



Enforcers Summit – April 4, 2022

Paige Carter:

Good morning, everyone. So sorry for the delay. We are delighted to welcome you to our international and state enforcement events, our Enforcer Summit, co-hosted by the Department of Justice and the Federal Trade Commission. Before turning things over to Chair Khan, I wanted to provide a brief introduction. Prior to becoming the head of the FTC, Khan was an Associate Professor of Law at Columbia Law School. She also previously served as counsel to the U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law. Legal advisor to former FTC commissioner Rohit Chopra and Legal Director at the Open Markets Institute. Khan scholarship on antitrust and competition policy has been published in the Columbia Law Review, Harvard Law Review, University of Chicago Law Review and Yale Law Journal. Without further ado, I'd like to turn things over and thank you again for your patience. Chair Khan.

Lina Khan:

Thanks, Paige. Good morning, everybody. Welcome to our Enforcer Summit and apologies for the slight delay in getting started. I want to extend an especially warm welcome to our international and state enforcement partners who have joined us today, we're so thrilled to have you. Let me say upfront that I had so been looking forward to us all being together in person today, and it's of course, a big disappointment that we find ourselves back in a virtual setting yet again. I know many people had adjusted their travel plans to be with us in person, and I so regret that out of concern for everyone's health, we needed to move to a virtual format. So we will be doing our best to adapt. I also want to give a thanks to the FTC and DOJ teams for not only spending months pulling together today's event, but then also arranging for it to go fully virtual at the last minute.

Lina Khan:

We're also grateful for your heroic efforts to make this work. So for competition enforcers around the world, this is a remarkable moment, one marked both by significant challenges as well as tremendous opportunity. Here in the U.S., enforcers are operating against a backdrop where decades of consolidation across markets has contributed to higher prices, lower wages, falling rates of new business formation, and an economy that is less dynamic. Meanwhile, in the digital economy, a handful of firms have captured control over key arteries of commerce and communication. And these facts are prompting enforcers and policy makers to reassess the efficacy of our current tools and approach and have spurred a broader public discussion around how to ensure that our antitrust regime is fully promoting a thriving, competitive economy and widespread prosperity and innovation that serves all Americans. In this moment of reassessment, we want to be benefiting from the expertise and experiences of our fellow enforcers, both around the world and around the country.

Lina Khan:

A key goal of today's Enforcer Summit is to create a forum, where enforcers can discuss shared challenges and learn from one another. As a greater number of countries have developed and built out their competition regimes, we now have a greater set of experiences and a broader body of expertise that can inform all of our work. A prime motivation in hosting this summit is to learn from the valuable experiences of our counterparts. From the tremendous work being done overseas, from Johannesburg to Seoul, from Tel Aviv to Melbourne, from Brussels to Brazilia. Similarly, our state attorneys general are at the vanguard of bringing lawsuits to challenge unlawful practices in digital markets with numerous bold cases pending before U.S. courts. This summit also follows in the tradition of former FTC chair, Bill Kovacic, who looked to the experience of state, federal, and international counterparts to inform how we think and operate. The Enforcer Summit is being live streamed publicly, providing the public open access and insight into these discussions among enforcers.

Lina Khan:

Given that our work, our actions and inactions have broad and direct impact on people's lives from the price of food and medicines and the wages one can earn to the resiliency of our supply chains and the health of our local communities, promoting greater access to our work is critical. Opportunities to learn from the public are also key for ensuring that our work is staying rooted in and responding to marketplace realities. At the FTC, we now convene monthly open meetings to hear from the public and together with DOJ, we are hosting a series of listening sessions with a variety of stakeholders and experts to understand how the agencies past merger enforcement regimes impacted consumers, workers, and businesses. We hope that today's summit will be the first of many. We will focus today on merger reform and interagency collaboration, two topics that are particularly salient for us here in the U.S. In January DOJ and FTC launched a joint review of our merger guidelines to ensure that our tools and frameworks are reflecting new market realities.

Lina Khan:

This initiative comes against a backdrop of deep concerns around merger driven consolidation across markets and questions around whether dominant incumbents have been too easily permitted to buy up rivals and other firms in ways that lessen competition or tended to create a monopoly. As we seek to ensure that the merger guidelines reflect both the dynamics of our current economy and the statutory mandate that Congress gave us, we are keen to hear from our state and international counterparts. Some of the topics on which we are especially eager to engage, include the use of presumptions, [inaudible 00:05:52] competition, the role of direct evidence and market definition, how to update our conceptual framework to better account the digital markets and the administerability of our standards. Interagency collaboration is also front and center for us, especially given President Biden's executive order last summer, which charged leaders throughout government to adopt a whole of government approach to competition policy.

