FORDHAM UNIVERSITY SCHOOL OF LAW
FORDHAM COMPETITION LAW INSTITUTE

47TH ANNUAL CONFERENCE ON INTERNATIONAL ANTITRUST LAW AND POLICY

Day 3 — Friday, October 9, 2020

Welcome

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

MR. KEYTE: Good morning and good afternoon, depending on where you are, and welcome to day three of the Fordham Antitrust Conference.

It has been an excellent two days so far with great economic workshops, a Heads of Authority Q&A, wonderful keynotes and discussion yesterday, a great tech panel, a mergers panel, and a very invigorating Fireside Chat with Barry Hawk and Bill Kovacic.

In this age of pandemic, in some sense you get closer to the speakers. It's up-close, it's not personal, but it is definitely a different experience and in some sense more connected.

Today will be equally substantive and interesting. We have two fantastic keynotes from the Chairman of the FTC and the head of the U.K. Competition and Markets Authority; a Fireside Chat with Fred Jenny, head of the Competition Committee of the OECD among many, many other things; and Karen Lent will finish by moderating an in-house counsel panel with competition counsel leaders from Verizon, American Express, Walmart, and Google.

I would like everybody to stay tuned for all of those.

Keynote Introductions

MR. KEYTE: Our keynotes are two of the most analytical and forward-looking enforcers that we have in our antitrust global community.

Joe Simons is the FTC Chairman. He has had an illustrious antitrust career. He was the chief of the FTC's Competition Bureau a while back, and there he was known as someone willing to litigate based on a first-principles assessment of the merits. He was known as a very creative analytical thinker, responsible for developing the critical loss framework for market definition. Even back then Joe was a person of practical action.

He co-chaired Paul, Weiss's Antitrust Group. I worked with him and against him a few times. It was always a pleasure and I always had to be on my toes analytically.

Since heading the FTC, Joe has brought that energy and analytical focus to the FTC across a number of industries — very forward-looking, very practical,

very evidence-based, whether he is looking at hospital mergers, pharma, IP, and now tech, which we have all talked about so much.

Joe has also organized a great group of people around him both for analysis and investigations and also for going to court when they feel there is a basis for that, and you will always know that the FTC is looking at the interests of consumers but also looking at the effects on businesses and on understanding what businesses are up against on an *ex ante* basis.

It will be great to hear from Chairman Simons.

After Joe will be Andrea Coscelli, the Chief Executive of the CMA. He happens to also have his PhD in Economics from Stanford.

His leadership at the CMA has been highly visible, analytical, and very forward-looking. Whenever there is an industry or an analysis that is on the cutting edge of antitrust both jurisprudence

and economics, Andrea Coscelli is usually on that edge with the CMA.

He takes a fresh look at markets using again a very analytical but practical approach, identifying problems, looking for solutions. That is again in pharma, abusive pricing, financial services, and obviously also in tech.

He has also been a great participant in the Fordham Conference in the past as well as over the last couple of days with our Heads of Authority Q&A Workshop, which was fantastic.

Our questioning panel are also two leading lights in the antitrust field.

Sharis Pozen is a forming Acting Assistant Attorney General at the DOJ and had a leadership role in the past at the FTC. She was the Vice President of Global Competition Law and Policy at General Electric, she was a former Partner of mine actually at Skadden Arps, and now is the co-head of Clifford Chance's global antitrust practice.

What I can say from having worked with Sharis and having seen Sharis in action in all of those different roles is that she has a great instinct for what is an antitrust risk and how to address it practically, and so she brings great perspective to this panel discussion.

Finally, we have Antonio Bavasso, who co-heads Allen & Overy's global antitrust practice. Antonio has serious academic chops, a summa JD from the University of Florence, a PhD from the University of London.

He is Co-Founder and Executive Director of the Jevons Institute for Competition Law and co-editor of *Competition Policy International*.

His day job at Allen & Overy focuses on merger control, media, and abuse of dominance, particularly in media, broadcasting, and high tech.

I understand he is also close friends with Andrea, but I don't think there is any evidence of conspiracy that I have seen in terms of the panel

discussion today.

We will get started. I will fade away and bring in Chairman Simons.

Keynote Address[1]

Joseph J. Simons
Chairman, U.S. Federal Trade Commission

MR. SIMONS: Thank you, James, and good morning to everyone or good afternoon as the case may be. Thank you to Fordham University for hosting this wonderful conference. I also want to thank our moderators for putting this panel together, thank you to Sharis and to Antonio, and of course thanks to James for organizing the conference, especially under these less-than-ideal circumstances.

It is unfortunate that we cannot see each other this year in person, but I clearly appreciate the opportunity to join you for what I have always found to be an absolutely outstanding program.

After nearly two-and-a-half years or so as Chairman of the FTC, I marvel at how much has happened

[1] The published version of these remarks, including citations, is available at https://www.ftc.gov/public-statements/2020/10/prepared-remarks-chairman-joseph-simons-fordham-universitys-47th.

over the course of my relatively brief tenure — some of it not so good.

In late 2018 and early 2019, we faced a government shutdown that kept the Commission staff out of work for about a month. This year, of course, we have had to deal with an unprecedented global pandemic and virtually 100 percent telework at the Commission.

Yet, despite this adversity, the FTC has remained resilient and aggressive. In fact, as an example, our Bureau of Competition has had a record-setting year with more merger enforcement actions in Fiscal Year 2020, which just ended a few days ago, than any year since the year 2000. Let me repeat that: We have had more merger enforcement actions in Fiscal Year 2020 than in the last twenty years.

I am so grateful to our dedicated staff for the amazing work that they continue to do on behalf of American consumers, especially during these challenging times.

One of the best parts for me of being at the

FTC has been the opportunity to work with our team of bright and dedicated economists in the Bureau of Economics, or BE as we call it. BE provides tremendous value to our agency's mission by supporting our case work and conducting independent research that sheds light on difficult competition questions. Needless to say, I strongly believe that economic analysis is a powerful tool for informing policymaking and I welcome efforts by economists at the FTC and outside the agency that help in that regard.

Nevertheless, I think we have to be disciplined and careful in using economic studies for policymaking, especially when we consider major changes.

Over the past few years, many critics have called for drastic changes in competition policy. As support for their positions they have cited a variety of economic studies as allegedly justifying the need for such changes.

But I have noticed three types of problems

with how economics have been deployed in efforts to justify these changes. First, economic studies with methodological limitations have been used to support overly broad conclusions. Second, economic studies have been cited to support propositions without accounting for more obvious alternative explanations. And third, new economic models or tools have been widely incorporated into everyday practice, perhaps without the sufficient rigor that we would really want to have.

Although I am encouraged that people are looking to the best available research in support of their views, we need to be careful in how we use research to advocate for policy changes, particularly significant policy changes.

Let's start with the problem of drawing broad conclusions from studies with methodological limitations.

As I said earlier, economics can be a powerful tool for studying competition policy

questions, but there can still be serious limitations in doing so, even after decades of advances. Data may not be available to study a certain question. The sample size might be too small. There may not be an appropriate control group. Even the most sophisticated techniques sometimes cannot overcome these limitations.

For example, Professor John Kwoka prepared a monograph that conducted a meta-analysis of a whole set of merger retrospective studies to assess how well U.S. antitrust merger enforcement is working. His study concluded that merger enforcement has been too narrowly focused, which has allowed price increases to occur following certain decisions not to block mergers. Also, he found that merger remedies, particularly conduct remedies, were not adequately eliminating harm to competition.

