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Panel 1:
Tech, Platform, and Privacy — What the Future Holds

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MS. HESSE: I want to thank everyone for joining us this morning for the virtual 47th Annual Conference on International Law and Policy.

We are doing the panel on "Tech, Platform, and Privacy — What the Future Holds," a very minor set

of issues to tackle in the next hour and twenty minutes. Nothing big is going on in any of these areas, so I think this is going to be a very dull, boring discussion amongst this panel. We will be covering privacy and competition law and policy with a mix of U.S. and European government and private sector perspectives.

We have a terrific lineup this morning who I am going to introduce, and then we will jump right in.

We will be holding some time at the end for questions from the audience, so please send those in using the Q&A function. James will be moderating the questions and passing them to me. Forgive us if we do not get to everything that comes in, but please do send your questions along and we will try to get them either as we move through the session or at the end. Please send them when they come up and we will see if we can address them.

There is a CLE code for this session. The CLE code is TPP20.

Let me introduce our panelists.

Cani Fernández is the President of the National Commission for Markets and Competition in Spain. She has had a very distinguished career —

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... of the antitrust department of Fried, Frank, Harris, Shriver & Jacobson, and Vice Chair of the American Bar Association's Section of Antitrust Law.

Next is Sean Royall, a Partner at Kirkland & Ellis's Dallas and Washington, D.C. offices and focuses on antitrust and consumer protection from both the litigation and government investigations perspectives. Mr. Royall previously served as the Deputy Director of the FTC's Bureau of Competition, and in that capacity he supervised the FTC's investigations of many major mergers and acquisitions, and also served as lead trial counsel in a landmark patent-related monopolization suit that the FTC

brought against computer chip designer Rambus.

Last but definitely not least is Koren Wong-Ervin, a Partner at Axinn, Veltrop, and Harkrider. She has also worked in-house, in academia, and in government, and previously served as an attorney adviser to FTC Commissioner Wright and counsel for IP and International Antitrust at the FTC.

With those introductions, we are going to get started.

Sean is going to lead off. The first topic we are going to cover is the general question of where do privacy and competition come together.

MR. ROYALL: Thanks, Renata.

I am going to kick us off by laying out some of the theories that have been proposed for how privacy-related concerns can — or in some cases arguably should — be taken into account in antitrust- and competition-related analyses, and then Koren is going to share some additional thoughts on each point, and maybe other panelists as well.

The first concept is that privacy — or, more specifically, protections on user or consumer privacy — can be viewed as a feature of competition. The notion is that just as firms compete across a range of other quality-based dimensions, they also compete, or may compete, to win and retain users or consumers by offering to enforce more user-friendly privacy protections.

With that as a starting premise, the theory is that in the absence of robust competition, dominant firms may lack incentives to improve their privacy and data collection practices in a way that would best serve consumer interests, and may even regress by failing to enforce their existing privacy policies, the idea being that erosion of privacy protections and diminished incentives to continue competing to improve such protections may be akin to an increase in quality-adjusted prices.

Various people have discussed this idea, but it was featured, for example, in a 2019 article by

Dina Srinivasan entitled "The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy," where she asserted that in the earlier years of social media platforms the platforms were competing furiously in an attempt to win market share in part through the quality of their privacy protection.

Applying this concept, let's say for example in a merger context, theoretically a merger that led to increased concentration in a market where firms depend heavily on the collection and accumulation of consumer data could potentially be seen as anticompetitive, in part because of an anticipated lessening in incentives to protect consumer privacy. I will note, though, that this theory seems to rest not only on the premise that firms at times compete on privacy, but also to some extent on some built-in assumptions.

One of those is an underlying assumption that consumers do in fact, and maybe even universally,

take privacy into account when they choose among alternative products and services.

Another assumption seems to be that consumers as a group think about and value privacy and data collection practices in a sufficiently uniform way that one can observe which approaches to these issues may be "better" or more consumer-friendly than others.

In a speech earlier this year given by FTC Commissioner Noah Phillips at Stanford Law School, he touched on these issues. He expressed fairly deep skepticism about antitrust theories that presume some form of consensus in terms of how consumers approach privacy-related issues and what tradeoffs they are willing to make in choosing among products and services.

He noted that while we all want lower prices, there are examples of consumers exhibiting fundamentally divergent views about privacy. He suggested that even if there is something to this

"privacy as quality" concept, you need to be very careful where the value or aspect of competition that you are focused on is one that potentially lends itself to polar disagreements among the very consumers whose interests you are seeking to protect.

The last thing I would mention is that quality as a form of competition is not an entirely novel concept for antitrust. It is also not something that comes up very often, at least as a central concern for antitrust enforcement in the merger context or otherwise. While there are examples of mergers being challenged because of effects in innovation markets, usually when these issues arise there is some very concrete and identifiable risk to consumers.

With that introduction of the issue, Koren, what are your thoughts on this?

MS. WONG-ERVIN: Thank you, and thank you to the organizers for inviting me and to Renata for organizing this panel.

