FORDHAM UNIVERSITY SCHOOL OF LAW
FORDHAM COMPETITION LAW INSTITUTE

47TH ANNUAL CONFERENCE ON INTERNATIONAL ANTITRUST LAW AND POLICY

Day 1

Thursday, October 8, 2020

Welcome

James Keyte
Fordham Corporate Law Institute Director and Adjunct Professor of Law, Fordham Law School; Director of Global Development, The Brattle Group

MR. KEYTE: Welcome, everybody, to the 47th Annual Conference on International Antitrust Law and Policy put on by the Fordham Competition Law Institute.

First, we wish all the best health and safety in this time of pandemic, which is both tragic and challenging.

As for the Conference, when Barry Hawk founded the Fordham Competition Law Institute I'm not sure he envisioned how international it would be in terms of antitrust law and policy; and, of course, the role of economics in the 1970s was pretty much

nonexistent and just on the horizon in some of the U.S. courts. Now we cannot think of antitrust law and policy and economics without a global focus, especially in today's digital economy.

By necessity, this is the Fordham Corporate Law Institute's first virtual conference. All of our work lives and families have all changed. We have gotten used to being more mobile. We have seen probably more of our families than even some of them care for. I finally learned how to use a computer, how to do track changes. But it all seems fitting in an economy that is fully digital.

For our Fordham Conference we have stayed on the basic format, with a few changes.

We had a Workshop Day yesterday with two wonderful economic workshops with Edgeworth Economics and The Brattle Group.

We typically also have an in-person Heads of Authority Workshop that is a private meeting, but instead in the virtual environment we had a Heads of

Authority Q&A Session yesterday with seven fantastic heads of authority. It was very interactive, with questions and answers and questions from the audience.

Today we start the main Conference. We have fantastic keynotes; we have panels on tech and on mergers; we have a Fireside Chat with Barry Hawk and Bill Kovacic, which I encourage you to listen in on. It will be all the more interactive with some questions at the end of each session coming from you all in the audience.

Keynote Remarks

MR. KEYTE: Let's get started with our first keynotes and panel discussion.

Neither of our keynotes nor our panel need much in the way of introductions, but I will do it briefly.

For Executive Vice President Vestager, this is not easy. She has two extremely critical roles in the European Union, Executive Vice President of the European Commission for Europe Fit for the Digital Age, a very appropriate title, and of course the European Commissioner for Competition, a position she has held for a significant period of time. Prior to that, Executive Vice President Vestager had an enormously successful political career in Denmark, including as Minister for Economic Interior Affairs.

But her real impact has been, especially for the focus of this Conference, as Commissioner for Competition and in her Executive Vice President role, leading enormous investigations and review of policy

in platforms, in tech, in privacy, in State Aid — and, in some sense, it feels like it is still just the beginning because she is so much a leader in this critical area of antitrust and international antitrust law and policy.

Assistant Attorney General Makan Delrahim has also had an enormous impact here in the United States. Like myself, he is from Los Angeles. He went to UCLA and George Washington. People don't probably know he has a Masters of Science in biotech from Johns Hopkins. He had a very successful intellectual property and antitrust practice. He was Chief of Staff and Chief Counsel of the Senate Judiciary Committee. In the Bush Administration, he was very known for being both creative and practical.

He is extremely active with respect to cartel enforcement; merger enforcement — I think to the surprise of many — looking creatively at different types of analyses on merger effects; and obviously, very active with respect to the overlap between

intellectual property and antitrust.

In fact, the amicus program from the Department of Justice has been quite influential in the courts. I think it also gives good *ex ante* advice for businesses, and I think it is a very useful and practical shift from the agencies to do that in their interaction with the courts. The DOJ is right in the thick of it and we look forward to more of that in the coming months for sure.

Our two panelists are both established and rising luminaries of antitrust. The panelists will do a Q&A with the keynotes after their keynote remarks.

Howard Shelanski is a Professor of Law at Georgetown; JD, PhD in Economics from Berkeley; served in several roles in the Obama Administration; clerked in the circuit and then in the Supreme Court for Scalia; Chief Economist at the FTC; FTC Director of the Bureau of Economics; and is currently also a Partner at Davis Polk.

Michele Davis is a true rising star from

Freshfields in both mergers and Articles 101 and 102 advice, a real litigator on her feet. Her education: post-grad at Oxford, Harvard Law. She will also offer an interesting perspective on the ground in both London and Brussels.

Now Executive Vice President Vestager's remarks. Thank you very much.

Margrethe Vestager
Executive Vice President, A Europe Fit for the Digital Age, and Competition Commissioner, European Commission

EXECUTIVE VICE PRESIDENT VESTAGER: A very warm introduction.

It is impossible to participate in the annual Fordham Conference without reflecting on the history. It is the longest-running forum for transatlantic cooperation and exchange in the field of competition law — so long-running, in fact, that it was first held in the autumn of 1974, before the Department of Justice filed its historic antitrust suit against AT&T.

In those days, DG-Competition (or DG-IV as we were called then) was a young, inexperienced competition authority compared to our U.S. counterparts, and we came to Fordham and listened and learned. We used this knowledge to develop our approach, often in concert with our transatlantic partners.

It is particularly true, for example, for our merger policy, something that crystallized in 1990 with the entry into force of the EU Merger Regulation. I will spare you the calculation; it is now thirty years ago.

Today EU competition policy has forged its path fully invested in shaping the international discussion, and that is only natural since we have seen the first-hand benefits of competition law enforcement and international cooperation in doing so.

As the economy has become more and more global, harmful practices of larger market players extended more and more beyond the limits of the

jurisdiction of any single competition law enforcer.

Formerly, governments signed cooperation agreements — the European Union and United States did so in 1991 — but the informal networks behind them were forged long before, thanks very much to things like Fordham.

So we are in the right place for a serious discussion.

The extraordinary events of the last many months bring up fresh challenges, challenges that call for serious discussions. The coronavirus crisis has hit us hard and it has hit us fast. It is a crisis of profound human tragedy — so many people have lost their lives; so many people have lost their loved ones — and it is a crisis that also severely damages our economy; it has forced workplaces to close; millions of workers have been put into temporary unemployment, and some even in redundancy.

Emergency measures taken all around the planet have helped lessen the immediate impact of

lockdowns on workers and consumer demand. We can, and we should, continue to intervene to reduce the harmful effects on the labor market and on the economy as a whole.

But we also have another task: to ensure that the recovery and new growth is in line with our principles and our strategic priorities of green and digital transition.

For us in Europe, this will in the first place depend on a European Single Market that is unfragmented and that functions properly. We need fair and contestable markets because they make us better off. They signal where investments should flow. They tell us where value is and who is creating value in the economy.

A deep and unexpected crisis, like the one we are in right now, doesn't change any of that. If anything, it reinforces what we already knew. It is precisely when things are changing fast that we need to rely on our fundamentals most.

The crisis and the recovery, as we all sadly know, have losers and winners too. So much is sure, is a given — we know that from our experiences — but which firms will win and which will lose in the crisis that we are in and have ahead of us? In my experience, that is not a question that politicians can answer, at least not very well.