His monograph is an important contribution; let me make that clear. These are the kinds of questions that we should be studying, and I am very

thankful he has been seriously looking at these issues.

But the study has its limits. FTC economists Michael Vita and David Osinski raised some serious questions about Professor Kwoka's study.

They point out that some of the retrospective studies that he relies upon predate much of modern merger enforcement. For instance, three of the analyzed mergers predate the issuance of the 1982 Guidelines and one predates the enactment of the Hart-Scott-Rodino Act back in the 1970s.

Also, they note that the mergers that John studies are concentrated primarily in a few industries — petroleum, airlines, and academic journals — which limits the conclusions that can be drawn about the overall effectiveness of the merger enforcement programs at the FTC and DOJ.

Also, in the portion of the study that considers the efficacy of merger remedies, the study is only able to use seven merger retrospectives to

estimate price effects after the merger, and one of those studies only relied upon data for the period prior to the remedy being imposed.

Of course, that is not to say we should ignore Professor Kwoka's work, but we also should not just rush to conclude that we need wholesale changes in our merger policy. Instead, I think what we need to do is dedicate even more resources to studying some of the questions that his study leaves open.

Professor Jon Baker recently published a book called *The Antitrust Paradigm: Restoring a Competitive Economy*. In March of 2019, I gave the keynote address for the release of Jon's book at a conference at American University. At that event, I noted that Jon's book represents a very significant contribution, and I stand by that assessment.

But Jon appears to draw broader conclusions from some of the studies than I think are warranted. For instance, Jon cites a working paper that aims to estimate the empirical effects of the Supreme Court's

decision in the *Leegin* case. The *Leegin* decision reversed an old precedent that treated resale price maintenance (RPM) as per se unlawful, and instead the *Leegin* Court applied a rule of reason framework to those agreements going forward.

Even though *Leegin* changed the treatment of RPM agreements under federal law, some states continue to prohibit RPM agreements *per se* under state law. The study compared the price and output effects in the states where RPM followed *Leegin's* rule of reason analysis with the states that prohibited RPM agreements *per se*. The study found that prices were higher and quantity was lower for some products in the *Leegin* states. But the products experiencing a price increase were rarely the same products that experienced a decrease in quantity. And where prices go up but the quantity does not decrease, the most likely explanation is an outward shift in the demand curve, which likely enhances consumer welfare.

In addition, others have pointed out that

this study was not able to identify which firms actually imposed RPM agreements in the *Leegin* states. In fact, many of the products covered by the study, such as produce and everyday consumables, typically do not even use RPM agreements. That makes it very hard to draw conclusions about the effects of RPM agreements from this particular study.

Finally, a number of economists have published studies showing an increase in markups and citing that as evidence that market power is growing across the economy. These studies all appear to show consistently increasing markups, though the magnitude of the effect varies significantly among these studies.

Although the results initially may appear concerning, there are at least two methodological limitations to these studies.

First, some studies rely on the North American Industry Classification System (NAICS) codes to study effects. NAICS codes are industry

classifications that are simply too broad to be useful for analyzing anticompetitive conduct or mergers.

Second, many of the markup studies rely on accounting profits, not economic profits. But when we think about the increases in market power, we really need to focus on economic profits. In evaluating these markup studies, we have to consider how these limitations affect the studies' conclusions.

Even after we account for methodological issues, we also need to think carefully about what conclusions to draw from studies. A study may show an increase in markups, a decline in labor share, diminished startup activity, or a reduction in capital stock across the economy. But before we link those studies to weak antitrust enforcement, we need to rule out other potentially more obvious explanations.

First, many of these studies look at markets that are so broad as to be irrelevant for antitrust purposes. In addition, many of these studies consider changes in concentration that may be totally unrelated

to antitrust enforcement. For instance, a study might find increasing concentration among hospitals in some geographic regions, but if it doesn't account for hospital closures, then it may incorrectly attribute increasing concentration to weakened antitrust enforcement.

Second, broader trends in the economy or society may provide better explanations. For instance, changes in aggregate markups may reflect technological changes, globalization, the shift from manufacturing to services, and other broader macroeconomic trends that can lead to increased fixed costs and lower marginal costs.

Indeed, a working paper from Harvard economists Anna Stansbury and Larry Summers estimates that a decline in the workers' share of income can be accounted for entirely by a decline in unionization, cost-cutting pressures at firms brought on by activist investors, globalization, and technological changes, rather than a decline in competition.

Another example involves studies that link a decline in business startups to rising market power. But these studies do not rule out demographic changes as a cause, particularly in the U.S. economy where the population is aging. Also, if it is true that bigger companies are making more fixed-cost than sunk-cost investments, then startups may face higher hurdles entering those markets, which of course would reduce the number of startups.

Other factors may also be at play, such as an increase in regulatory burdens that disproportionately affects potential new entrants.

In short, we need to consider carefully whether the broader effects that we are seeing in the marketplace are really linked to antitrust enforcement or whether other causes are at play. If other explanations are more likely, the appropriate policy response is not to change antitrust.

To make antitrust changes under such circumstances runs a two-pronged risk. First, the so-

called "fixes" to antitrust will not fix the problems people are worried about. And second, a misguided focus on antitrust may prevent implementation of real fixes from areas other than antitrust.

Last, I want to touch briefly with you on a topic that I have written about extensively: the use of economic models in our enforcement work.

One of the more difficult problems we are facing is bringing precision to antitrust analysis. Theoretical economic work can help, but we have to be careful not to rely too heavily on tools that have not been empirically tested or that have not demonstrated predictive accuracy.

For example, I have raised questions about the use of generalized upward pricing pressure indices, merger simulations, and aggregate diversion critical loss analysis. I am not going to go into those criticisms here, but I do want to encourage economists to evaluate how these approaches perform at making predictions.

If all we do is identify some mergers that we failed to challenge but that resulted in price increases, which is only half the story. We will not be able to improve our analysis unless we understand why we were wrong — why did we miss those mergers that resulted in price increases? That is something that we need to focus on as an antitrust community.

In support of that specific goal and our broader interest in seeing how well antitrust merger policy is doing, we recently announced the launch of a more formalized and robust Merger Retrospectives Program at the FTC. As a part of this program, we plan to allocate more staff time and resources to retrospective studies.

We have launched a website devoted to highlighting retrospective studies that includes a searchable database to make it easier to find these studies. Our Bureau of Economics plans to organize and support sessions at a major industrial organization conference on merger retrospectives. And every three

years, the FTC's Annual Microeconomics Conference will include a session dedicated to retrospectives research.

We will also explore initiatives to allow cooperation with outside academics. I am really hopeful that will bear fruit.

This program is something I am really excited about, and I am hoping it will inspire others to start programs of their own. Unfortunately, we at the FTC really should be devoting even more resources to this effort, but we just do not have the money to do it right now.

I am going to end my remarks today by reemphasizing the value that economics brings to antitrust. I commend the economists for their work in developing new studies and new tools to identify and deal with important antitrust issues and concerns. But as policymakers, we have an obligation to carefully evaluate new work and not move away from a strong bipartisan approach to antitrust without making

sure that we are confident that that is the right thing to do.

Thank you for your attention, and I will turn it over to Andrea now. Thank you.

Keynote Address

Andrea Coscelli
Chief Executive, U.K. Competition and Markets Authority

MR. COSCELLI: Thanks, Joe, and thanks, James, for organizing the event.