I think that the privacy-as-quality analogy on its face is appealing, but when you take a closer look, I think the analogy falls apart, and this is for at least four reasons. There is a really excellent paper by Professor James Cooper that goes over some of these, and I recommend you read this paper.[1]

The first reason is that, unlike a manufacturer who is exercising monopoly power to skimp on quality in order to make more money, when you have, say, an online publisher who decides to collect and mine additional data, there is no automatic benefit to that publisher from reducing privacy. In fact, when you collect and store and analyze data, that is an additional cost.

So I think it is more appropriate to look at the publisher's collection and use of data as an investment. The publisher hopes that it can use this data to enhance revenue through providing consumers

[1] James C. Cooper, *Privacy and Antitrust: Underpants Gnomes, The First Amendment, and Subjectivity*, 20 GEO. MASON L. REV. 1147 (2013).

with higher-quality content and selling more finely targeted ads. So, to me reductions in privacy would be an odd way to exercise monopoly power.

The second thing is that unlike, let's say, a lower-quality car, consumers derive some benefits from the data they reveal, and those benefits must be weighed against any privacy reductions. Of course, these benefits can include increased or better services or products and revenue streams that allow platforms to offer things like zero-monetary-price goods and services.

The third thing is what Sean mentioned, which is that the value that consumers place on these costs and benefits varies greatly throughout the population, which would make identifying a lessening of competition difficult to say the least. I think when you take into consideration the varying privacy tastes of consumers, a firm's decision to collect more or less data should be seen as product differentiation and not as an exercise of monopoly power.

The fourth reason is what is known as the "privacy paradox," or the difference between stated and revealed preferences — for example, the difference between what consumers say on surveys and how they behave in the real world. Now, this is not to say that privacy is not important or that consumers do not have an increased expectation of privacy, but rather to say that it is complicated and that we should be very wary of government enforcers imposing their own privacy tastes on consumers.

The last thing I will say is that in the unilateral conduct context it is particularly difficult for me to envision the privacy-as-quality theory because you need some type of exclusionary conduct that results in harm to competition. If you have poor privacy alone, that is not sufficient. At least in the United States, firms are free to charge the highest price that the market will bear.

Now there is one type of conduct that I have heard, and I will turn it back over to Sean to discuss

that.

MR. ROYALL: Focusing on unilateral conduct, it has been suggested that a second way that privacy-related concerns may warrant antitrust enforcement is in instances in which a firm arguably has made misrepresentations about privacy in order to secure a dominant market position.

In the same article that I mentioned earlier, Dina Srinivasan asserts that Facebook engaged in what she claims was a "decade-long pattern of false statements and misleading conduct" involving claims of superior representations of protecting consumer privacy, all with the aim of inducing consumers to trust and favor Facebook over all targets. She asserts that Facebook's robust privacy-related assurances in that time period foreclosed competition in what was at that time a contested market, but that the company then later consciously reneged on its commitments in a way that she claims is evidence that the company now possesses monopoly power.

Renata mentioned that while I was at the FTC I was involved in the FTC's *Rambus* case, and this theory does remind me a bit of *Rambus*. The argument there was that Rambus exploited an industry standard-setting process by making false assurances to other participants that it lacked patent rights over proposed designs for computer memory chips that were being standardized, and once the industry was irreversibly locked into using the standardized design that they adopted, Rambus then surfaced its patents and began demanding royalties.

Koren, *Rambus* and I think some other cases do at least provide some precedent for using the antitrust law to challenge alleged deceptive conduct that gives rise to monopoly power, but what do you think about applying these concepts of alleged misrepresentations about privacy?

MS. WONG-ERVIN: I will be very brief in case Barry or Cani want to jump in.

I think that at the very least you would

need a deception that is material in that it shifts demand, and durable in that it is not easily discovered or corrected, or that even once discovered consumers cannot switch. Under *Rambus*, of course, we know there is the but-for standard, so a plaintiff would need to prove that but for the misrepresentation consumers would have chosen a different technology.

I do think there is one wrinkle to applying *Rambus* – I am not saying that I don't like the but-for standard because I do — and that is that unlike in *Rambus*, where you had a technology that was set through standardization and there is arguably lock-in, that is not the case in, say, Facebook or Google or other platforms where consumers can and do switch.

MS. HESSE: Let me jump in for a second with a couple of follow-up questions. There are two that I want to hand out to people, whoever wants to jump in and answer.

One is: Do we think that competition would lead to greater transparency amongst firms in their

privacy policies and how they protect privacy, and is that a value that is something that competition law should care about?

The other question goes to Sean, and he can maybe answer that first and then we can go on, but others might have views on this too. You mentioned the *Rambus* case. I am wondering whether you have views based on that experience and whether others have views on how difficult it might be to bring an antitrust case against a social media platform, for example, for allegedly reneging on privacy policy assurances; and, if you think that would be difficult, why?

I will throw those out to the group and let you all take it away.

MR. ROYALL: I can comment briefly on the second question. Barry actually was at the FTC and we were both in the deputy positions overlapping during the *Rambus* years, and Barry may have been more involved in the Commission appeal because I left right

after the administrative trial.

We agonized in developing that case at the FTC over proof issues and elements of proving monopolization or attempted monopolization in this context. A couple of things that we agonized over and spent a lot of time on are exactly things that Koren alluded to.

