue that tradition of the school. So thanks for the chance to be here, and great honor to Barry for his work.

I think we are in a crucial transition of the kind you described, and Barry captures precisely the conditions that tend to cause this type of transition:

- Economic upheaval that causes great distress;
- A change in the literature – by my count, there have been fifteen significant books published in the last two years that raise the question about whether our treatment of dominant firms and mergers has been adequate and decisively saying “No.” So a powerful change in the literature; and
- A political mood that has changed as well, with, as we saw earlier this week, demands in the House Judiciary Subcommittee report for a fundamental retooling of the antitrust system.

I think what is missing in this is the appreciation for why we fall short in the way that you mentioned before.

In the late 1970s, I joined the FTC for the

first time and we were coming to the end of a decade in which the Department of Justice and the FTC undertook a sweeping program of efforts to restructure concentrated industries – petroleum, breakfast cereal, computers, telecommunications, bread, chemicals – a host of areas.

I think what was missing was an appreciation for the mismatch between commitments and capabilities. If you are going to take on all those battles, you have to have an extraordinarily capable team of professionals in the enforcement agencies to do that.

I think a major gap in the House report is its failure to address the implementation challenges. There is an admonition in the report that says, “We need more resources.” We don’t just need more bodies; we need elite people, people who are really superior in their ability not just to fight one big case at a time, but to fight several.

When you look at our past experience, you can see the resources that defendants will mobilize to

protect existing business models and market structures, and at the FTC so many matters came to grief in the late 1970s and early 1980s because the FTC, and to some extent the Department of Justice, were simply overwhelmed by the talents that were being brought to bear against them.

The suggestion that Alison Jones, my colleague at King's College, and I made to the House Committee in our written comments was: You not only have to raise the budgets dramatically, but you have to raise the compensation levels. Alison and I suggested that you at least have to put the competition agencies on the same footing as the financial services regulators — do what we did for the Consumer Financial Protection Bureau (CFPB), which basically means a 20 percent bump in the federal pay scale.

Our suggestion was if you want to go to the moon you have to pay for it. Our idea was in the case of the FTC to raise the budget from roughly \$300

million to \$1 billion a year, do it for ten years, and go out and hire the best. Be willing in many instances to pay market rates to get the best litigators, the best economists, and – very important – the best technologists.

Our simple point was: if you are promising to go to the moon but you are providing resources and compensation that doesn't match, you will be lucky to get to Kansas City.

JAMES KEYTE: That's excellent, and it leads into a question for both of you and also some of the questions that I have been getting in some chat.

There is some enthusiasm there, Bill, and Barry has brought the broad perspective to where we are now. I want to understand whether your views of antitrust enforcement and principles, really the underlying principles – the analytical framework, the consumer welfare standard – have they changed over the years? What was it twenty years ago, forty years ago – not to get into too many decades – and has it

evolved, and in what ways?

I will start with you, Barry.

BARRY HAWK: History is relevant. When we start out in 1890, it's the Sherman Anti-Trust Act, not the Sherman Competition Act. The popular concern was about the effects of large firms that often were organized as trusts. Over the years, the trust as a form of business organization disappeared. Importantly, the antitrust laws or the Sherman Act went from an antitrust act to a competition act. There is a lot of debate about what competition means, but competition was the essential element of antitrust law.

Then, in the 1970s competition seems to have transitioned into consumer welfare. Today we talk about consumer welfare. The nature and importance of a distinction between consumer welfare and competition is not entirely clear to me. I think there are different notions of competition and different notions of consumer welfare. You can blend them, play with

them – but I will just stop there.

I don't see the history of the United States so much in terms of the concept of competition or consumer welfare. I am not seeing it that way.

JAMES KEYTE: Bill?

BILL KOVACIC: Yes, it has changed dramatically. If you want to read two landmarks from the 1960s that identify the broad egalitarian vision, read the *Brown Shoe* merger decision from 1962 and read the *Procter & Gamble* merger decision from later in the decade. Both of these consciously embrace a broad vision of what competition law should do.

Most significantly, the last page or so of the *Brown Shoe* merger decision says: "We willingly sacrifice efficiency benefits of this vertical merger for the sake of preserving a more egalitarian business environment because that is what Congress wanted in 1960 and we are delivering on that."

That language disappeared from the Supreme Court decisions basically going from *Brunswick* in 1977

forward. It just evaporates.

Why does that happen? In part because there is an economic upheaval going on where the United States is no longer preeminent, as it was in 1962, with Japanese and German producers suddenly becoming very effective competitors, and courts understanding this and not willing to cast efficiency aside.

But you had the academic consensus that said, "This has to happen as well." It wasn't Judge Bob Bork in *The Antitrust Paradox* in 1978; it was Phil Areeda and Don Turner in the first three volumes of the *Antitrust Treatise* published in 1978, where Areeda and Turner said: "These broader egalitarian goals in the legislative history and in earlier cases — yes, of course ignore them." And why do they say "ignore them?" Because you cannot formulate what they called an "administrable framework" for making all of these goals effective in individual cases and trading them off as you want to.