Good morning and good afternoon to everyone. It is a pleasure to be with you. Obviously, it would be better to be together in New York as in previous years, but I think we are making the best of the current situation.

Today I plan to focus on the CMA's work in relation to digital markets and, in particular, our emerging views in relation to the design of a new *ex ante* pro-competition approach to address some of the harms in digital markets that we see. I will also say a few words about our existing work to deal with these problems.

Why is competition in digital markets important now? Obviously, no one could have

anticipated the situation many governments around the world now find themselves in as a result of the pandemic, and clearly economic recovery is dominating the agenda in most jurisdictions.

Earlier this year, we published the findings and recommendations coming out of a year-long market study into online platforms and digital advertising. This piece of work considered how advertising revenue drives the business model of major platforms.

Our work found that large multinational online platforms, such as Google and Facebook, now have a central role in the digital advertising ecosystem and have developed such unassailable market positions that rivals can no longer compete on equal terms.

In particular, their large user base is a source of market power, leading to weak competition in search and social media. This matters to consumers, who receive reduced innovation and choice but also will be paying higher prices for goods and services

when the producers pass the high costs of advertising on to consumers. We found, for instance, that Google's price is around 30-40 percent higher than Bing's when comparing like-for-like search terms on desktop and mobile.

We are also concerned that the largest platforms are increasingly acting as a brake on innovation, setting the terms of competition in a way that tips the balance in their own favor and undermining the business models of new entrants and potential challengers alike.

Our key recommendation was that a new regulatory regime is required in the United Kingdom to ensure that these markets continue to deliver benefits to consumers, businesses, and the economy as a whole.

For me, the case for regulation is clearly made. We have firms with very substantial and enduring market power protected by strong network effects who are able to leverage into adjacent social network (DSN) markets and can engage in envelopment

strategies that further protect their core sources of market power. These firms are active across many markets and in many cases also act as an important access point to customers, giving them a strategic position. They can use this to exploit the many consumers and businesses who rely on them and act to exclude or quash innovative competitors.

Existing tools, in our view, are clearly not sufficient to address these potential harms. For me, regulation seems to be the absolute best way at this stage to ensure digital markets continue to thrive and deliver the wider benefits we value so highly. Structural solutions may be needed in some cases if regulation is not effective.[2]

In the course of our work we heard from many companies who told us that the significant market power of some online platforms poses an existential threat to their businesses. We believe that without reform existing market dynamics in these industries

will mean that the next great innovation cannot emerge to impact our lives in the way the previous advances in digital markets have done in the past.

As the Furman Review in the United Kingdom had done previously, we recommended that within the new regime a Digital Markets Unit should be established with the ability to enforce a code of conduct to ensure that platforms with Strategic Market Status (SMS), like Google and Facebook, do not engage in exploitative or exclusionary practices or practices likely to reduce trust and transparency, and to impose fines if necessary.[3]

This Digital Markets Unit would also have the ability to impose 'pro-competition interventions' to drive greater competition and innovation in digital advertising markets. This includes requiring Google to open up its click and query data to rival search engines to allow them to improve their algorithms so

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[2] Similar recommendations are included in the recent report by the US Judiciary Antitrust Subcommittee.

[3] https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel

they can properly compete. This also includes requiring Facebook to increase its interoperability with competing social media platforms.

The CMA is now building on these recommendations in its work leading a Digital Markets Taskforce that was commissioned by the U.K. government earlier this year, just before lockdown, to provide advice on digital regulation.

Alongside the code of conduct and the pro-competition interventions, as part of our advice we are also considering a third pillar which will form part of this new SMS regime, a parallel merger regime for acquisitions by companies with Strategic Market Status. We are considering whether the evidence supports a policy justification for such a regime based on the particular features of digital markets that increase the risks of consumer harm arising from acquisitions by particularly powerful companies and a heightened risk of underenforcement. In particular, we are analyzing the extent to which such concerns

cannot be fully addressed under our current merger regime.

As I will mention later in the speech, the CMA's approach to digital mergers has already evolved considerably.

It is against this backdrop that we are considering the merits and characteristics of a special parallel regime. Our current thinking is that any special regimen would have its own jurisdictional and substantive test.

In relation to the jurisdictional test, in contrast with the U.K.'s standard voluntary merger regime, companies subject to this special regime could be required to notify all transactions to the CMA subject to certain limited exemptions.

In relation to the substantive assessment, competition concerns could be assessed under the standard "substantial lessening of competition" test. However, the inherent uncertainty that often characterizes developments in these digital markets

combined with increased risks of consumer harm where the acquirer already has Strategic Market Status may justify the use of a more cautious standard of proof than the "balance of probabilities" threshold under the standard regime.

So what about this new regulatory regime for digital markets looks like? Our view is that this new regime does not mean that some of the existing fundamentals go out the window. The framework for antitrust is grounded in economic analysis. It is well established and well understood. We believe that any new regime needs to be grounded in this framework.

For example, the notion of market power and the potential for abuse of this must still squarely factor in our consideration of where and when intervention is necessary.

Similarly, the existing case law around anticompetitive practices will still be important in guiding future considerations as to the effects of actions, such as self-preferencing, which we recognize

in some circumstances might have procompetitive benefits.

But it does mean that we need to examine the accepted wisdom carefully and not be afraid to change course, do things differently, and try new approaches where necessary.

For example, it means looking hard at procedures and ensuring that they strike the right balance between giving appropriate rights of defense to parties without being exploited as a tool to frustrate the investigations.

Similarly, we need to ensure that we at the CMA act with appropriate evidence and due diligence but equally recognize the pace many of these markets move at.

It also means looking hard at the skills and capability we need to appropriately monitor these markets, investing more in our ability to collect and interrogate data. In the CMA this is an area we have already been investing heavily in through our Data,

Technology, and Analytics Unit, which specializes in data science, engineering, behavioral science, and data and technology insights.

It means not being afraid to try using new tools and approaches. Our work on open banking, for example, has demonstrated the potential that opening up access to data can have in driving innovation. Just last week we announced that users of products enabled by open banking top 2 million in the United Kingdom, demonstrating clear demand for these services, which have been enabled by this intervention.[4]

Lastly, it means understanding that our work is likely to be far more wide-reaching than just competition. Digital markets are increasingly interconnected. Action in relation to competition will never just occur in a vacuum, but increasingly will have consequences for work in relation to privacy, online harms, intellectual property, and

consumer protection. We need to work more closely than ever before with our partners in other agencies, both domestically and internationally, to tackle these problems together.

What is the path to this new regime? In the United Kingdom the path to establishing this new regulatory regime will likely still have some way to run beyond the delivery of advice to the government by the end of this year. Clearly, we are keen to see progress in a timely manner and stand ready to assist in any way that we can.

In the meantime, we are focused on using our existing powers to the maximum extent.

Over the past few years, a large part of our consumer protection work has been focused on building trust in online markets. For instance, we have examined the practices of the largest cloud storage providers, tackled unfair practices by online gambling firms, and gone after social media influencers who

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[4] https://www.openbanking.org.uk/about-us/latest-news/real-demand-for-open-banking-as-user-numbers-grow-to-more-than-two-million/

have tried to conceal paid advertising.

Competition/antitrust enforcement is another key part of our toolkit. This is an area we expect to be increasingly active in over the coming years, particularly pending the new regulatory regime described above.

When the United Kingdom was a Member of the European Union, many of the biggest digital enforcement cases were undertaken on our behalf by the European Commission. From January the CMA will be able to start to investigate the conduct that most affects U.K. consumers and we are actively considering a number of potential enforcement cases in the digital sector. Given the cross-border nature of these markets, we are looking forward to working in close collaboration with our international partners.