One of them is: Was there true lock-in? Because the whole theory was what economists refer to as "hold-up," that you needed a lock-in in order for the parties that were allegedly harmed by this to have been vulnerable to monopolistic practices.

In that case, there was a standard that was adopted and there were literally billions of dollars of capital investment around building memory chips according to the standard that had been adopted, and those investments occurred and they were sunk irreversible costs before arguably — there was disputed evidence — before anyone knew that Rambus had or asserted patent rights. So we thought there was

rather strong evidence of lock-in.

I do not know here how you would prove lock-in. I think we are going to talk a little bit more later about the concept of multihoming and the fact that in social media people use different social media platforms; people are not necessarily locked into one. There is also potential to move, to port data from one to another. I just don't know that the lock-in concept really works or applies here.

The other thing that Koren alluded to is but-for causation. This actually ended up being a weakness in the *Rambus* case that caused the D.C. Circuit ultimately to reverse.

Speaking for the trial team in that case, we were very focused on proving but-for causation and proving that for each element of the standard that was at issue there was an alternative technology, and the proof, including contemporaneous documents and testimony, showed that had the participants known about Rambus's patents, they had available alternative

technologies and they would have adopted them and avoided any patent exposure. In the end, the D.C. Circuit found that the proof was not convincing on that point.

I do not know how you would prove but-for causation here — that is, that but for these representations about privacy that consumers would not have adopted the Facebook platform. Koren referred to this idea of the difference between maybe what people say in surveys and what their revealed preferences are. I do not know how you would use a survey group or some other group to persuasively show that it was the privacy-related representations that people were relying on that caused them to adopt the platform.

MR. NIGRO: I am happy to comment on that briefly.

If a firm makes a representation or a promise to keep certain information private and then breaks that promise, it seems to me there is obviously a breach of contract claim. I agree with Sean that it

is not so obvious how that would automatically convert into an antitrust claim.

I think one of the challenges with privacy is that it is not entirely clear how much people care about it. I think people know when they sign on to these platforms or do business with a particular firm that they are giving up a certain amount of information or privacy in exchange for whatever product or service they are looking to acquire.

I think if people really cared about privacy and that affected their demand, that firms would respond to that and it would be a significant qualitative basis for competition among the firms. It would show up in the documents; it would be something that they might advertise against each other on, etc. It is just not clear to me how concerned people are about privacy.

I do think it is important to distinguish between privacy as some qualitative basis on which firms compete and privacy as something that is valued

as a matter of social policy.

In the case of the latter, I don't know that antitrust is the right tool to address it. I think that is better addressed through the legislative process and the Executive Branch. It does not neatly fit into the antitrust world and I think efforts to try to put it there when it belongs better elsewhere are misguided. I am hesitant to try to use antitrust to address all concerns that people have with privacy.

MS. HESSE: Cani, do you might something to say?

MS. FERNÁNDEZ: Thank you very much, Renata.

Listening to you and the whole debate on whether consumers value privacy or not reminds me of the movie *Monty Python's Life of Brian*, when there is this queue of people going to the crucifixion, and the Romans ask them, "Crucifixion?" and they say, "Yes, please."

This is the view I have when you have to tick to the privacy concern that you have to give in

platforms. It is either you say "yes" or you are banned for life — you cannot use Facebook; you cannot use Google; you cannot use anything that everybody is using — and trying to survive with that goal, as I have been trying to for some months, it is very interesting the limitations that you are facing in order to compete in searching with others.

I think that in the privacy debate privacy has come at the moment in which we as consumers probably have to surrender our privacy rights in order to be able to use the service. There is not sufficient competition in these services, so I do not think it is a really good choice or a choice in competition terms. That is my personal view. I wanted to be a little controversial in that.

There is a long debate on how consumers value privacy, and I think there is a new set of studies that puts the emphasis on the questions that are to be made to consumers in order to ascertain whether they value privacy or not.

As to the debates on the relationship between privacy and competition, I think this is a very complex and manifold debate. The goal is to find the right balance, in my view, between competition and user-protection objectives.

In some cases, regulation aiming at protecting consumers may have unintended consequences in competition, even adverse effects. Sometimes getting consumer consent — for example, with the new General Data Protection Regulation (GDPR) in Europe — may be very cumbersome. And those that are already in the market, the Big Tech companies, the incumbents, those that were already dominant companies when the GDPR was adopted, are not facing that constraint because we already consented. Even now, if we consent once, we consent for the whole group of different services or vertical searches that they are having. So for new entrants it is not irrelevant how to compete with this tick on privacy that sometimes is very cumbersome.

There are several theoretical and empirical studies that are showing us that Big Tech, or even incumbent companies that are already in those markets, may be using the privacy regulation strategically in order to set up barriers to entry — for example, in data-sharing situations where others that could be new entrants and enjoy the possibility of those synergies in those data-sharing situations are barred from doing so on the basis of regulation that is there in order to protect consumers. This is an unintended consequence.

We have experiences of regulation that has gone in the contrary sense, that has proved to be procompetitive. One example of this is the Payment Services Directive, which has played an important role in establishing a framework within which financial information from consumers must flow under secure conditions so that fin-tech companies, for example, are able to enter the market offering services that are in a way increasing competition in those markets.