The modern contest brings us back to that

fundamental issue and says, "Yes, you can do these things" – and that's in the House report. The House report very specifically says, "Repudiate the consumer welfare vision; bring antitrust back to its original roots in this broader vision of what competition law should accomplish."

JAMES KEYTE: Bill and Barry, very well said. There is a challenge, of course, and then what you can do with that with where courts are now.

That brings me to my last question for both of you: Where do you think these investigations of Big Tech are going to land both in terms of at the DOJ and the FTC and also in light of where we are in our jurisprudence?

BARRY HAWK: If there is going to be a transition, as you put it, or an ending of this present retrenchment era, you have to deal with this inhospitality tradition in the courts – I'm calling it the inhospitality tradition – or worldview, i.e. a *weltanschauung*. It's what Olivier Guersent two weeks

ago termed "legal culture," which is pretty much the same thing. He said, "The Americans have a different legal culture."

Inhospitality toward antitrust law is well documented – it started with *Matsushita*,² right? – and that has to be dealt with. I see that as the major obstacle to change.

If you want "reforms," like the House Report, the biggest obstacle is the courts right now. There are different ways of dealing with that problem, if that's the problem.

How can reformers respond? It is very difficult to challenge a court's worldview or legal culture. There are different ways of dealing with this. You can do it directly – you can change the court, change the judges. You can enact new legislation as the Parliament did in 1841 when repealing forestalling bans.

BILL KOVACIC: I think by the end of this

² *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

calendar year we are going to see major monopolization lawsuits filed by the Department of Justice against Google, by the Federal Trade Commission dealing with Facebook, and by the State Attorneys General either joining or bringing additional cases in both respects. We are going to have the next big wave of monopolization cases.

They face a foreboding judicial gauntlet. It's an extremely demanding set of standards – not impossible. The challenge is to take the footholds that still exist and map out a path to the summit using favorable court of appeals precedents like *Microsoft* as well.

So there is a way to get there, but there are a lot of dead bodies along the way on what's called "the death zone on Everest." You will see them as you're going up. You have to be very careful to try to make it to the summit. It is a hard climb and dangerous.

I think there is a way there, as both

agencies and all of the public enforcement officials now are saying, "We have changed our risk appetite. We are willing to take that chance."

I think what Congress is saying is, "Even if you lose, it's worth bringing the cases; and then, if you lose them all, that is why we are going to change the law."

That is why they have the parallel suggestion in the report to change the law. They named over ten cases that they want to topple by statute, and easily five of them go to the core of the modern nonintervention-minded Supreme Court jurisprudence, the favorites that Barry just mentioned — *Matsushita*, *Brooke Group*, *Verizon*, *American Express*, *Ohio*.

The report says, "We have to clear these obstacles out of the way." It is a recognition in the report that these are risky and difficult cases to bring with additional doctrine — not impossible.

The Court is not inflexibly averse to

finding antitrust liability. In the 2010 decade, the FTC went three times to the Supreme Court and won three in a row, in cases which at the table internally at the FTC, the General Counsel's Office said, "More likely than not you'll lose." They prevailed in all three. So it can be done, but it is an exceedingly difficult journey to make.

What Congress is saying is, "We don't care if you lose. At least play the match. You won't know if you are going to lose until you play the match, that's why you play the match; and in parallel we will do our best to try to change the law, to change these defaults.

JAMES KEYTE: Thank you. Very provocative.

Do you have one sentence you want to give me, Barry, and then I will say a few things and people can go back to their tables.

BARRY HAWK: Congress can do what legislators have done throughout history - If they do not like the law, they pass new legislation.

I think maybe, given everything that is happening that we've talked about, five years from now, despite this inhospitality tradition, my prediction is that in some of these cases brought by the agencies, the Supreme Court will decide in favor of the agencies. This is what history teaches us.

JAMES KEYTE: My last comment is it is going to be a very interesting year for sure, either way – if it cuts through the courts or if we see generation of some legislation and debate about that. Certainly by the time we have our live conference next year there will be things to talk about.

BILL KOVACIC: James, in the presidential debate the one question I would like to ask Joe Biden is: "Are you and your running mate in favor of the House report or not? Would you take that package?"

JAMES KEYTE: That would be a very interesting question, for which we typically do not get straight answers from all politicians.

BILL KOVACIC: Well, take it seriously. It's

on the table.

JAMES KEYTE: We will know and we will talk about that next year.

I do think, with the composition of the Supreme Court, we even saw in *Amex* a pretty solid set of facts for harming rivals and disadvantaging rivals, but at the same time with a marketplace that was growing dramatically, and the majority there had the view that the consumers were not harmed in that circumstance.

So it will be a very interesting potential large collision down the road if these cases actually come to fruition.

Thank you very much for our first Fireside Chat. I couldn't have asked for two more important and better people for this, and we will do it again during the course of the year and then live again next September or October.

I will turn everybody back to your tables. You can stay there as long as you want.

I will highlight that Freshfields is having their similar event starting soon.

I would like to see everybody tomorrow morning at the event with Kirkland & Ellis. We also have another set of keynotes and an in-house counsel roundtable Karen Lent runs, which will be wonderful and very relevant today.

Thank you both again very much.