I want to say a few words about digital mergers. This is a key area of focus for us.

We have been working hard to develop our substantive assessment in recent years in light of our

increased understanding of digital markets and the learnings from some recent expert reports — for instance, in our case the Lear Report on past digital mergers that we published last year.[5]

Key elements of the development in our substantive assessment include:

• An analysis of a broad range of theories of harm, including those related to the loss of innovation and access to data. Examples include the *PayPal/iZettle*[6] review last year and *Google/Looker.*[7]

• Consideration of dynamic counterfactuals, such as development of new products or services — for instance, the *Sabre/Farelogix*[8] review and *Amazon/Deliveroo*,[9] which is a transaction we reviewed this year.

• An analysis of the valuation model and rationale for the merger to gain insights into the

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[5] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf

[6] https://www.gov.uk/cma-cases/paypal-holdings-inc-izettle-ab-merger-inquiry

[7] https://www.gov.uk/cma-cases/google-llc-looker-data-sciences-inc-merger-inquiry

[8] https://www.gov.uk/cma-cases/google-llc-looker-data-sciences-inc-merger-inquiry

[9] https://www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry

acquirer's plans and expectations for the target — again, for instance, *Sabre/Farelogix; Google/Looker; Visa/Plaid*,[10] which is a transaction we recently cleared and where we published a decision this week; and *Salesforce/Tableau.*[11]

• An assessment of the impact of the merger on both sides of the market in digital platform mergers, taking account of the differences in customers' options on each side of the market — for instance, the current investigation of the *viagogo/StubHub*[12] transaction and investigation of *Taboola/Outbrain*,[13] which is a merger that was abandoned a few months ago.

• We are also continuing to monitor closely mergers in digital markets and to initiate investigations ourselves where appropriate when parties choose not to notify to us ahead of completion — for instance, our current investigation of the

[10] https://www.gov.uk/cma-cases/visa-international-service-association-plaid-inc-merger-inquiry
[11] https://www.gov.uk/cma-cases/salesforce-com-inc-tableau-software-inc-merger-inquiry
[12] https://www.gov.uk/cma-cases/viagogo-stubhub-merger-inquiry
[13] https://www.gov.uk/cma-cases/taboola-outbrain-merger-inquiry

acquisition of Giphy by Facebook.

We are also making full use of our evidence-gathering powers when assessing digital mergers. Internal documents are often a key source of evidence as historic evidence, such as market shares and switching data may be less informative of future competition in dynamic markets.

The potential importance of internal documents was brought into stark relief, for instance, by the recent disclosure in the United States by the U.S. House Judiciary Antitrust Subcommittee of Mark Zuckerberg's emails from 2012, which highlighted that neutralizing the competitive threat was a key driver for Facebook's acquisition of Instagram. Obviously, this is information that would have been relevant to our predecessor agency, the Office of Fair Trading, when looking at that transaction in 2012.

Our document review capabilities have been significantly enhanced since then. We may now require the production of a large volume of documents in

appropriate cases, even at Phase I.

We are also increasingly considering making us of our compulsory information-gathering powers to hold witness interviews, like we did, for instance, in *Amazon/Deliveroo*.

We are also carrying out a major update to our substantive Merger Assessment Guidelines to reflect our current approach to merger review. These updates are broader than digital mergers, but digital markets are one of the most significant areas of development.

Lastly and just to conclude, earlier on I mentioned the work of our Data, Technology, and Analytics team. Compared to staff members we have traditionally hired, this team has markedly different qualifications. We have a number of PhDs in applied mathematics and physics. In our new Behavioral Hub, we have colleagues with a background in psychology as well as a range of other backgrounds.

One area this team is increasingly focused

on is scrutinizing how digital businesses use algorithms and how this could negatively impact competition and consumers, something that we believe will become increasingly important with ever-increasing availability of large data sets and, given cloud computing, the ever-increasing use of machine learning and artificial intelligence algorithms.

We believe it is not acceptable for firms not to be able to explain to us the outputs of these algorithms. We plan to publish a paper on potential harms arising from algorithms in the coming months, and we will invite collaboration with firms, researchers, and stakeholders on matters for authorities to investigate, mitigate, and remedy any harms. As part of this work, we will be considering how requirements for auditability and explainability of algorithms might work in practice.

This is what I wanted to say by way of introduction. I am very happy to take any questions. Thank you.

Panel Discussion

Antonio Bavasso
Partner and co-head Antitrust, Allen & Overy LLP

Sharis Pozen
Partner, Clifford Chance LLP

MS. POZEN: Thank you both for such interesting remarks.

Joe, I love your "mythbuster" on the economic reports. We have been waiting for that for a long time in the United States for some of the criticisms that have come in as a result of those.

For you, Andrea, it is very interesting to hear what you are doing in the United Kingdom with the CMA.

We are going to start our Q&A. I know we have over a hundred people on, so if you have questions for these great leaders, I hope you will put them forward, and Antonio and I will make sure that they are asked.

I am going to start my questioning to you,

Joe, if that's okay. We have all seen the *FTC v. AbbVie* decision in the Third Circuit and some trimming of the sails on disgorgement, which was stunning, and we heard about regulatory issues that Andrea is considering in the United Kingdom.

Are there needed legislative tools or reforms related to your disgorgement or other enforcement powers that you think are necessary right now in the United States?

MR. SIMONS: Thanks for that question, Sharis.

The answer is yes, and let me give a little context on 13(b).[14] That is the part of our statute that at least historically has given us the authority to get monetary relief.

Section 13(b) is the part of our statute that courts have interpreted gives us the ability to go get injunctions. And courts for decades have interpreted that to include not only an injunction in

[14] 15 U.S.C. § 53(b).

the regular sense you would think about it, but also the ability to get equitable monetary relief. I forget the number, but seven or so appellate courts have been, for decades, saying that we have that authority.

But over the last year or so, two circuit courts have said that we do not have that authority. One of those cases is now pending before the Supreme Court.[15] This impacts a very, very significant part of what we do at the FTC both on the consumer protection side and on the competition side.

On the consumer protection side, our anti-fraud program relies heavily on this type of relief. We are able to go into court and get interim relief right away that freezes the assets of fraudsters. It preserves those assets and prevents them from getting dissipated during the trial, and if we win at the trial, we have the ability to provide restitution or consumer redress.

This also was at play in one of the biggest cases we have ever had at the FTC, which was an $11 billion settlement involving Volkswagen and its clean diesel technology.[16]

Then, on the competition side, you mentioned *AbbVie*. We had a victory at the district court level in which the court awarded us $448 million that we would apply for consumer redress, and the circuit court has now reversed that.[17]

So, at least in the Third and Seventh Circuits so far, we do not have that authority anymore. This is very problematic for us, and we have asked for Congress's help. We would like Congress to effectively clarify that the interpretations that were extant for thirty years by every circuit court that considered this issue really is the law and make sure we do not lose this important ability to get monetary relief.

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[15] *AMG Capital Mgmt. LLC v. FTC*, No. 19-508. The Supreme Court has consolidated *AMG* with the FTC's appeal of the adverse ruling from the Seventh Circuit in *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019).

Then you asked about digital markets and legislation there. Andrea has discussed a whole bunch of potential legislative types of activities relating to these digital markets.

Some people in the United States, and other places as well, are thinking about digital platforms like public utilities and that they should be regulated as such. Andrea was discussing this just before.