That brings us back to the Single Market. The more competitive and the more contestable that it remains, the better investment will flow where it is truly needed. The result will be a quicker, a stronger, a more sustainable recovery, and this is what we need. It will be our compass in the coming months and the coming years and we will need to manage, to be able to navigate in I think quite stormy waters ahead of us.

Our competition rules give us a formidable toolkit to defend the Single Market. Each of the three instruments — antitrust, mergers, State aid — has a role to play, and each of them will be

challenged by the crisis.

For antitrust it is a priority to continue to pursue and unmask cartels. Collusion causes most harm to competition because it takes place behind a veil of dishonesty. Collusion leads to artificially high prices and slows down innovation.

Just last week, the Commission adopted a decision against three components manufacturers in the car industry representing two separate cartels with a total fine of €80 million.

Part of the antitrust battle lies in being clear and transparent about what is and what is not allowed. To this end, from the very outset of the crisis we offered guidance. We provided an ad hoc comfort letter in relation to agreements to tackle shortages of essential products due to the Covid-19 crisis.

The Covid-19 crisis is obviously an unprecedented situation for many sectors, not just essential products, so we have been open to clarify

what kinds of cooperation are unproblematic and identify the necessary safeguards for cooperation to bring benefits without the risk of unwanted effects. We have done so through informal feedback to companies that have been approaching us. For example, we have had very useful exchanges with representatives of the automotive sector.

We must also continue to fight abuse of dominance. Dominance is nothing new, but in times of crisis there is an added concern: when money is tight, having deep pockets matters, and that heightens the risks posed by predatory pricing behavior or other forms of exclusion.

Fighting dominance can also mean changing our enforcement approach. Yesterday we adopted our final decision in the *Broadcom* case, for which interim measures were announced earlier in the year. This is the first time interim measures have been used in a case leading to commitments, but I don’t think that this will be the last one. They can prevent

irreparable harm to competition during the time it takes to reach a final decision, and obviously it is when markets are moving fast that this will matter the most. They do something else in addition to preventing irreparable harm while the case is being investigated: they also create the right incentive for companies to work with enforcers to reach commitments.

Another key challenge in antitrust is keeping up to speed on new and emerging areas of business. In June we launched a section inquiry in the Internet of Things to understand the market dynamics for networked products and services where data plays a very big role. With markets shifting, new technologies emerging, it is likely that we will bring more sector inquiries in the near future.

Finally, we need to make sure that our antitrust toolkit is up-to-date, and that may mean new powers to enforce. What is currently missing in our toolbox is the possibility to carry out market investigations into structural issues that create

inefficiencies, in particular in digital markets.

We are working on a new legislative proposal focusing on digital markets which will feature two complementary pillars: a combination of *ex ante* regulation and case-by-case enforcement.

The regulatory side will target a small number of large gatekeepers, setting out a clear list of do's and don'ts. Yes, you should make certain data available to platform users; and no, you should not engage in proven forms of harmful self-preferencing.

The case-by-case enforcement side will allow us to investigate digital markets and intervene by imposing remedies where we identify a structural market issue of failure.

Of course, the reach of these markets means that this is a shared challenge for competition enforcers everywhere. I was very pleased to see in the report published by the House Judiciary Committee that it covers many of the same issues that we are faced with in Europe.

Regarding mergers, we have seen a temporary reduction in notifications, although the decline has been quite small. There have also been some delays in responses to questions. But merger enforcement never stops.

In the near future we expect to see consolidations. I think it is often the case after a crisis that industry tends to reorganize itself following a shock. The biggest issue for us will of course be to avoid excessive concentration that will adversely affect European businesses and consumers.

The crisis may also form the background for more recourse to the failing-firm defense. That may be the case if a company wants to a buy weakened rival. That makes our criteria even more important than ever — the failing firm's future in the market; the availability of other options that harm competition less; the final fate of the assets if the firm actually were to fail — and any departure from these criteria would mean falling into the trap of

allowing the crisis to lead us away from our objective, which is to preserve open and competitive markets.

The final instrument is State aid, something that, as you all know, is uniquely European. State aid is here in order to ensure that companies compete on real equal terms, also when it comes to subsidies from Member States. It also helps Member States to do more with less by using competition to drive down costs and by making best use of limited public and private resources.

Now State aid control is more relevant than ever. At the start of the crisis, we adopted temporary rules to enable Member States to support businesses suffering from the extraordinary restrictions taken to contain the virus. This response was necessary to preserve value, to preserve jobs, and also to set the conditions to protect fair competition.

Given the continued economic uncertainty, we

are in the process of prolonging and adopting these rules until mid-2021. But, of course, temporary rules must remain temporary, and we are at the same time thinking about what the right conditions would be to enable much needed forward-looking investment while preserving the level playing field.

Which also brings me to my last point, which is that State aid control also contributes to fight tax avoidance. Subsidies can come in many forms — a favorable loan, a piece of land, a tax advantage given selectively to a company. If Member States allow a handful of companies to pay a lot less in taxes than their rivals, that undermines fair competition and it also deprives the public purse of funds for much needed investment.

Before the summer the General Court — which for a case is like the first instance — annulled the Commission's State aid decision in *Apple*. In the decision we found that Apple received illegal tax advantages in Ireland. Of course, we have very

carefully reviewed the judgment, and after doing so we believe that the Court has made certain errors of law. That is why we have appealed the judgment to the higher instance, the Court of Justice of the European Union.

For example, we are seeking clarity on a legal issue concerning the treatment of the different companies within the group for tax purposes. It is a well-established principle that for tax purposes companies within a group should be treated as if they were separate entities operating independently from each other.

However, the judgment seemed to imply that when assessing the tax treatment of Apple Group companies in Ireland the Commission should have taken into account the role of employees and directors of Apple Inc. in the United States in managing Apple's intellectual property, although these were separate and distinct companies and although Apple Inc. was paid billions of euros for its management services

through a cost-sharing agreement.

This has far-reaching consequences. It is undisputed that Apple's Irish Group companies recorded almost all profits generated by sales of Apple's products outside of the Americas. They were able to do so because they owned a license to use Apple's intellectual property outside of the Americas, and they obtained that license by making annual payments to Apple Inc. in the United States under the cost-sharing agreement.

Unless parent and group companies are treated as separate entities, companies can have their cake and eat it. They can reduce their taxable profits by paying for a license while at the same time claim that the profits resulting from that license should be taxed elsewhere. In the case of Apple, that meant for the year 2011 €16 billion of profits recorded in Ireland of which only €50 million were considered to be taxable in Ireland and the remainder was then taxed nowhere.

We now have to wait for the European Court of Justice to deliver its judgment, but two things are already clear. First, we will continue our efforts to make sure that selective tax advantages do not undermine fair competition. Second, we need to push ahead to put in place the right regulation to address tax loopholes and ensure transparency.

I have said a lot, but I realize that I am actually really just scratching the surface. I am sure that, with the wonderful program outlined in the introduction, in the course of this Conference we will have a lot to learn, a lot to hear, and have many more perspectives on the crisis and where we are headed.

This crisis has kept us apart. At times I have found it very, very difficult and painful to manage the lack of a face-to-face, of a real interaction, of coming together.