So I would say that we should follow a case-by-case approach. I am not sure that we have already exhausted all the debates on whether privacy is good or bad for competition and whether it is a parameter of consumer welfare. I think there are many things to say there.

It is true that even when talking about privacy we should be able to at least guarantee interoperability and data portability and multihoming because this is going to reduce switching costs. Given the high concentration in the market and the lock-in effects and the tipping dynamics that we are experiencing, that could be reduced.

That is my first intervention in this panel. Thank you.

MS. HESSE: Thanks, Cani.

Much as I would like to keep talking about this, because it is super-interesting, I think we need to shift to our second topic, which is the topic of the hour, and then maybe if we have a little bit more

time, we can come back to this, because I think there are lots of interesting questions about regulation as a barrier to entry or creating barriers to entry for smaller firms and questions about how the GDPR and the California legislation have worked and what we can learn about that as we go forward, particularly in the United States, where we do not have any federal privacy regulation yet.

But let's jump into the Big Tech topic area. Barry and Cani are going to lead us out on this one. Here we are going to talk a bit about competition enforcement versus regulation and whether these tools are likely to be an effective way to address the concerns and the issues that have been raised and that we have been hearing about — I do not mean to comment one way or the other on whether those are valid or invalid — but the things that we have been hearing being expressed about what we like to call Big Tech.

Barry, do you want to start us off?

MR. NIGRO: Sure. Thank you, Renata.

"Big Tech" is like "Big Data." It seems like when people use that term they are suggesting a conclusion, which is that there must be a problem because it has the modifier "big" in front of it. I think in order to evaluate competition issues — whether it is Big Tech, Big Data, or anything in that realm — it is important to recognize that the concerns and the issues can vary quite significantly. So precision is important when you talk about concerns with Big Tech.

I don't think it is fair to lump them all together and treat them as though they all benefit and suffer from the same sorts of issues, especially when you are trying to decide whether the appropriate tool for addressing those concerns is regulation or competition.

Our general preference in the United States is for competition over regulation. I think this has been a well-recognized principle going back hundreds of years. If you look at the Supreme Court's *Northern*

Pacific Railroad case, it talks about the Sherman Act resting on the premise that the unrestrained interaction of competitive forces yields the best allocation of resources, the lowest price, and the highest quality.

The Supreme Court's decision in 1951 in *Standard Oil* acknowledged the long-held faith in the value of competition. Much of the work of the Antitrust Division has been aimed at furthering that value and protecting it and ensuring that our markets remain competitive.

That is not to say that there are not some circumstances when regulation may be appropriate. If you think about markets that have characteristics of a natural monopoly, where the economies of scale and the savings from those economies are so pronounced, it may be that the most efficient outcome is to have a single firm — a monopolist so to speak. It could be in that case that, because of natural monopoly characteristics, it is feasible to implement some sort

of regulation in a way that improves market performance, as compared to the economic performance that would otherwise be associated with unregulated markets; it may be that some sort of limited regulation is appropriate.

I also think that even where you have a dominant firm for some period, that is not necessarily a bad thing. If you think about what the Court said in *Trinko*, charging monopoly prices by itself is not only not unlawful but it is the opportunity to do so that, at least for a short period, is what attracts business acumen, and that induces risk-taking and ideally in the long run produces greater output and innovation.

It has generally been the view of the antitrust agencies that big is not bad but big behaving badly is bad. I think that is a common refrain.

I also think it is important to take account of some of the learning that we have done in this

area.

Commissioner Wilson recently spoke about the benefits of deregulation. In particular, she focused on the bipartisan decision to disband the Interstate Commerce Commission and the Civil Aeronautics Board in deregulating the railroad and airline industries and the benefits of lower prices, higher output, and more innovation that resulted from those efforts.

I think it is important to recognize that regulation does have a cost associated with it — it is not cost-free; it is a tradeoff — and that tradeoff should be reserved for situations where the market characteristics are such that antitrust is not up to the task. Let me just talk a minute about antitrust and whether it is up to the task.

I will start by saying that digital services are not necessarily inherently bad. I think a lot of them are where they are today in their popularity because they provide something that is highly valued by the consumer and platforms are not necessarily

acting badly by charging high prices as a result of their innovation.

But where they engage in unlawful conduct, or conduct designed to maintain their monopoly or otherwise distort competition, I think that is where antitrust needs to step in and protect the market and ensure that competition can thrive, that new competitors are able to get in and provide an alternative to consumers. That is where the job of the antitrust enforcers is at a premium.

While some may believe that it is possible that regulation may be appropriate if carefully tailored to address specific concerns that are not appropriate for antitrust — because, for example, they are better characterized as social policy concerns rather than competition concerns, or because circumstances are such that antitrust is incapable of promoting long-run consumer welfare, such as the natural monopoly example — I for one am not ready to throw in the towel on antitrust.

I do not think we are in a place where antitrust has tried and failed. I think part of the problem and one of the concerns that people have is that it has been more than a decade over which these concerns have been expressed and we have not really taken on some of these issues.