There is in fact some precedent under antitrust law to do that. I can think of two examples off the top of my head: one is the breakup of AT&T via the consent decree with the Justice Department;[18] and the other also involved a DOJ consent decree with the two main performing rights organizations, BMI and ASCAP.[19] Both of these examples were predicated on antitrust violations that then resulted in these

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[16] https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating.
[17] *FTC v. AbbVie, Inc.*, No. 18-2621 slip op. (3d Cir. Sept. 30, 2020).
[18] *United States v. AT&T, Co.*, 552 F. Supp. 131 (D.D.C. 1982).
[19] *United States v. ASCAP*, 41 Civ. 1395 (S.D.N.Y. June 11, 2001), https://www.justice.gov/atr/case-document/second-amended-final-judgment; *United States v. BMI*,

consent decrees with these public utility-like aspects to them.

These decrees require judges to act effectively like public utility commissions by setting prices and other terms of service and conditions for access. But clearly, these were not ideal circumstances. The courts are not really structured to do this kind of work. They do not have a team of economists and lawyers working for them to think about what the right pricing is, what the right terms and conditions are, and how access should be allowed or not.

On the other hand, industry regulators, like real public utility commissions, do have the infrastructure to handle that kind of a job and they are set up specifically to do that. Unfortunately, nothing is ideal, and at least the history in the United States is that entities like that, particularly at the federal level, are subject to political

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64 Civ. 3787 (S.D.N.Y. Nov. 18, 1994), https://www.justice.gov/atr/case-document/bmi-final-

influence and regulatory capture.

There is a really interesting book called *Misregulating Television: Network Dominance and the FCC* that describes what the problems have been historically in the United States in terms of how television was regulated.[20]

What they illustrate is that oftentimes what happens is the regulating body turns out to entrench the entity that it is regulating and actually reduce competition. A good example of this is when cable television first came into being, the Federal Communications Commission (FCC) prohibited it except where there were no over-the-air broadcast signals that could be received from the broadcasters. Rather than allow the cable companies to compete with television in their main places where they were an oligopoly, the FCC prohibited that.

So, at least in the United States, history shows that such regulators often entrench the entity

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judgment.

they are regulating and they often can reduce competition and squelch innovation.

This approach sounds really good in practice, but the execution is often very difficult, and before you do something like that you want to be really careful and thoughtful about it, which I am sure the folks in the United Kingdom are.

I will leave it at that.

MR. BAVASSO: If I understood Chairman Simons's comments correctly, he was pleading for a note of caution about the use of studies and retrospectives, although they clearly have a role also in his view given the plans that they have to strengthen them.

I was wondering, Andrea, if you could offer us your perspective of how useful they have been. There has been a number of them that you have mentioned — the retrospective on *Facebook/Instagram*, the Furman Report, your market study. How useful do

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[20] STANLEY M. BESEN, THOMAS G. KRATTENMAKER, A. RICHARD METZGER, JR., JOHN R.

you find these studies and retrospectives in guiding enforcement and policymaking; and have we had enough in the digital sector or do we expect more in the months to come?

MR. COSCELLI: Thanks, Antonio.

I am probably in a very similar place to Joe, in the sense that I think both the FTC and we believe that retrospective studies are useful. The question is, who does them and how?

It seems to me there is a bit of a division of labor between an academic debate on retrospectives, which I think is helpful. Obviously, a number of very competent people spent a lot of time thinking about the methodologies and some of the discussions that Joe referred to, but also I think there is a role for the agencies because sometimes we have better data and also we understand probably better some of our own processes than external academics.

The decision we have taken in the CMA was essentially to do some studies ourselves, or

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WOODBURY, MISREGULATING TELEVISION: NETWORK DOMINANCE AND THE FCC (1984).

commission some studies, as a complement to the academic debate.

We have done two studies. One I mentioned briefly was about digital mergers, which we commissioned through a consulting firm called Lear.

Another one was an interesting study that we did a few years ago looking at a subset of mergers that were cleared on the basis of entry and expansion arguments made by the merging parties, which seemed credible to us at the time. We went back and looked at eight of these cases just to track what actually happened in terms of the entry and expansion of rivals, and we found a fairly mixed picture. In around half of these mergers what happened was much more limited than what we expected to happen, which obviously had a negative impact on the competitive pressures in those markets, which we thought was quite relevant.

The final point — is that we use our markets powers that most other agencies don't have, to look at

the way competition works today in particular markets. We collect routinely lots of complaints about markets that are not operating particularly well, and use this to decide when to do particular studies in particular markets. Very often those markets are markets that are quite concentrated and where essentially you can go back and look at previous transactions as potentially a source of some of the problems we find now.

So it is not a particularly scientific exercise, but it is certainly very informative to try to think about the impact of mergers after a number of years.

MR. BAVASSO: Of course, as you said, you carried out an authoritative and very detailed and excellent market study on digital advertising, which has been followed closely in the United Kingdom and worldwide.

I am intrigued and I want to ask another question related to that. Obviously, if you cross the

Channel and look at what the European Commission is thinking in terms of equipping itself with new regulatory tools, one of the ideas that seems to be emerging is that they are looking — and I heard Commission Vestager mention that yesterday on the panel that she joined — at an idea very similar to the power that you already have, the power to start aftermarket studies and market investigations. That gives fairly uniquely to the U.K. CMA the ability to impose wide-ranging remedies even in the absence of a breach of an antitrust rule.

In relation to digital advertising, you carried out that study. You concluded that the test was met, but, interestingly, you declined to use the powers that the Commission now thinks it wants to equip itself with.

Can you perhaps expand on your thinking as to why you opted to recommend a regulatory reform, as you just told us, as we heard, and what are the downsides if you were to advise Commissioner Vestager

of having those powers that you in this instance declined to use?

MR. COSCELLI: Linking a bit to what Joe was just saying, if you think about the mandate you have as an antitrust agency or the mandate you have as a regulator, the markets regime is a bit of a halfway house. I think the intent of the British Parliament in creating this regime was to essentially allow the competition authority to be sort of a one-off regulator in some areas.

Our practice is that there are some examples where this can be quite successful — so, for instance, the idea that post-privatization all the airports in London and Scotland were owned by the same entity; and following this process this market investigation reference our predecessor decided to break up the entity and create competition among the airports. I think anyone who has used the London airports over the last ten years will have seen the benefits of that.

Our assessment is that for something that is

complicated, like the digital advertising ecosystem, and where in a sense regulation or intervention probably needs to be targeted and then you need monitoring and you needed tweaking just to be effective, we felt this one-off process was probably not perfect, and we thought that the problems were so systemic that probably there should be a regulatory mandate — the way we regulate wholesale financial markets or energy markets or telecoms — obviously, bearing in mind the risks with regulation as well.

That is our current view. The U.K. Parliament will have to decide over the next months whether they agree with that and whether they are going to create this mandate, but we have made very clear that if this is not going to happen — either because the government is unconvinced or because of Brexit or Covid-19 or for whatever reasons — we are certainly going to come back and do what we think then is right using our current powers.

MS. POZEN: Great.

Antonio, I just want to note that we have gotten a couple of questions in. Folks should continue to ask their questions. We will hold those to the end because I think you and I have a little back-and-forth to continue.

I am going to turn my question now to Joe Simons. Joe, I think I came into the FTC just as you were leaving the first time. You have been to the FTC now three times — Randy Tritell corrected me before — first in the Bureau Director's office as a staff lawyer, then also in the Bureau Director's office, and now as Chairman.