I think, though, that now we cannot be any different. It has in some sense also brought us closer together in some ways because for competition

policy it crystallizes what we share, what we have in common, as practitioners as well as as policymakers. I want to thank you for that closeness in our approach and in sharing, I think a very common and a very important mission.

Thank you very much.

"Video Killed the Radio Star": Promoting a Culture of Innovation

Makan Delrahim
Assistant Attorney General, U.S. Department of Justice

ASSISTANT ATTORNEY GENERAL DELRAHIM: Good morning. Thank you for the earlier introduction, James, and thanks again to the Fordham Competition Law Institute for inviting me back to participate today.

I know firsthand we have all recently learned the challenges of hosting virtual international events, and I congratulate you for making this important event possible despite the obstacles we face.

I also want to acknowledge and thank and say what a privilege it is for me to appear again with Commissioner and Executive Vice President Vestager, for her continued contributions to promote a culture of competition and for the valuable and constructive partnership she and I have had these past three years I have been privileged to be in this job. We have accomplished a lot, worked civilly through minor disagreements, and have together improved in my view

the free markets to the benefit of consumers across the globe.

Some of us are old enough to remember that life-changing moment when MTV launched in August of 1981. As you may know, the first video MTV aired was a song by The Buggles called *Video Killed the Radio Star*, which happens to be the title of these remarks. The song is about the transformative power of innovation. A new form of musical entertainment had arrived on the scene and radio's dominance was under a very real threat.

Today, nearly forty years later, MTV's video stars long since have been killed by technologies that followed. That particular song's sentiment nonetheless remains as relevant to antitrust policy as ever. Innovation and technology continually are changing markets and the economic landscape, and even creating whole new industries, industries we couldn't imagine just a few years ago let alone forty years ago. It is incumbent on competition law enforcers to

champion policies that support the incentives for the next generation of the "video stars" to emerge.

The pandemic has underscored the importance of protecting the climate for innovation. We all are counting on innovations in medical science for the development of strategies to treat and protect us from infection, and of course every one of us, including at this conference, are affected, whether it is education or health or just our entertainment that this pandemic has forced to move to the digital realm.

Today I would like to share some examples of the innovations that the Antitrust Division has undertaken to ensure that we enforce the antitrust laws in a way that accomplishes the goals of protecting competition and also supporting growth and innovation.

Over the past there years, we have taken a fresh look at the Division's policies across nearly all aspects of our work to ensure that they accomplish these aims. A mindset of embracing flexibility and

adaptability served and continues to serve us well as we pivoted to telework and pandemic-related competition challenges. In many ways the pandemic actually reinforced our perspective, and experimenting with new ways of doing things provides opportunities to learn, grow, and ultimately make us better — or, as I have noted before, anti-fragile.

Of course, competition law, as we all know, is about protecting a process, not about mandating a particular result or favoring one competitor over another. In that spirit we have focused on improving processes that promote and sustain conditions of innovation to thrive rather than directing specific outcomes in the marketplace.

At the OECD's Global Forum on Competition last fall, I was struck by some familiar insights of Nobel Prize-winning economist Jean Tirole. He is a giant figure in the field of competition law and economics and he has contributed much. In that particular address, he offered some advice to

enforcers for tackling the complex issues we all face in the digital space. He said, "We don't need more laws. We need more guidance." He called for more "participative antitrust" between competition agencies and stakeholders to consider appropriate enforcement or regulatory approaches to modern competition challenges.

I agree with Professor Tirole that our existing antitrust laws are up to the task of addressing modern competition problems. Yet, we have to be flexible; we need to be self-reflective and collaborative to ensure that our approaches keep pace with evolving facts and economic wisdom.

The House Judiciary Committee's report reflects that. It has taken a look, as our constitution system with the separation of powers allows, for them to constantly be looking at the enforcement regime and taking a look to see if there are changes that may be required to the system that we enforce in the Executive Branch.

The participative approach has served us well at the Antitrust Division. In the past three years, we have improved our transparency: we actively have updated our Guidelines, made speeches, issued business review letters, and submitted amicus briefs and statements of interest to courts in a deliberate effort to share and explain our analytical processes.

The amicus program was an initiative that we launched about three years. It didn't really get active until about two years ago. I appreciate, James, your mentioning that earlier. We have seen by any objective standard the incredible impact it has had on the development of the law: narrowing immunities where folks have advanced very broad immunities and defense in many cases, and also the proper interpretation of the laws.

Clear guidance helps mitigate the risks innovators and entrepreneurs face when investing resources to develop new products.

Whenever possible, we welcome a wide range

of views, including from industry participants, academics, and consumer advocates. For example, we regularly hold public workshops and post draft Guidelines for public comment.

The dialogue that plays out in these fora inevitably leads to better and more thoughtful results. You may have noticed that I often invite the views of my biggest detractors that we have had over the past few years, and I welcome and thank them for their views, and I think they add to the process to help improve the process and the final product.

I would now like to share some specific examples of the Division's efforts to promote innovation, which I will group into four broad categories: (1) better explaining the state of the antitrust laws relating to patent licensing practices; (2) promoting substantive and procedural convergence with our international partners; (3) modernizing our domestic enforcement program; and (4) encouraging innovation within the Antitrust Division itself.

"New Madison" Approach

I will start with our approach to the intersection of antitrust and intellectual property law, a critical area for innovation policy I think.

I first presented an updated and transparent analytical framework based on neutral principles last year in a speech followed by an article called *The "New Madison" Approach to Antitrust and Intellectual Property Law*. This was published in the University of Pennsylvania Law School's *Journal of Law and Innovation*.

This correctly balanced approach is aimed at ensuring continued innovation and dynamic competition in the context of standard setting. We have cautioned that antitrust law should not be used as a tool to police contractual commitments to license standard-essential patents on fair, reasonable and nondiscriminatory (FRAND) terms. When licensing negotiations fail, patent owners should have the full range of statutory remedies available to them when

their patents are infringed, including injunctions, the right to exclude. At the same time, coordination among members — competitors — of standards development organizations can raise competition concerns that should not be overlooked. We have advocated for these principles through speeches, guidance documents, business review letters, and statements of interest in various federal courts.

I am encouraged that the principles of this New Madison approach continue to gain acceptance not only in the courts in the United States but in international courts as well.

In May, the German Federal Court of Justice issued its decision in *Sisvel v. Haier* in support of a standard-essential patent holder's enforcement rights. The German high court held that an implementer must take an active role in negotiations and be willing to take on a license on any terms that are FRAND.

Other German courts have echoed this concern

for patent holder rights. In a decision in early September in a dispute between patent-holder Sharp Corporation and implementer Daimler, a Munich court rejected Daimler's antitrust-law based defense and attacks on that system. The court granted the Japanese corporation Sharp's injunction request against Daimler's sales of the Mercedes-Benz for infringing Sharp's patent which is essential to LTE technology.

We have also seen that in the UK Supreme Court's decision in August in *Unwired Planet v. Huawei*.

These decisions are important successes reflecting the continued development of the thinking and the proper approach and the convergence of legal systems around the principles outlined in the New Madison approach as the right way to look at these in a way to ensure maximum innovation incentives, and in doing so they promote innovation.