The transactions that are identified in the House report and some of the conduct concerns have essentially, at least so far, gone unchallenged. Why have they gone unchallenged? Is it because the concerns are not well founded, or is it because the agencies lack adequate resources, or maybe it is because there is too much concern with bringing a case that might not be won?

I am more optimistic about antitrust than some. I said at the George Mason conference earlier in the year, before Covid-19 hit, that the antitrust agencies need to get out of their comfort zone and bring the right cases, even if they may be hard to win. I do not know that that has happened yet with

the current concerns that have been expressed.

When it has happened in the past, the agencies have actually done quite well. I am thinking in particular of the conspiracy case against Apple that was won and the case against Microsoft. So when we have gone to bat and used the antitrust tools in a way that is appropriately aggressive, I think the agencies have done well.

What we probably need is to invest more energy in bringing the right sorts of cases and not shying away from the possibility that they might be lost. I think that is what is needed, and until that happens I am not ready to give up on antitrust and jump right to regulation.

MS. HESSE: I think people are eagerly awaiting some cases that appear to be percolating, so we will see. Maybe we will see that play out.

MR. NIGRO: I have no idea what you are talking about. [Laughter]

MS. HESSE: I did want to turn to Cani and

get your perspective on these issues because Europe has been very, very active in this area.

MS. FERNÁNDEZ: Thank you, Renata. Yes, you are right. Big Tech's impact on competition is one of the most relevant challenges for policymakers and enforcers. We are concerned about increasing concentration and reduced contestability in markets dominated by digital behemoths.

As a consequence of this, the European Union is considering as you know a New Competition Tool with some *ex ante* investigative powers on the ability to impose remedies, not necessarily applied in digital markets exclusively but mainly. The European Union is also contemplating a potential Digital Services Act with a specific regulation for digital so-called "gatekeepers."

We at the Spanish Competition Authority have had the opportunity to state our position in our contributions to the consultation opened by the European Commission on these two instruments. This

input builds on the idea that we believe strongly that intervention should not be taken for granted.

A test is, in our view, needed to determine when intervention in a market is really necessary to protect effective competition, innovation, and growth, and thus regulation as well.

From our point of view, the debate should focus first on identifying the gaps of the current framework and the ways to solve those gaps and, in view of the results of this analysis, then we should go to the institutional setting — so who will be in charge of applying potential new instruments or the potential need for any regulator if that is the case?

Nonetheless, we acknowledge that the consistent implementation of the rules for digital players shall apply in Europe strong harmonization mechanisms across the European Union, and clear rules as well for allocating competencies between the Commission and the Member States. At the moment, as you know, there are several cases — for example, the

booking hotels cases or others not really in very good shape.

In addition, we believe that the current toolkit, which includes both antitrust policies forbidding concerted practices or abuse of dominant position, and a specific sector regulation — for example, energy, transport, but mainly telecoms and audiovisuals — will remain, in our view, the main instruments to address also competition problems. It is a combination of both of them.

We believe that there could be a risk of undermining the efficacy of the new framework by introducing new tools that are not yet completely checked out. This is why we have suggested a clear hierarchy of instruments. In our view, new policy instruments should be enacted only where current tools are not sufficient to tackle competition issues.

I can think, for example, of two possible gaps under the current competition framework, at least at the European level.

First is attempted monopolization of a sector, which you do cover with your framework but we don't because it would not fall under the category of an abuse if the company is not yet dominant. We have *Continental Can* as a precedent, but Continental Can was already a dominant company, so we did not have the attempt to monopolize. By eliminating future competitors we see that there is a need for enforcement and we do not have a very clear tool to do so.

The second gap that I can identify easily is the risk of tacit collusion, which cannot be addressed in Europe under the traditional instruments against cartels. This behavior can be even further facilitated by algorithmic techniques.

These are two gaps that probably need some reflection on how to cope with them, and that is what we have advocated, that we need horizontal — I mean in general, across sectors, not only digital — and flexible tools while keeping predictability and legal

certainty, which is what businesses need in order to operate in a market.

This horizontal dimension across the sectors is necessary given that competition problems arise everywhere nowadays, and in the near future we will have rapidly evolving economies that are not only digital but across other sectors.

Furthermore, even if one wants to put an emphasis on digital markets, the truth is that all sectors are becoming now affected by digitalization, so we should not lose perspective there.

Remedies and interventions where needed must be imposed only to those undertakings actually or potentially distorting competition.

Our view is that we should follow a case-by-case approach, even if regulation should be enforced. That is why the Spanish Competition Authority is taking advantage of our experience and our leverage as a multi-sectorial institution. We in fact have two hats: we are the enforcement of competition policy

authority, we are the antitrust authority, but we are also the regulator in sectoral regulation and monitoring of subsectors, notably the telecoms and audiovisual sectors together with postal, transport, and many others. These two in particular are extremely important when we are dealing with how to regulate the digital market.

So we are using this multifaceted perspective in order to contribute to the debate on the optimal policy response to digital platforms for the sake of consumer welfare.

MS. HESSE: Thanks, Cani.

I assume both Koren and Sean are interested in jumping into the fray.

MS. WONG-ERVIN: Sure. I am with Barry. I am not ready to give up on existing antitrust laws.