Let's turn to enforcement and the enforcement record. What have you seen? What is different? What do you think now, as Chairman of the Federal Trade Commission, and what do you think about your enforcement record?

MR. SIMONS: Let me cover that on a couple of different levels.

First of all, the current level. If you had

told me two years ago that we could handle 100 percent teleworking, I would have been very, very skeptical. The Commission was back then known for having a kind of rickety email system and IT infrastructure. But we have two things going for us.

First, we recently modernized our IT infrastructure by moving much of it to the cloud and making our systems much more scalable.

Second, our staff is spectacular, incredibly qualified, and dedicated to our mission. They were good when I was at the agency the last time, but now they are even better. We are operating at an incredibly high level and maintaining very good morale under these challenging circumstances.

In spite of the circumstances, what we are doing is unprecedented in terms of the level of enforcement activity at the FTC.

For example, we have had twenty-eight merger enforcement actions this past fiscal year, which is Fiscal Year 2020 which just ended on September 30.

That is more than any year in the last twenty years. Just think about that. We are going through a pandemic, our folks are almost 100 percent teleworking, and that they are able to function at this level is just mindboggling.

We have had two federal court trials since July. That is a lot for any year, and in this circumstance it is just incredible. We also have two other merger cases in administrative trials that are ongoing.

And the thing that is really remarkable is that our pipeline is still incredibly full, so we expect this huge number of enforcement actions to keep coming, at least through the next six months.

So we are firing on all cylinders, and it is just a great thing to watch from my vantage point. It's just incredible. I cannot say enough about our staff.

MR. BAVASSO: Andrea, can I take a slightly different tack but still related to the abuses that

are relevant to the digital sector? What is your view and experience about the pursuit of allegations of exploitative abuses? The CMA has pursued some of those in the pharma sector. Do you see that continuing beyond the pharma sector, or is it your view that this is all too difficult and should be primarily left to regulation?

MR. COSCELLI: We have a couple of standalone excessive pricing investigations in the pharma sector. Obviously, the legislation allows for pure exploitative abuses. These two cases, I want to make very clear, are very extreme in terms of fact patterns and in many ways I think could be described as very aggressive exploitation of regulatory loopholes.

The first case has now gone through litigation. We had a difficult judgment coming out of the lower court here, the Specialist Tribunal, which we decided to challenge, and we went to the Court of Appeal. We now have a very clear legal framework

coming out of the Court of Appeal that makes sense in economic terms, it is perfectly consistent, but it sets a very high bar for intervention.

The current cases we have are very extreme in terms of facts, so we are comfortable with what we are doing, but I think the clear consequence of that judgment from the Court of Appeal is that the ability of the competition authority in the United Kingdom to do standalone excessive pricing cases would be limited to pretty extreme cases in terms of facts.

So I think the answer is no, that we are unlikely to have many more cases like this one. There might be areas where our view would be that we would be advocating for either regulation or changes in existing regulation, if we find outcomes that we think are problematic.

MS. POZEN: There is a question that has come in from Nikita Shaw. If you click on Q&A, you can see it. I will read it out in case people don't see it. It has to do with algorithmic collusion,

which I think many of us have seen presentations about. It is an interesting area to address if you are ready, willing, and able.

The question is: "How are we going to address algorithm collusion where the collusion has been brought about by a hub without an actual agreement or any information to the spokes? For instance, two developers develop software which could do a first-degree price discrimination by recognizing a reservation price of the consumers and charging them accordingly, and eventually all softwares start speaking within themselves without a company that adopts them having any role in it. Alternatively, the public-distancing approach adopted in *Eturas* has more false negatives than false positives. How will the U.S. antitrust authorities respond to such an approach?"

I don't know, Joe, if you want to talk about algorithmic collusion and if you have any thoughts about that or are thinking on it.

MR. SIMONS: Sure. I am always fond of saying that there is nothing new under the sun. Anytime someone comes up with something that is going on today in the digital world or whatever that seems highly unusual, I am usually able to find some kind of analogy back to the past, and I think there is one here.

In the early 1980s, the FTC brought a case against a series of companies that made what was back then called anti-knock compound.[21] If you are old enough to remember this, there were automobiles that if you were using low-level fuel, your engine would knock, literally it would make noises, and so they developed this additive that stopped the knocking. There were four companies that did this. Two of them were much larger and they were very oligopolistic.

The FTC saw that one of the things that they were doing was they all adopted most-favored-nation (MFN) clauses of one type or another, and the FTC

[21] *E.I. Du Pont De Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984) (vacating Commission decision dated Mar. 22, 1983).

found that what those clauses were doing was facilitating collusion. These are called facilitating practices.

The FTC pursued the case in a very novel way, like a standalone Section 5 claim, and they did not bother to try to make the argument that the vertical contracts with the MFNs in them were agreements under Section 1. They went purely under Section 5 standalone and did not go under Section 1. I think today, if we were to see something like this, we could go under Section 1 of the Sherman Act and actually attack this kind of thing.

This is similar to these algorithms. They are potentially facilitating price fixing or tacit collusion, and if that is what we saw was going on, that is something I think we could reach under the Sherman Act.

MS. POZEN: Andrea, I don't know if you have views, if you have thought about these algorithmic collusion cases.

MR. COSCELLI: We have a bit. I think our view is that we want to understand the facts because it is clearly quite case-specific. We will then hope that under our current legislation there is a way for us to address these problems if we believe that these are problematic; and, if we do not, then that is clearly another area where probably we would do some advocacy and talk to government and think about potential gaps in the current legislation.

MR. SIMONS: I think that is a big issue for us too. With the *Ethyl* case I was describing, you could have had an agreement and brought that under Section 1 of the Sherman Act, but in the algorithmic collusion that is the subject of the question it is unclear whether you would have something like that at play and whether you would have a gap, in which case maybe that is something that Section 5 of the FTC Act could handle.

MS. POZEN: Antonio, back to you.

MR. BAVASSO: I had another question for

Andrea stemming from his remarks earlier about what to do on digital mergers.

You referred to the fact that you are thinking about introducing something or the appropriateness of introducing something that falls short of the balance of probabilities.

I noticed that the Antitrust Subcommittee that published their report earlier this week suggested that the U.S. Congress consider something very extreme, which is essentially introducing a presumption for a future acquisition by a dominant platform whereby they need to show that any acquisition would be presumed anticompetitive unless the merging parties confirmed that the transaction was necessary to serve the public interest and similar benefits cannot be achieved. This is a very extreme presumption that they advocate Congress consider. At the other end, there is the *status quo*.

I infer that you are thinking somewhere in the middle. We know that the Furman Report talked

about the introduction of an alternative test based on a balance of harm. Do you have any emerging thinking that you can share with us as to what type of test could be applied in these types of circumstance and which companies would be caught?

MR. COSCELLI: We have been a bit on a journey in this area. One key point for us is obviously of the 400-odd acquisitions by Google, Facebook, Amazon, and Apple. There has never been a prohibition, which from where we stand today does not quite seem right with the benefit of hindsight. So the question is, where did we go wrong; where was the problem?

As you know, over the last two or three years we have devoted quite a lot of resources in looking at a number of these mergers. We have ended up interfering with literally just a few of those, and some of those have been abandoned.

But one of them, the *Sabre/Farelogix* case, which quite interestingly we looked at in parallel

with the Department of Justice, we prohibited, and we are now being challenged and we are going to be in court next month in the United Kingdom. Obviously, as people here know, the Department of Justice also challenged this in the United States but was unsuccessful.