International Engagement

This leads me to the topic of international engagement more generally, which has been a key focus of my tenure at the Antitrust Division.

With more than 140 competition agencies around the world, and as mergers and conduct increasingly draw attention from enforcers in multiple jurisdictions, convergence on substantive and procedural approaches is more and more critical.

As the great American innovator Henry Ford once said, "Coming together is a beginning, staying together is progress, and working together is a success."

I think we have had many successes over the past several years and I look forward to continued success with our partners abroad.

We have worked together as a strong community of international enforcers as we have reacted in real time to the many challenges posed by the pandemic.

Since March, the Division has participated

in a number of virtual events hosted by multilateral organizations — such as the ICN, OECD, and UNCTAD — to compare notes on pandemic responses and to make sure we learn from each other's experiences. We appreciate the opportunities to learn from others in these unprecedented times and to help contribute our experience to the extent it is helpful.

We have not neglected our other priorities in the meantime.

Promoting greater procedural norms and due process is a prime example. The International Competition Network's Framework for Competition Agency Procedures (CAP) is a huge step forward toward harmonizing due process principles, principles that we have lived by here in the United States, in Europe, and in multiple jurisdictions abroad.

When I first announced the initiative in June 2018, at that time called the Multilateral Framework on Procedures (MFP), I urged competition authorities to go beyond soft commitments and sign on

to a multilateral agreement on due process that included meaningful compliance mechanisms. Less than a year later, that vision was fulfilled when the CAP came into effect through the ICN with seventy founding competition agencies, importantly including authorities in Europe, Canada, and the United States.

We all came together and recognized the importance of sending this signal. I think through this agreement we will all be more transparent, predictable, and consistent as law enforcers, and we will continue to build trust in our enforcement actions.

The CAP also represents a remarkable achievement for the ICN itself, an innovative organization in its own right. The ICN was launched less than twenty years ago by a group of fifteen agencies, including the Antitrust Division. Today, the ICN has grown to include 138 member agencies from 125 jurisdictions. It has become an influential force in driving sound policy through recommendations and

guidance for its members.

A recent example of the ICN's meaningful policy work is this year's Guidance on Enhancing Cross-Border Leniency Cooperation. The ICN's influence was on display last month at the ICN 2020 conference — which had to be held virtually and unfortunately not in my home town of Los Angeles — that was hosted by the Antitrust Division and the Federal Trade Commission. It featured spirited discussions on some of the most challenging issues in competition policy, including the issues of High Tech.

The OECD is another great and important forum for advancing international convergence that enhances innovation for the benefit of consumers. The Competition Committee's biannual meetings provide an opportunity for wide-ranging competition policy discussions. I mentioned Professor Tirole's great presentation this last fall.

Over the last three years alone, we have

addressed the digital economy, intellectual property licensing, labor, education, and fin-tech markets, to name just a few of many topics we have addressed at the Competition Committee. It has been a true privilege for me to have chaired the Working Party 3 of the Competition Committee, where so much has been accomplished.

Cooperation with respect to specific cases has increased substantially in recent years as the number of jurisdictions active in merger review has grown.

We communicate with our global counterparts on a daily basis. Last year, we collaborated with at least twenty-five jurisdictions on cross-border investigations and global cartel enforcement and with fifteen international counterparts on merger and civil nonmerger matters alone. These are actual specific matters of enforcement, not the broader policy discussions and the convergence, where we engage with over a hundred agencies through the various fora.

There is still much work to be done, particularly as agencies around the globe grapple with the challenging issues presented by the digital economy.

At the Antitrust Division, we are continually looking for innovative ways to strengthen international cooperation. For example, in September, a month ago, I signed a new competition enforcement Framework among the DOJ, the FTC, and the competition agencies in Australia, Canada, New Zealand, and the United Kingdom. The Framework provides the basis for future bilateral agreements focused on investigative assistance.

Innovations in Domestic Enforcement

Let me now turn to a number of domestic enforcement initiatives that we have launched aimed at promoting free markets and a culture of innovation.

Not surprisingly, over the past seven months, responding to the Covid-19 pandemic has been the key priority. In March 2020, the Antitrust

Division and the FTC announced an expedited process for reviewing and providing guidance relating to collaborations of businesses working to protect the health and safety of Americans during the pandemic. The Antitrust Division has issued four Covid-19-related business review letters through this process. We have done this within a week. These are processes and reviews that normally could take nine months or over a year.

At the same time, we remain vigilant about combatting anticompetitive behavior by firms seeking to take advantage of the turmoil. The pandemic did not sideline other important efforts to rethink and improve our enforcement program.

One of these was we withdrew and reconsidered and issued new merger remedies guidance. The last one was the Division's 2011 guidance from which we withdrew. The DOJ's modernized Merger Remedies Manual, released in September, reflects our strong preference for structural over behavioral

remedies as the proper solution to problematic merger transactions.

As I have explained before, antitrust law is law enforcement, it is not regulation. We have not been given a license to meddle in day-to-day business as a condition of merger approval. Merger either violates the law or it does not. Behavioral remedies tend to be regulatory in nature and entangle the Division and the courts in the ongoing operation of a market, which is inefficient and probably improper in most instances. Often, these types of behavioral remedies will distort the market and stifle the innovation and competition that we should be advancing.

In a similar vein, we undertook a comprehensive effort to review nearly 1,300 so-called "legacy" judgments, some of which date back to the 1890s, in our Judgment Termination Initiative. We filed motions in federal district courts across the country to terminate decrees that were no longer

needed to protect competition, and in some cases were potentially harmful to competition. We posted these for public comment, we evaluated each and every one, and I believe we have now terminated a little over 800 of these decrees.

In a recent case, a federal court in Manhattan terminated the Paramount Consent Decrees, which for over seventy years had regulated how certain movie studios distribute films to movie theatres. As the court noted, *Gone with the Wind*, *The Wizard of Oz*, and *It's a Wonderful Life* were the blockbusters when these decrees were litigated. All great movies, but it just shows the age of when those were implemented.

Our efforts in this regard ensure that regulatory decrees do not stand in the way of the free market functioning as it should. God knows how many innovative business models the consumers have missed out on because of just the Paramount Consent Decree; how many different mechanisms that technology would have allowed consumers to view and enjoy theatrical

movies that had been hampered by these consent decrees. We hope going forward there will be more innovation in that field.

It also frees up the Division's resources and attention so that we may better focus on protecting and promoting competition in our day-to-day responsibilities.

Another example of our efforts to advance merger policy is the recent update to our guidance on vertical mergers, which we revised for the first time since 1984, when the Justice Department issued the Nonhorizontal Merger Guidelines.

We, along with the FTC, I'm pleased to report, released joint draft Vertical Merger Guidelines in February 2020, right before the pandemic, and conducted workshops to collect feedback and perspectives from diverse groups. The revised final Guidelines, issued in June, provide transparency into our approach to evaluating vertical transactions, which we are seeing more of these days.

Knowing that delays can create business uncertainty and harm innovation, we also took a fresh look at our merger review processes internally to seek ways to streamline our investigations and provide for greater predictability.