I do not think we have sufficient evidence that there is a monopoly or concentration problem. There are tons of studies on this rebutting it. I have written some and done things with Josh Wright and

Judge Ginsburg.[2]

I was really happy to see AAG Delrahim and Chairman Simons at the recent ICN conference push back and warn about the dangers of rigid *ex ante* regulation as opposed to the flexible case-by-case analysis of antitrust. They talked about the fact that you need evidence, you need an identifiable market failure as a necessary but not sufficient condition for regulation, and then it needs to survive rigorous cost/benefit analysis.

They also talked about the dangers of regulatory capture. I was happy to hear that. I think it is important to remember with this House report that was mentioned that it is one party putting it out, it was a staff report in fact, and it does not reflect a widespread bipartisan view.

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[2] *See* Koren W. Wong-Ervin, *Assessing Monopoly Power or Dominance in Platform Markets*, COMPETITION POL'Y INT'L (Jan. 29, 2020), *available at* https://www.competitionpolicyinternational.com/assessing-monopoly-power-or-dominance-in-platform-markets.; Joshua D. Wright, Koren Wong-Ervin, Douglas H. Ginsburg, Bruce H. Kobayashi, & James C. Cooper, Comment of the Global Antitrust Institute, George Mason University School of Law, on the European Commission's Public Consultation of the Regulatory Environment for Platforms (Dec. 29, 2015) (unpublished manuscript), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709188.

We have the antitrust agencies saying, "No, we do not want *ex ante* regulation." Like Barry mentioned, there is the paper by Commissioner Wilson about the dangers of it.[3]

I will turn it over to Sean.

MS. HESSE: Let me just jump in quickly on that, Sean, because Koren raises a couple of good points, one in particular that I want to weave into the conversation: Is there a difference and should there be a difference in terms of how, for example, lawmakers think about these issues from a competition policy perspective versus what is possible in the law enforcement perspective in the United States, for example, under the Clayton and Sherman Acts? Is that difference there — I think I would say there is — and does that mean that Congress might have greater leeway to act in this area if it sees a competition policy question?

[3] Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENFORCEMENT 10 (2020), *available at* https://academic.oup.com/antitrust/article/8/1/10/5614371.

The other issue that I wanted to flag is a little bit of a controversial statement. Christine cites the deregulation of the airline industry as a success and I think there are a lot of consumers who view the airline industry as one of the industries that really does not function particularly well.

To weave that into Koren's point, one of the things that I thought a lot about when I was in the agency is when a consumer experiences competition in a market in a way that is different from how the agencies evaluate it, is that something that the agency should take note of and, not necessarily change how they are doing things, but at least try to think about why the agency enforcement agenda or how we are enforcing the laws does not appear to match up with how consumers experience competition in the marketplace?

For me, the airline industry has always been a place where that is the case. You hear people complaining constantly about airlines and complaining

about what we did in the Obama Administration on the *American Airlines/US Airways* case, which we believed was perfectly consistent and correct from a competition law perspective, but the consumer experience seems to be different.

With that, I will pass it off to Sean. He can either jump on those topics or not, and then we can have others talk about it.

MR. ROYALL: Well, there is a lot there.

One of the things that I can say, picking up on what Cani was describing in terms of what is going on in Europe, is you talked about the difference in competition policy and the traditional approach in the United States of enforcing the antitrust laws. I do think that some of the things that are being discussed in Europe are quite foreign to the way that we tend to think.

She mentioned the New Competition Tool that is being discussed as one of the potential gap-filling mechanisms for dealing with Big Tech or Big Data. As

I understand it, what is being discussed is the idea that when regulators perceive that a market may be tipping — I think the term "tipping" is used — in the direction of some platform achieving dominance, that that alone might be something that would trigger regulatory intervention, even if there has been no abusive conduct, nothing that we would consider exclusionary conduct, not even what Cani referred to as the potential to expand their authority to attempted dominance.

Even if there has not been any of that, potentially this new tool would allow regulatory intervention based on a perception that a market is tipping and that there could be behavioral remedies or other remedies that could be imposed to preserve the *ex ante* status of competition. I think that to American ears sounds like a pretty radical notion. Of course I know these are just thoughts and this has not been adopted yet.

I will say, though, that some of these

things that struck me as I looked at what the Europeans are discussing as potentially radical and out of step with the way we traditionally have viewed antitrust are coming close to home.

I know the panelists, including myself, have not reviewed these lengthy documents in detail, but just this week the House Antitrust Subcommittee issued a report — and there are multiple reports; there is a majority report and a minority report; I think there may be a total of three reports — but some concepts are being thrown out by this House subcommittee that are very much akin to what the Europeans are considering. I know it is very far from that actually happening in Europe maybe, but certainly here. There are some ideas that are being thrown out that look very different from a competition policy standpoint than the way that we normally approach antitrust enforcement.

MS. HESSE: Thanks.

Barry, Koren, or Cani, anything more on this

topic, or should we move on?

MS. FERNÁNDEZ: Yes, let me add something.

I understand that the approach in Europe is different to that of the United States, but I would like to bring here an example of a Regulation that was imposed at the European level that in fact has worked well in the area of telecoms.