This is a useful data point for us because again we need to understand to what extent our courts are comfortable with substantive concerns about dynamic competition, innovation, things that personally as an economist I am very comfortable with, but obviously you need to reflect this in the case law.

At the end of the day, we need the right outcomes. We are certainly not on a crusade here to spend a lot of time just looking at acquisitions by these particular platforms or certainly not to end up in an area where essentially you block everything that these companies are doing.

The question is: What is the landing zone?

Jason Furman and the other academics looked at the test of balance of probabilities. We are looking at standard of review. For instance, we have a standard of review at Phase I, which is a reasonable prospect, of "substantial lessening of competition." Should that be the right test at Phase II for acquisitions by this handful of platforms that have significant market power?

These are the current questions we have and we will be talking to government about. But, as I said, it is very much in parallel to the actual work that is going on every week in terms of looking at digital mergers and understanding a bit more about the analysis and the issues.

For instance, Facebook is taking us to court now on interim enforcement orders, and again we are in court next week on that. That is a challenge on procedure, but it has a big impact in terms of our ability to deal with completed mergers.

So there are a number of things happening

now in parallel discussions that are going to influence I think where we land in terms of our own advice, and then obviously it will be for Parliament to decide whether anything is changed in terms of legislation.

MS. POZEN: Antonio, can I follow up on that with Andrea?

We sit across the Atlantic and we watch the CMA. I have heard you have enhanced your staffing. I think if you took Joe's Bureau of Competition and the DOJ lawyers together, they are roughly equal at the CMA. I don't know if that is fair. I think we are seeing a lot of assertive, aggressive — whatever word what we want to say — enforcement out of the CMA.

Again, I have had a lot of American clients say, "Do you have somebody on your team who can talk to us about the CMA?" And likely we do.

I would love to understand, if you can share with us, your enforcement philosophy. I know consumers obviously have to be your North Star — that

is the North Star of the U.S. agencies as well — but how else would you describe your enforcement philosophy? I think people would love to hear that.

MR. COSCELLI: It is very much focused on consumer outcomes, very much focused on continuous learning. We were talking about retrospectives earlier today. I think this is really important for us.

Also, I think we want to be very much part of the intellectual international debate. Obviously, there is an academic debate. There is a political debate obviously in the United States and obviously around Europe.

I think some of the remarks Joe made early on about some of these discussions about outcomes — whether there has been underenforcement, concentration markups — this is quite important for us. Personally, my current reading of the debate is that there has been a degree of merger underenforcement over the years by everyone, so we are trying to correct that.

I have some lawyers comparing us in terms of deal mortality with some other agencies, but when I look at some of the deals that are failing in front of us, these are three-to-two horizontal mergers with massive barriers to entry. So you really wonder about the risk assessment going on in some boardrooms today.

Also, as you know and we know, there is quite a lot of shopping around in terms of advice as well of people who really believe that certain transactions have to happen and are essential, so maybe they then go with their third set of lawyers after the first couple of sets have expressed some concerns.

I think there is a general discussion going on where a number of people think that there should be very, very limited constraints on a lot of merger and acquisition activity, and that is probably not where we are, so we think it is actually quite important to try to prevent some of these issues from arising.

As I say, I think this market regime is

quite useful because I literally receive every day a number of letters from members of Parliament or associations complaining about poor outcomes in particular sectors. In a number of these sectors, quite honestly, if you go back to the last five or ten years, there have been one or two transactions that have potentially caused some of the issues we have. I think we are trying to learn from that.

MR. BAVASSO: Andrea, we can't let you go without talking about Brexit. Very generally, two things in relation to that are: What do you expect the role of the CMA to be post-Brexit; do you see it as increasing its influence and ability to go its own way?

A related question to this in terms of the impact on the U.K. regime: Do you think that the voluntary regime in the United Kingdom for merger notification is sustainable after Brexit, or do you see that requiring an adjustment to the prevailing mandatory regime that applies everywhere else?

MR. COSCELLI: I will start from the latter question.

For instance, this case in court next week on *Facebook/Giphy* is a useful one to understand whether the regime can actually sustain the current situation.

We have a voluntary regime. The *quid pro quo* is essentially that we have powers to stop integration because obviously otherwise if we end up blocking a merger, it is not obvious what the remedy would be.

If a company is involved and the courts think that we need to spend a lot of time on this enforcement order, it essentially becomes impossible for us to administer the regime as is. So I think we will be very vocal in asking for a mandatory notification regime like everyone else.

In terms of Brexit, I think our ambition is very much to be at the top table discussing international mergers with our counterparts. Over the

last two or three years, most of our big merger inquiries have been in parallel either with the FTC or the DOJ — obviously not with the European Commission because of the way things have worked so far — and also with some of the other national competition authorities. Obviously, the European Commission will become a very active partner for us in terms of parallel investigations.

Again being very open, there is a question for us in terms of added value and resources about truly global mergers. I will give you an example. At the moment, the London Stock Exchange is buying Refinitiv. It is a big transaction in Europe and obviously it is a big transaction for the United Kingdom. So you can imagine in the post-Brexit world next year us spending quite a lot of time in parallel with the European Commission looking at that particular transaction.

What we are less clear about internally are truly global transactions. If you think about

Bayer/Monsanto, what is the role for the CMA on something like that? I think that is something we need to see in terms of the way it will play out.

There is also again a question for us but also for the courts about the evidence and, in a sense, the U.K. process in terms of the evidence in litigation in the context of very international and parallel merger reviews. Again, that will settle and sort itself out somehow over the next few years.

But I think there is definitely going to be a significant discontinuity for us between the current situation and the situation in a few months' time. We have had plenty of time to think about it and to prepare for it, so hopefully we will manage it well.

MS. POZEN: Shifting back over to Joe, can you talk to us a little bit about the Vertical Merger Guidelines? I know it was an achievement to have both DOJ and the FTC sign on, although I will note the vote on that. Talk to us about what you think that is going to do, how it is going to help, what we should

take from the Vertical Guidelines.

MR. SIMONS: Originally, I was not that focused on drafting Vertical Merger Guidelines.[22] But then what happened was the *AT&T/Time Warner* case[23] changed that outlook for me.

I was taken aback to see that some people were suggesting that the federal government does not do vertical merger enforcement, effectively saying or implying that vertical mergers are *per se* legal.

I was really taken aback by that, and I thought to myself: *Gee, if serious people think that, then we really have to disabuse them of that, and maybe the best way to do that is to revise the Vertical Merger Guidelines.*

For us they were not really a revision. We didn't have any Vertical Merger Guidelines; it was just the DOJ Guidelines from more than thirty years ago.

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[22] Vertical Merger Guidelines, https://www.ftc.gov/system/files/documents/public_statements/1580003/vertical_merger_guidelines_6-30-20.pdf.

[23] *United States v. AT&T, Inc.*, No. 18-5214 (D.C. Cir. 2019).

I wanted to make clear to people that, "Yeah, maybe vertical mergers are not as problematic as horizontal ones on average, but that does not mean you shouldn't have vertical merger enforcement."

Anticompetitive vertical mergers are not unicorns. We challenged a few of them when I was the Bureau Director, almost twenty years ago, and we have had some since I have been back, and I would not be surprised if we have more coming in the near future as well.

We really wanted to make sure that people knew that we were alive and well on vertical merger enforcement and that this is something we are absolutely looking at and, if we see a problem, we will act.