In September 2018, I announced a goal of resolving most investigations within six months of filing, provided that the parties promptly comply with Division requests throughout the entire process. We published for the first time a Model Voluntary Request Letter and a Model Timing Agreement to facilitate expeditious cooperation and compliance and to allow for greater predictability and transparency.

We sought to streamline enforcement actions where possible too. Earlier this year, the Division made its first ever use of arbitration to resolve the proposed merger of Novelis Inc. and Aleris Corporation. The arbitration proved to be an effective and efficient way to resolve the one dispositive issue in the case, which centers, as it often does, around

market definition, and I expect it will be used again under the right circumstances.

Turning to an innovation in our criminal program, last November we launched the Procurement Collusion Strike Force — or the PCSF as we call it — which is an interagency partnership among the Antitrust Division, thirteen U.S. Attorneys' Offices across the country, investigators from the Federal Bureau of Investigation, and four federal Offices of Inspectors General. Liaisons from these agencies are working together to detect, deter, and prosecute cartels in government contracting.

It has generated an overwhelmingly positive response from stakeholders. We have received more than fifty inquiries to PCSF from federal, state, and local government agencies seeking outreach training, assistance with safeguarding their procurement processes. Of course, an OECD report some years ago had noted that proper deterrence in this field would save taxpayers more than 20 percent in the costs

outlaid for procurement in the government programs.

So far, we have opened nearly two dozen PCSF grand jury investigations. And we just appointed our first ever permanent Director of the PCSF, Dan Glad, who is the Assistant Chief of our New York Field Office and a career veteran prosecutor, and we are now searching for a permanent Assistant Director given the overwhelming response we have had.

I have joked that by creating the PCSF I broke the monopoly that the Antitrust Division has had on federal enforcement of these cartels and now we have partnered with the very capable U.S. Attorneys across the country.

Promoting a Culture of Innovation Within the Antitrust Division

Finally, I will briefly mention a couple of our efforts to encourage innovative thinking within the Antitrust Division itself.

Technological advancements in recent years have changed virtually every industry within our

purview.

In August, I announced a restructuring of our civil program to ensure efficient and effective enforcement that accounts for these changes. This included a realignment of responsibilities within the civil sections, which created a new section of Financial Services, Fin-tech and Banking, where we took various commodities and expertise among four different sections and put them into one.

We also combined our media and entertainment sections with our telecommunications section. Given the convergence we are seeing in industry, that just seemed to make good efficient sense.

We also created an Office of Decree Enforcement and Compliance to dedicate Division personnel to ensuring proactive enforcement of consent decrees. These are consent decrees where the merging parties had given their commitments to the public through the Justice Department to ensure certain conduct and activities and we thought it was important

to proactively hold their feet to the fire.

In addition, we created a Civil Conduct Task Force to focus full time on civil nonmerger work where the parties may not have the incentive to cooperate all the time like they do in mergers because they want to get a deal done. When you are dealing with nonmerger work, the parties may have other incentives as far as cooperating with the Justice Department.

We are paying close attention to a number of emerging issues, and we are making sure we develop and maintain expertise on cutting-edge issues and developments.

Last year, we launched a novel program to build our expertise by training some of our attorneys and economists in emerging technologies in the fields of blockchain, machine learning, and artificial intelligence. We started with a pilot program of about nine of our top attorneys and economists. I think it is critical to understand these technologies and their growing business applications in all

industries.

We have selected this training through MIT's Sloan School, and so far have trained over thirty of our professional staff, all of whom have had an overwhelmingly positive response to these courses. In fact, I participated in one of them myself.

Conclusion

To conclude, the Antitrust Division is committed to ensuring that competition policy remains a force for good in fostering innovation.

Back in 1981, video may have killed the radio star. In 2020, however, streaming video provides a lifeline for the rest of us to carry on with our lives — from learning, shopping, or enforcing the antitrust laws — in the face of unprecedented physical limitations.

Recent experience has shown the power of technology to improve our quality of life, and also how much we have come to depend on it. As The Buggles put it, "We can't rewind, we've gone too far." There

is no way to predict what life-changing, or even life-saving, innovations are on the horizon.

We *can* guarantee that, through vigilance in our role as competition law enforcers, we will preserve incentives to innovate while promoting the competitive process.

I very much thank you, James and Fordham, for inviting me back. Regardless of the outcome of these elections, I anticipate this might be my very last one as the Assistant Attorney General for Antitrust. It has been an absolute privilege to be here and share these thoughts.

Panel Discussion

Howard Shelanski
Partner, Davis Polk & Wardwell LLP;
Professor of Law, Georgetown University

Michele Davis, Partner
Freshfields Bruckhaus Deringer LLP

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MS. DAVIS: Thank you very much, Executive Vice President Vestager and Assistant Attorney General Delrahim, for those remarks. And a special thanks to the Assistant Attorney General to make sure we all have *Video Killed the Radio Star* stuck in our heads for the rest of the day. [Laughter]

I would like to open the Q&A part of this session by turning to the subject of merger control and touching on a few developments that we have seen on both sides of the Atlantic.

My first question is to Executive Vice President Vestager. You recognized in your remarks that, given the crisis, we are going to see more consolidation going forward, and also that you and the Commission will be obviously very focused on avoiding

any excessive concentration.

We have recently had the General Court's judgment in the *CK Telecoms v. Commission* case annulling the Commission's decision which prohibited the *Telefónica UK O2/Hutchison 3G UK3* merger back in 2016. One of the key things coming out of that case was that the 2004 Merger Control Regulation regime did not lower the standard of intervention for these so-called "gap" cases.

I know Commission officials have been quite critical of the judgment on the conference circuit in recent times, calling it contrary to the spirit of the EUMR. I suspect you and I may well have very different views on the merits of the judgment because I was part of the team advising CK Hutchison on this.

The CJEU is going to have the final say on interpretation of the "significant impediment to effective competition" (SIEC) test. But, as we know, the wheels of justice do not turn particularly quickly in Europe, so I am interested to get your view on what

the judgment means for how the Commission will look at these sorts of gap cases in the interim period while we wait for the CJEU to rule.

EXECUTIVE VICE PRESIDENT VESTAGER: I see that there is not only an academic interest; there is also a personal interest that you have in this question and the answer to it.

One of the things that is very important in the question on teleco mergers is that you can see in our practice that we do not have a "magic number." It depends on the market situation. I think that is very important to take onboard.

Also, the UK case was a very specific case due to the way that it was set up with a network-sharing arrangement, and I would be very careful to make that a general thing that can be generalized to any merger because, first and foremost, I think it is very important that every merger is investigated on the facts of the relevant market and how the merging parties are situated in that market.

You probably know that we tried to encourage, at least positively mention, pan-European consolidation. We have a number of very big telecos in the European Union as well, but not as big as you have them in the United States where the big ones would have a presence in every state. I think in Europe the one with the strongest presence is in fourteen Member States.

The question is also very much on the side of the industry if one continues to pursue mergers within national markets or try to pursue a more pan-European presence. We of course do our best to build a regulatory environment that would cater for having a stronger single market also when it comes to telecos.