We have the net neutrality principle. That was, as you know, an experience that we had in electronic communications. There was a Regulation at the European level, and national regulation authorities were supervising the existence and respect of this net neutrality, which is very relevant in areas such as Internet platforms.

As you know, this debate originated from the fear that Internet service providers, by managing the traffic carried their networks, could act as gatekeepers for providers of content or applications. This was the Open Internet Regulation at the European level that was addressing these topics. The

Regulation was prohibiting technical blocking or throttling of applications with some exceptions.

This Regulation was followed by Guidelines that were adopted in 2016 and which are now under review for updating. I would say that this open Internet principle has worked so far relatively well and that net neutrality has proved to be a procompetitive element.

I understand that maybe the view on the other side of the Atlantic is a different one, but it is not the first time that a debate on how to regulate situations in which you may have a gatekeeper has happened in Europe.

I have to say that even if I was supporting case-by-case analysis and the need to really analyze first the market failures and the gaps before introducing legislation, the truth is that we have already have an experience that has worked out very well in Europe.

MS. HESSE: There has been a tremendous

debate in the United States around net neutrality also, so that is something that has arisen here.

Barry, do you want to jump in, or do you want to move on? Cani provided us with a perfect segue to our next topic, which is gatekeepers, but I are happy to have you jump in if you would like.

MR. NIGRO: I would just like to reiterate that I think there is a cost associated with regulating *ex ante*. It does create a risk of chilling procompetitive behavior, and that sort of regulation should only be used as a last resort where the competition laws have sought to be enforced and failed and there is actual concrete evidence of anticompetitive effects.

I know you are going to talk about gatekeepers, but I think an important part of that conversation is what we mean when we say "gatekeeper?" If I walk into a Kroger, Kroger is the gatekeeper to everything in the store, but does that matter?

So I think it is important when you talk

about gatekeepers to define it in a precise way, which is one of the points I made at the very beginning of our talk today. Maybe it is another way of talking about market definition, what is the relevant market, and what role does the particular firm being focused on have in the market?

But I will let you move on to the next topic.

MS. HESSE: Great.

We are running long. I just want everybody to know we are going to run over our allotted time. We are supposed to end in a minute. I do not want to run over too much for personal reasons — my husband is moderating the next panel and he will get mad at me if I make him too late. I am just kidding — he is moderating it, but he is not going to get mad at me.

James said it is okay for us to keep going a little bit, so we are going to keep going and the next panel will join us. I think we have ten more minutes, so we will go to 11:30.

I have seen no questions come through the Q&A. I encourage people, given that we are nearing the end of our time, if you have questions to please throw them into the Q&A, and we will try to answer them.

With that, I will hand it off to Koren, who is going to take us out on — I have been doing a lot of Peloton, and they say, "So-and-so, take us out" — our gatekeeper question — what does it mean to be a gatekeeper, and should we be concerned about them; and, if so, why?

MS. WONG-ERVIN: I agree with Barry that it is important to be clear about what you are talking about.

The gatekeeper framework is based on the model of a two-sided platform in which you have one side (Group A, for let's say Internet Operating System (iOS) users that single-home) and another side (Group B, let's say application developers that multihome so that they can reach all the users of the different

platforms). The idea is that the only way for the application developers to reach users of the iOS platform is to join the platform.

According to the theory, the iOS platform has a "monopoly" over access to those specific users irrespective of its market share or how competitive the market is for all users of the different operating system platforms. This theory has at least two built-in assumptions.

The first, of course, is that the Group A users single-home because, if they multihome, then members of Group B can reach them outside the platform.

The second assumption is that there are no effective market mechanisms to constrain the platform's ability and incentive to set high prices or restrictive policies to the multihoming side. So the idea is that consumers on Site A cannot switch if the platform imposed a price increase or restricted policies on Site B.

But of course, this is contrary to our fundamental economic understanding of platforms, which is that there are interactions or interdependent demand between the two sides that serve as a competitive constraint on the platform vis-à-vis members of Group B.

So, for example, in response to a price increase the application developer could pass through those higher prices to the users on the other side, which, because of positive indirect network effects, can reduce demand for those users. And some application developers may even leave the platform, which again can affect demand on the other side.

To sum up, I think there are three issues. The first is what Barry mentioned, a market definition. Are we really defining a market as just the users of iOS platforms, even if they have a small overall market share of all the platforms in the market? And then also there this idea that we are ignoring the market mechanisms at play.

The last thing I will say with regard to multihoming is there is ample evidence of multihoming in various markets, not just social media.[4]

MS. HESSE: One question I wanted to add that came to mind as Koren was talking is that there is legal precedent for defining single-brand submarkets. I take the two-sided market point, but I think in the *US Airways/Sabre* case the court of appeals endorsed a single-brand submarket, and there have been other cases where that has been the case. I would be interested to know how people think that plays into this gatekeeper platform question.