I think the other thing too is that there has been a huge amount of literature on vertical mergers that has developed since the DOJ Guidelines back in the 1980s.

People like Sharis and Antonio, who are

heavily involved with the antitrust community and leaders in the field, probably knew how the agencies would approach vertical merger enforcement, but for the broader antitrust community, I think that was really pretty opaque.

I think some of the broader community really had the view that, *Oh, this is not something we need to worry about*. That is one of the primary reasons we needed to change that.

MR. BAVASSO: Can I ask a question to both of you? It is a broad question, but I am interested in your take. There is an increasingly vibrant debate about the impact of sustainability questions in antitrust enforcement that go beyond traditional considerations. Do you see these types of considerations having a real impact on antitrust enforcement; and, if so, how?

MR. COSCELLI: I can be very brief. This is obviously something we are thinking about. In Europe, I think the European Commission and the Dutch

Competition Authority have been in the lead intellectually in this space. Particularly the Dutch Competition Authority has had some specific cases where they came under quite strong criticism for some of the positions they took.

Our current position at the moment is that we are spending quite a lot of time looking into it. We have not received direct approaches from companies that have complained to us of not being able to do certain things because of competition law. Our door is certainly open if you want to come. Obviously, lots of people self-assess and get advice.

For instance, one of the things we are planning to do now is to talk to some nongovernmental organizations active in this field that may not have access to legal advice in the same way as large corporations to see whether they think there are some constraints in terms of some of the things they think should happen.

Obviously, the main player in a lot of these

issues is the government rather than a competition authority, but at the same time it seems quite useful to all of us if competition authorities are helpful in these areas as opposed to potentially being an obstacle to some of these initiatives.

MR. SIMONS: Antonio, it was not clear to me what your question was. Did you say "sustainability?" I'm not sure what that means.

MS. POZEN: In the United States, Antonio, wouldn't we call it in economic terms externalities; to what degree should we take into account externalities like sustainability or jobs?

MR. BAVASSO: Yes, sustainability or jobs or environmental considerations. I do not know to what extent that is an active debate in the United States, but it is certainly an increasingly active debate on this side of the Atlantic.

MR. SIMONS: There is certainly an active debate in terms of what should the goals of the antitrust laws be, what is the first principle.

I think it is safe to say in the courts the first principle is consumer welfare, although I would interpret that term very broadly to include not only price but quality and innovation for sure.

There is a debate with respect to things like inequality and workers' income share and things like that, but I think, at least under the existing case law, that it would be very hard to cover that.

Also I think it presents some real, serious problems. When you have a first principle like consumer welfare, which is very consistent within itself and drives the analysis, and it gives you a basis on which to balance procompetitive and anticompetitive effects.

If you are talking about things like worry about jobs and income share and inequality, then you seem to have to have tradeoffs: "Okay, this merger may result in lower prices for consumers, but it may also cause fewer jobs." How do we balance those things out?

My own sense is that those types of other considerations are best dealt with outside of an antitrust framework and that we should deal with them through direct means rather than using antitrust, which is a very indirect tool to deal with those.

MR. BAVASSO: That, of course, was one of the most powerful intellectual arguments — particularly in the United States, where the role of the court is so important — to construe consumer protection narrowly.

I think we have a very different perception here because a court would have great difficulties presumably to balance off heterogeneous considerations of that type, an area that a competition authority would be more comfortable with.

MS. POZEN: Antonio, I see that we have gotten a clarification question for the CMA about the *LSE/Refinitiv*. I will read for the audience who do not have access:

"A clarification question for the CMA: Would

the *LSE/Refinitiv* deal be reviewable by the CMA if the European Commission is already in the final stages of their review of the transaction? Your previous comment seemed to imply that they would review it next year alongside the European Commission, though the deal is expected to close by early next year. More broadly, if two merging companies have formally made their EC filing prior to year-end, could a merger be subject to CMA review? Thank you."

MR. COSCELLI: My fault. I was not being clear.

The *LSE/Refinitiv* deal is in Brussels and will finish its review in Brussels and the CMA is not involved with it, although we are involved as a Member State.

When I mentioned next year, I just meant a transaction like *LSE/Refinitiv* taking place next year would be reviewed in parallel by us and the European Commission. But this particular transaction I am using as an example will have nothing to do with the

CMA. It is being reviewed by the European Commission, and that review will finish in the next few months, and that will be the end of it.

MR. BAVASSO: The Withdrawal Agreement is very clear: Jurisdiction is determined at the time of notification.

MR. COSCELLI: Basically everything that is filed in Brussels before Christmas stays in Brussels with some technical referral things we are not going to get into now. But if the filing does not occur this calendar year, from the first of January we will have jurisdiction on turnover and share supply.

MS. POZEN: Well, it looks like we have one more minute. You have both mentioned international cooperation and cooperation between your agencies and others. Is there anything you want to add that our audience — we have about 119 people — might be interested in?

MR. SIMONS: My impression is that the pandemic is having almost no effect. The overwhelming

majority of the work, at least in our international group, is done on the telephone anyway and in videoconferences, so that is clearly not being affected.

It is actually quite interesting. You miss the personal interaction. I think if this were to go on for a long period of time, it would be detrimental to international cooperation because I think what happens is that over a period of time, people see each other and they know each other and they feel comfortable with each other. And so it is much easier to do things over the phone once you have that kind of base already established. At least that's my view.

For now it is working very well. If this were to be a long-term thing, then it might become more problematic.

MR. COSCELLI: Yes, very much the same. I just want to make a couple of extra points.

I think on merger control there is a lot of international cooperation that has been very effective

over the years at the case team level literally week by week.

What is interesting, obviously, at the moment is the attempt to coordinate antitrust activities or market studies in areas like digital platforms, which we have discussed today. If you think about all of the work going on vis-à-vis Google or Facebook, it is the first time probably in history that so many agencies are dealing with very similar problems, not on the merger side but on the conduct side, and I think there is a very significant effort by all involved to coordinate. It is just more difficult because people are using sometimes different tools and national legislation is somehow different.

So if we end up with a world of remedies, a lot of work will be needed to try to coordinate, to make sure that this patchwork of remedies will make sense from a business point of view and from a consumer's point of view.

MS. POZEN: Inn the United States we have

the State Attorneys General as well, as Joe knows only too well.

Antonio, back to you to close us out.

MR. BAVASSO: I think it's a wrap as they say.

I just want to thank Chairman Simon and Andrea Coscelli for their availability. It has been fascinating to get direct insight from both of them. Thank you for your comments and your candor. I am sure our audience has benefited a lot from getting this perspective directly from you.

MR. SIMONS: Thank you for a great panel.

MR. COSCELLI: Thanks, everyone.

MS. POZEN: Thank you, and we pass it back to James.

MR. KEYTE: Thank you very much. Thank you, Joe, Andrea, Sharis, and Antonio.

What a wonderful panel. What a wonderful discussion. These are very dynamic times for antitrust and for debating these policy and

enforcement issues.

I also really do enjoy this format where we have more Q&A with the keynote speakers, so we certainly will do that in future events including, presumably, a live event next year.

We would like all of you now to join us and your colleagues for a Fireside Chat with Fred Jenny. It is going to be fascinating. He is another icon in our industry. It will be a lot of fun. We will be doing that in this Remo technology, where you can also interact with your colleagues and friends.

Let's all transition over to Remo, and then after that we will have our in-house counsel panel that Karen Lent will lead, which should be a very interesting conversation.

I will see you all in a few minutes. Thank you very much.