MS. DAVIS: To follow up on what you said, the General Court's judgment can be of wider application because clearly that was more focused on the sort of gap case test and has wider application beyond just the teleco sector.

Can we expect to see any difference in how

the Commission actually goes about assessing cases in those sorts of four-to-three scenarios that you mentioned in light of the General Court's jurisprudence on these points?

EXECUTIVE VICE PRESIDENT VESTAGER: Now that you have rephrased the question I will rephrase my answer.

What is important here is that we need to be able to assess gap cases. We need to be able to assess them on the merits of the case. That is not changed by this judgment because, since we do not have a fixed view — I know that some think so, but it is not a situation that I at all can relate to, that we should have a fixed view as to the number — then of course there is no fixed rule for us to revise because of a judgment.

We of course learn from every judgment. That goes without saying. We live in a Union built on the rule of law. The facts of the case, the objective facts that we can see and the facts that we get from

market participants, are our bread and butter. So we will assess any case on the merits of it, and then of course eventually we will have the CJEU's take on it as well, and then of course it will be final, and I think only then will it be really interesting to see what will be the final SIEC in cases like this.

MR. DAVIS: Thank you very much.

I am going to hand over to Howard at this point.

PROF. SHELANSKI: Good morning. Thank you very much.

Before we turn to the U.S. side, Executive Vice President Vestager, I would like to follow up on Michele's question with another question on the theme of mergers. It again stems from your remarks about the likelihood that in the wake of economic crisis we are going to see efforts for reorganization of businesses and some realignments in certain markets.

I think in the global context in which we operate — that gives rise to this kind of conference —

a lot of these mergers are going to be multijurisdictional and touch on a number of different countries.

The concept that merger notification thresholds are coterminous with jurisdiction has long been a central tenet in Europe. How have stakeholders reacted to the Commission's recent announcement that Member State authorities will be encouraged to refer cases to the Commission even if those cases are not notifiable in the referring Member State's jurisdiction?

How does this practice fit with the International Competition Network's best practices, which require a material nexus with the reviewing jurisdiction, and the Commission's longstanding advocacy of those practices?

I would be interested to hear really what you have in mind with that recommendation and how it will be implemented going forward.

EXECUTIVE VICE PRESIDENT VESTAGER: As you

probably know, for quite some time we have had an ongoing consultation about how we set merger thresholds; how do we get to see the right mergers that will have effects in the marketplace.

One thing was the question of minority shareholding because we had a case that we were able to assess because it was directly referred to us. That gave us sort of food for thought: should we change in order to see more of those without referral? Here we assess that changing the notification laws would give us many, many cases but no certainty that we will actually get to see the ones that were important.

It is kind of the same thing here. We have a worry or a concern about the market effects when giant businesses buy up smaller innovative businesses before the scaleup phase. Without prejudice obviously, it will be very interesting to see. So far, we have seen the cases based on referrals. Those include the *Facebook/WhatsApp* and the

Microsoft/LinkedIn cases.

Again here we were going through what would enable us to see these cases. Again, we found it would not be proportional to ask all of these cases to be notified. That would give a lot of notifications, a lot of red tape for industry to deal with, and we did not find that to be proportional.

So we were looking for another way of dealing with this, and this is why we came to think of Article 22 and to make better use of those referrals. I think for a number of years we have been discouraging this, but I think here we will of course discuss with the Member States how to make this system work.

The criteria will be the same. The Commission can only accept a referral for a transaction that affects trade between Member States and that significantly affects competition within the territory of the referring Member State. I think those two principles give certainty, so it is also

possible for acquiring companies to have a quite clear idea of whether or not this is a case that has the potential of being referred to us.

But we are not done yet because we are still in the process of discussing the procedural and practical aspects with the national competition authorities. We hope to be done with that, give or take, late spring next year in order to make this system work. There is a lot of unease on our side if there are things that we miss — but again, obviously without prejudice, because every case will have to be assessed on its merits.

PROF. SHELANSKI: Thank you. That is very helpful and gives us a better idea of what you have in mind. We will look forward to the development of that framework.

Let me turn it back to Michele for the next question.

MS. DAVIS: Thank you, Howard.

I am heading to Washington now and to

Assistant Attorney General Delrahim.

You talked in your remarks about the importance of promoting substantive and procedural convergence with your international partners. As we rapidly approach the end of the Brexit transition period, we are going to see the UK CMA taking over jurisdiction for a large number of global deals and, in the words of the CMA's chief executive, "taking back control genuinely of the decisions."

The CMA has shown in recent times that it is not afraid of applying novel theories of harm and innovative analytical approaches, and in fact, it is not afraid of blocking international transactions involving no UK companies even when in some cases those transactions have been cleared by other major and respected competition authorities, including the U.S. agencies.

The recent abandonment of the *Taboola/Outbrain* deal follows a run of CMA decisions which have contributed to U.S.-centered deals

collapsing. Think about things like *Illumina/PacBio* and *Thermo Fisher Scientific/Roper Technologies*. Given the insurgence of the CMA on the international stage post-Brexit, do you think it is possible that we are entering a new era of transatlantic divergence on certain deals, and what do you think this means for how the United States and the CMA will cooperate on transactions going forward?

ASSISTANT ATTORNEY GENERAL DELRAHIM: Thanks for that question, Michele. That's a good question. I think it remains to be seen what transpires. Certainly, this is a shift from what we have seen over the past thirty or so years.

I am confident that we will not see the type of divergence where it is going to be disruptive or harmful to global competition and commerce.

Taboola/Outbrain was one where we ended up not taking action. However, we did recognize that the local facts and the impact on competition were different in Israel as far as the number of

competitors who were participating in that type of product offering. We had differences in how to prove the exact market definition. Were we talking about native ads? I don't know what kind of advertising you would call it specifically; but is it all digital advertising — probably not, like the parties had advanced — but it might not have been the type of content recommendation but maybe a little bit broader.

We were working closely with not only our friends in Europe but also the Israeli authority where the two companies were domiciled. It is not a big surprise that you will have a merger that will have different impacts in different jurisdictions.

The question is: Is the analytical approach different? I thought the analytical approach was largely the same.

Sabre/Fare*logix* was another one where we challenged it. We went through trial and — despite the judge's findings of the facts and the credibility of the witnesses on our side, based on the law, and I

think a misapplication of the law, in a decision that has since been vacated — the judge held for the parties. We never got a chance to fully appeal before they abandoned it. But in the United Kingdom they did block it.

The analysis and the outcome in those mergers were exactly the same between us and the United Kingdom.

It is a very advanced agency with incredible capabilities in the United Kingdom, with great leaders, and I think a great and developed court system there to continue to evaluate the proper analytical approach.

So I think it remains to be seen. There always is a danger of divergence. I have not seen the evidence so far, but we have not had the experience yet with the full Brexit in effect.

MS. DAVIS: Thank you.

I will hand it back to you, Howard.

PROF. SHELANSKI:

I would like to depart from the theme of mergers. Mr. Assistant Attorney General, I was very interested in your comment about the efforts you have taken to strengthen and revamp civil conduct enforcement.