MR. ROYALL: Part of what I was going to comment on here I think we have already discussed, which is what is going on in Europe and the regulations that are being considered, which I think are in part in response to gatekeepers — we heard Cani

[4] *See, e.g.*, LAWRENCE WU & JOHN SCALF, AN EMPIRICAL ANALYSIS OF THE EXTENT OF ADVERTISER MULTIHOMING (2012) ("Approximately 98 percent of the total ad spend managed through DoubleClick Search is by advertisers that use both Google and Bing/Yahoo!"); HBS DIGITAL INITIATIVE, *How Did We Decide Where to Eat Before Yelp?* (Mar. 5, 2018) *available at* https://digital.hbs.edu/platform-digit/submission/how-did-we-decide-where-to-eat-before-yelp (noting that multihoming costs are low for users where access to platforms are free, as is the case with Yelp).

say "gatekeeper" a number of times — so there are gatekeeper concerns there.

In Europe, as I understand it, I do not know how widely held, but there is a fairly popular view that these dominant digital platforms are essential facilities. As I understand it — Cani can correct me — I think there may be within the European regulatory framework an ability to designate a business as an essential facility, which has been done with railroads and others, and I understand there may be some proposals to formally designate certain dominant digital platforms as essential facilities.

In the United States, this gatekeeper concept or dominant platform concept is something that, at least in terms of government antitrust enforcement, I do not know that we have seen yet many examples of that.

There is some current private litigation. The *Epic* case relating to the *Fortnite* app against Apple is an example where concepts like this are being

thrown out.

Barry, you may want to talk about this. I know that you gave a speech, which I read in preparation for this, that really got at this idea of whether the essential facilities concept is appropriate to apply here. I think you made a distinction between competing within the market and competing for the market, and I thought made some good points about potential adverse effects in terms of disincentivizing investments and innovation if you were to go too heavily after companies that do arrive in an arguably dominant platform position.

MR. NIGRO: That is right, I did talk about those principles in the context of Big Data.

All of these things have a tradeoff in forced sharing of a product or a service. I think it is obvious that if you tell somebody: "If you invest, take a big risk, invest a lot of money and time trying to come up with an innovation that you hope will be highly valued, and you hit on something that is very

successful and popular, guess what? You will have to share that with the rest of the world because you may be deemed an essential facility."

The cost of that type of rule is to dampen the willingness to take on that risk, to make that investment, and it is at the expense of long-term innovation. These rules may address short-term concerns, but I think they are very detrimental to long-term innovation.

Facilitating competition within the market comes at the expense of competition for the market, and there is a cost, just like with all regulation we talked about earlier, associated with that sort of an approach. That is why I think ultimately going back to tools that are flexible and can deal with the facts on the ground, like antitrust law, should be the starting point, and I continue to think it is not appropriate to give up on antitrust just yet.

MS. HESSE: We do not have any questions in the queue and we are perilously close to 11:30.

I want to give each of you a chance to say a few final words, if you would like, and I will then close us out.

I think this has been a great discussion. It has been interesting to hear all of the different perspectives, and I hope those of you who are watching and listening enjoyed it as well.

Let me go in reverse order. Koren, anything you want to jump in on?

MS. WONG-ERVIN: On the House Judiciary report and the other proposals, I want to caution against going back to the pre-*GTE/Sylvania* days and ignoring the robust body of empirical and other economic research on verticals and mergers and the like. I hope that the U.S. antitrust agencies will continue to be leaders in defending the existing approach.

MS. HESSE: Sean?

MR. ROYALL: I do not want to say much. I enjoyed being on the panel.

I do agree with Barry, though. I have not given up on traditional antitrust, and I believe that the rigorous approach, including focusing, as we did earlier when we were taking about lock-in and causation and these other concepts, I think have served us well, and I think they will continue to serve us well. I think we have plenty of tools to get at these issues when there really are problems, even without coming up with new regulation.

MS. HESSE: Barry, any last comment?

MR. NIGRO: I look forward to seeing what happens over the next few months and few years. I think we are going to be in for interesting times when it comes to antitrust. I can only hope that we continue to value competition and some of the principles that have grown up around that and that have, to be honest, worked pretty well for the most part.

That does not mean that tweaks here and there to some of our laws may not be appropriate, but

I think overall the antitrust laws have done a good job and with effective, aggressive enforcement and the right cases can achieve a lot.

MS. HESSE: And this time, last but not least, Cani, who I feel has been a little bit outnumbered in this discussion.

MS. FERNÁNDEZ: Oh, let's continue to be outnumbered. Some food for thought with the current system of antitrust and merger control, which I very much like, because I know it very well and I know to apply it.

The truth is that we have not been able to keep markets open, or at least not concentrated in very high levels, and I wonder whether the current system — and let us go for merger control, for example — allowing for *Facebook/WhatsApp*, *Facebook/Instagram*, *Google/DoubleClick* is sufficiently good if its purpose to prevent high concentration in the market because, as we all know, the more concentrated the market, the less likely it is for competition. Well — question

mark — is there anything needed there?

MS. HESSE: I for one am a big fan of regulatory humility and of the enforcement agencies everywhere in the world continuing to self-evaluate and make sure that they are matching what they are doing with both the law that we have but also with consumer experiences. It is important every once in a while to step back and take a look.

I am going to be very interested to see what happens over the next weeks and months and years as antitrust continues to be at the center point for a lot of issues that are coming up both in the United States and abroad.

With that, I would like to thank everyone for your contributions. I would like to thank the audience for staying with us, which hopefully they did.