When we look back over the past twenty years or so, I think there has been a divergence in the appetite to pursue antimonopoly cases, single-firm tech cases, between the European Commission and the U.S. agencies. Indeed, we had the Section 2 report on single-firm conduct during the Bush Administration that established certain safe harbors and adopted certain presumptions that made it harder to enforce those cases and suggested that the U.S. agencies, or at least the Department of Justice, would not be pursuing them with quite the (inaudible).

Obviously, in recent times we have seen what looks like a resurgence of Section 2 cases, antimonopoly enforcement — certainly the FTC's case against Qualcomm and (inaudible) and a variety of

other cases of lower profile in which we have seen investigations and enforcement actions.

Is it fair to say that we are seeing a return or a resurgence of Section 2 enforcement? Is this a shift in philosophy or is this driven by certain market segments?

Is the House Judiciary Committee report that Executive Vice President Vestager referred to a harbinger of more of a focus on Section 2?

ASSISTANT ATTORNEY GENERAL DELRAHIM: Thank you, Howard.

I think it is probably a little bit "all of the above" as far as the factors weighing in. A lot of it depends on sometimes how risk-averse people are. I have been to some extent surprised at how conservative the enforcers have been about taking the risks.

I think it is important to advance the law, take the risk where you can appropriately when there is a case. I don't know the exact numbers, but I

believe I have opened at least six — it might be more — Section 2 conduct cases during my tenure, which is probably more than in the last ten years combined as far as Section 2 type cases. It was not just because we wanted to do that because of a statistic; it was because we saw cases and we were willing to go after them.

Part of the challenge is the fact that those are hard, they are difficult, and there is a number of factors that feed into that difficulty.

One, the most important, is resources. We are at the resource level of twenty years ago. The level of complexity and the volume of information that is available, just because of email and text messages and the generation of digital documents, is huge. Now, of course, we have computer-aided search through the discovery material, but the volume of information that we get in any investigation is huge and the number of staff we have has remained the same. In fact, the effective budget of the Antitrust Division

at the FTC is about 25 percent lower than ten years ago.

For the last two and a half years I have been pounding the pavement to get it. Finally, we have an administration request for an additional 10 or 12 percent increase in budget. I was pleased that there was bipartisan recognition in the House report that the agencies need more resources.

When you have resource deficiencies, you have transactions, like mergers, that have statutory deadlines to them; you have to deal with them. So what does that mean? It means that conduct transactions that do not have deadlines might have to take a back seat, unfortunately.

You have criminal cartel cases that have statutes of limitations in them. Those folks need to be continuing on, and that has been quite active for us.

So I think institutionally there has been a little bit of reticence to advance Section 2.

Let me throw in another one, which I mentioned. Part of the motivation behind creating the Civil Conduct Task Force internally to address it is that a lot of our attorneys are trained and think that because of the statutory requirements for merger filings.

As you know, Howard — you were a top regulator at both the FTC and the Office of Information and Regulatory Affairs in the White House, so you know this area — when you have a business that has a merger they want to get through, you ask them for information — you know, maybe they play around with some privileges, but by and large they are compliant. You may ask for times and deadlines, but when you ask them for information they will give it to you. Why? Because the leverage is with the agencies — if there has been a second request, if they have not complied —to delay the merger. So there is a real natural incentive, and therefore the leverage allows for the parties to come together.

Well, that is just not the case. Just like in private practice, if you sue a party, it might take a while to get that discovery in if they are not complying. The same thing with the agencies. The parties may take a different action and you need to be aggressive. We have come on the brink, literally within thirty minutes on three different occasions, to enforce a CID or a second request response which has been deficient in the Antitrust Division. Frankly, we have not done that.

We probably need some enhancements in the laws to allow the Division and the FTC to enforce that when the parties do not comply in Section 2. This is something that was not addressed in the House report but something that should be considered.

So a lot of those factors weigh into that. But I also think that certain industries, as you mentioned, probably do impact that, and part of that is the fact that the digital economy has basically manifested three or four companies — some of which are

under investigation by the Justice Department and some by the FTC — that hold a certain amount of market share.

Now, that doesn't mean that just because of that they violate the antitrust laws, but there has been a lot of media and academic attention to it, and now Capitol Hill attention to it, and the agencies are paying more attention to what Section 2 is.

I don't think ten years ago if you and I told our social colleagues who may not be in the antitrust world, "I practice antitrust law," their first question would ask, "What the hell is that?" Now people know what antitrust law is, for good or bad, because some them think antitrust should just preclude any company from getting big.

But we are having that debate, people are engaging, and I think that is a positive thing for competition overall.

PROF. SHELANSKI: Thank you very much.

MS. DAVIS: I am conscious that we are going

to lose you very quickly, Executive Vice President Vestager, but I couldn't let you get away without asking a question about the new legislative proposal in relation to the New Competition Tool.

You mentioned earlier in your remarks the formidable tools that the European Commission has in competition law enforcement in Europe. Those formidable tools — think about Articles 101 and 102 — have served the Commission very well over the years and have formed the backbone of competition policy and have actually shown themselves to be very flexible in adapting to new situations. We have seen that even in recent times in digital markets.

Is the New Competition Tool really needed or can you not use the existing formidable toolbox that you have to achieve the sorts of outcomes that you are looking for?

EXECUTIVE VICE PRESIDENT VESTAGER: The thing is that we really appreciate what Articles 101 and 102 have done, and they will work beautifully for

a very long future, if not perpetually, because these are the pillars of what we do.

But what we have been doing for quite some time is to look at how markets are changing, how market dynamics are changing. I have three special advisers who produced a report, "Competition Policy in the Digital Era." A number of national competition authorities in other jurisdictions are trying to figure out how to address the fact that market dynamics are new — business models are new; we have network effects; we have marginal cost approaching zero; we have zero-price markets — so there is something that we need here in order to make sure that we remain efficient in what we do.

Basically, we base our work on three different pillars:

• Obviously, vigilantly to enforce the existing rules that we have, making full use of Articles 101 and 102, including interim measures and restorative remedies.

• Second, *ex ante* regulation of platforms, as mentioned, including additional requirements for gatekeepers.

• Third, this New Competition Tool. The inspiration comes from colleagues quite spread on the planet. The CMA in the United Kingdom has done amazing work with the tools they have at their disposal, but we have also seen that with other colleagues and have discussed that. I think you would find it within the ICN.

The point is here that our tools enable us to investigate businesses but we lack the tool to investigate a market and be able to prevent that market from tipping. We have seen that now quite a number of times, that markets with these network effects, the marginal costs go down; they tend to tip.

If we want to make sure that these markets stay contestable, that there is the challenge to every company to stay innovative, then we will need a new tool.

I think there is a global consensus on the challenge that we have ahead of us. I think also if others look into what colleagues have in their toolbox they would have the same admiration for the work that they have done. You should, of course, expect nothing revolutionary or unheard of, but I think there is a true need to complement our toolbox and we are preparing the legislation to be able to do that.

Of course, the important thing that we always carry in our heart is to make sure that we have the processes right because it is a Union built on the rule of law, and that will obviously also be reflected in how the New Competition Tool should work.

MS. DAVIS: Some of the criticisms that have leveled towards the proposals are that intervention in this way could actually have the opposite effect and cause harm to competition and innovation.

I was struck when you mentioned in your remarks earlier that politicians cannot answer who will win and who will lose very well.

Some of the types of conduct that may be targeted by the tool appear indistinguishable from successful organic growth as the result of innovation and competition on the merits.

Is there a danger of the Commission effectively being in the role of picking winners and losers, and is that something that the Commission should be involved in in a free-market economy?

EXECUTIVE VICE PRESIDENT VESTAGER: Of course not. If that was the case, we shouldn't.

But, exactly as you say, when you have a market economy there has to be a market and the market has to be free and contestable.

What we have observed is that that is not a given thing. Some market dynamics may lead to an outcome where you do not any more have contestable markets, where you do not any more have a fair chance of making it in that marketplace, because of the characteristics of this market.

I think that is the important thing to have

in mind, that if you want to serve well the fundamental mission to have fair competition on the merits in an open marketplace, then we need to make sure that our toolkit is up-to-date, because otherwise we may fail dramatically in serving consumers and customers in the best possible way.

Of course any tool should be used with caution, but you need specific tools for specific issues. I don't know if anyone has tried to put in a screw with a hammer — the result is not very good. You need indeed to have the right tool for the right situation, and this is what we are trying to achieve here.

MS. DAVIS: Thank you.

VICE PRESIDENT VESTAGER: I will say good-bye.

MS. DAVIS: Thank you very much. I am sorry to keep you late.

VICE PRESIDENT VESTAGER: No, no, no. I am so honored that you have invited me again and that you

have made this happen. It has indeed been a pleasure to be here.

Also, of course, I very much appreciate Makan's remarks because it is indeed an inspiring and a learning opportunity to hear colleagues, and also to be challenged by your questions.

Thank you very much for all the effort and good luck with the rest of the Conference.

PROF. SHELANSKI: In my last question I would like to follow on the theme of new tools and also pick up on a question that was submitted to us from the audience. This question goes to you, Makan.

When we look at the Health Judiciary Committee report, there are a number of proposals that the Committee makes and they are forward-looking legislative recommendations of a fairly broad kind.

You said during the course of your remarks that you think we have the tools to adapt and adjust to new industries, and you made an interesting point in your response to my question about conduct cases,

that it is a question of taking a different risk perspective, worrying perhaps a little bit more about error costs on the other side and being a bit bolder through existing tools.

What is your view of the legislate proposal and, more generally, the need for new legislation as articulated in the House Judiciary Committee's report?

ASSISTANT ATTORNEY GENERAL DELRAHIM: First, I've got to congratulate the tremendous amount of good work that the House Judiciary Committee put into their report.

It is a process. As you know, I am a big believer, as I know you are, in the separation of the powers. The Executive Branch and we enforce the law, and there are certain due process procedures that are afforded to various folks before you adjudicate somebody has actually broken the law.

Not to take anything away from that, but there is a process that ends in the legislative process — and I have had the privilege of spending

about five years when I first left private practice to be on the Senate Judiciary Committee back a little over twenty years ago when we were looking at Microsoft — and it is an important process to look at and fine-tune the tools that we have and the processes, to take a look at the laws.

There are a number of recommendations. The very first one is that the agencies need more resources. I think that is a good recommendation.

There are a number of other areas in there, and we provided some technical assistance to the House at their request. We do not have Administration positions that have been cleared through the Office of Management and Budget and the Office of Information and Regulatory Affairs that you used to head. It is a public process.

But I think generally I would favor changes that do not throw out the baby with the bathwater. We already, I think, over-impose on the courts to force them to understand. You have a judge who may not have

in a twenty-year career ever had an antitrust case and for the first time who may ask the question, "What the heck am I supposed to do with this merger? I have to be clairvoyant and look into the future of this effect? I am used to knowing whether not the guy entered into an agreement or sold a drug, and I need a picture and evidence and an eye witness. That's what I'm used to."

You are asking the judge, plus three brilliant clerks who just got out of law school who are helping them, to in six or eight months resolve a $100 billion merger that the two agencies may have spent fifty attorneys and economists and God knows the amount of outside resources the parties and the brilliant economists — Dennis Carlton, Carl Shapiro, and Howard Shelanski — that they use. I think the system requires some review as well.

I am not a huge fan of specialized courts in general. Congress experimented and by and large that has been successful for patent cases in the Federal

Circuit. But Judge Ginsburg had also yet another innovative idea, almost like a Foreign Intelligence Surveillance Court, where the chief justice could appoint judges with expertise to build a core competency of antitrust expertise in these cases so that judges are not just completely shocked and surprised by the demands of an antitrust case, because I think the markets require that.

The other is, particularly in the high-tech area, I think the laws are flexible enough to identify — certainly the House Judiciary Committee found that some of the companies violated the laws as they exist.

The agencies go through that. The question is: How fast are we going to have an answer to be responsive, to provide the certainty for the companies but also to protect the consumers from the vagrancies or the transgressions by some of these companies that might occur, new innovations.

I was again pleased that they cited the Venture Capital Workshop that we held at Stanford in

February 2020 in their report. I thought that was good.

So I would look at the system. I would also look at just the system we have in the United States, the two federal agencies enforcing the antitrust laws, which sometimes could create confusion and uncertainty, the structures of them. I probably have a personal bias towards one agency, but I am not saying one or the other is the better model.

Also look at federal versus state. We already have potential divergence internationally, but do we really need that? I am a big fan of actually looking at the European model of how the Commission and the state and the agencies look at it. For transactions that do not bleed outside of state lines, defer more enforcement to the state AGs, to the extent they want to — some states may not have the interest or the resources and they would prefer that, but to the extent they want to, as long as they do not contradict national competition policy.

So I think there are a couple of other areas that I would encourage the policymakers to look at. But changing predatory pricing — the *Brown & Williamson* case from the Supreme Court — we have to be very careful about how we do that.

I do believe that there are different tests that I would apply to the Supreme Court's *Amex* case, so I think that is an interesting exploration by the House and I would welcome looking at how you would do that. I am a big believer in the test that we at the beginning of my tenure proposed to the Supreme Court in that case, and how the Second Circuit looked at market definition, and also how you account for procompetitive justifications of a vertical restraint in a two-sided market. I do believe you have to look at two-sided markets differently, but I do believe the Second Circuit got it wrong. Of course, five Justices disagreed with that view.

But that is an area that I think is rife for mischief and misinterpretation through litigation, and

frankly businesses need certainty.

We saw a brilliant judge in Delaware in the *Sabre* case who I think just plainly got it wrong, but that decision is rife for lots of litigation for the next twenty years unless Congress comes in and puts in some bright lines.

Those are my general views.

PROF. SHELANSKI: Thank you. That is a very helpful answer.

I think we are coming up on the end of this session. Many of us may be looking longingly at Michele's espresso machine.

I want to thank you very much, Makan and Michele, and turn it back to James.

MR. KEYTE: Thank you, Makan, Michele, and Howard, and Executive Vice President Vestager as well. That was a wonderful session.

ASSISTANT ATTORNEY GENERAL DELRAHIM: Thanks very much for having me, James, and I look forward to the rest of your Conference, as always.