Lina Khan:

This effort marks an all hands on deck effort to promote fair competition across sectors and invites close collaboration among regulators and antitrust enforcers. As we refocus on using the full anti monopoly toolkit available to a variety of enforcers, we are eager to identify ways to further strengthen collaboration and use our tools in complementary ways, including to bolster deterrence. So again, we're so excited to have our enforcement partners here today, and really looking forward to today's

discussion. With that, I will turn it over to Jonathan Kanter, our Assistant Attorney General for Antitrust to share some opening remarks.

Jonathan Kanter:

Thank you, Chair Khan, and thank you so much for the tremendous partnership and collaboration at the FTC. You and your colleagues have been just heroic in the work that you're doing and as I've said before, the relationship between the DOJ and FTC has in my view, never been better. And so I wanted to thank you. I also wanted to echo the comments that you made about the deep regret for not being able to gather in person, the last minute change as a result of safety considerations and above all else, we want to make sure that we're preserving the health and safety of each other and our colleagues, and so we appreciate everybody's participation remotely and understanding and accommodating.

Jonathan Kanter:

I'd like to start by offering a little bit of an update in terms of what's happening over at the Department of Justice. I should also note I'm just thrilled to participate in the first annual spring gathering of antitrust enforcers. It's really a privilege to be among this incredibly esteemed talented and dedicated group of speakers and attendees. Admittedly, I was excited, perhaps too excited to learn that people are actually calling this Antitrust Day. I certainly expect that by this time next year at your local store, there will be rows of greeting cards that you can hand to your loved ones to celebrate Antitrust Day, so may be the first of many.

Jonathan Kanter:

And so I look forward to also to learning as Chair Khan mentioned from each other, so that we can be more effective advocates on behalf of the public, this critical moment in the history of antitrust and competition enforcement. I'm confident this will be an engaging program and with the array of speakers on hand, it promises to really provide meaningful and transparent insight into the state of competition enforcement today. I'd like to open by highlighting some changes we have made at the Antitrust Division and announcing some nuance. As I've discussed before the Division has preference for remedies over settlements and merger cases. Over the last few months, Division has taken important steps to reject risky settlements and challenge illegal mergers in court. In fact, we have sued to block or obtain abandonments in four mergers in as many months. Just last week, we rejected a settlement proposal from Cargotec and Konecranes, which abandon their proposed \$5 billion transaction in the face of opposition from the Antitrust Division and the UK's CMA.

Jonathan Kanter:

Burgeoning scholarship demonstrates that flimsy settlements often fail. For example, the food and agriculture listening session that we held with the FTC last week, we heard concerns from milk producer about a 2017 dairy industry merger that failed to preserve competition. Stories like this reaffirm our policy view that the public cannot bear the risk of divestiture that flops. In order to protect the public, the Division must be able to go to court to block a deal. We will bring tough cases, cases where charging is consistent with the facts and the law and in criminal cases with the principles of federal prosecution. We have six active civil cases, including the monopolization case against Google, and merger challenges against American Airlines, Penguin-Random House, United Health Group, U.S. Sugar, and Verzatec. In the criminal program, we have 21 indicted cases against 42 individuals, including nine CEOs and corporate presidents under indictment. We ended fiscal year 2021 with 146 pending grand jury investigations, which is the most in 30 years.

Jonathan Kanter:

We will aggressively pursue enforcement of the criminal antitrust laws to protect consumers, workers, citizens, content creators, competitors, and businesses harmed by unlawful collusion and Monopolization. We are more committed than ever to litigating when we believe a violation has taken place. In fact, I've designated two active deputy assistant attorneys general to oversee our litigation docket, Carol Sipperly and Hetal Doshi. It's the first time I'm aware of that the Antitrust Division has had not one, but two litigation deputies, certainly in recent memory, a reflection of our intense focus on trying cases. Both Carol and Hetal are long time department prosecutors with a wealth of experience, including supporting Antitrust Division trials.

Jonathan Kanter:

Carol has first chaired and co-led over 30 jury trials. She's a revered prosecutor. Her career with the Justice department began as an assistant U.S. attorney in the Southern District of New York, where she investigated and prosecuting cases involving organized crime, as well as complex white collar violations, including cases against John Gotti Jr. and Darryl Strawberry. She's also a veteran of the Division's LIBOR cases. For the last two years, Carol has championed vigorous antitrust enforcement leading the Division's criminal litigation program as a Senior Litigation Counsel and a Co-Director of Criminal Litigation. In this role, she supervised and supported trial teams in U.S. v. Penn, U.S. v. Aiyer, and U.S. v. Lischewski. Hetal is a highly accomplished trial attorney who has experience both in private practice and the U.S. Attorney's office in Denver. Hetal supervised civil and criminal trial teams and trained and mentored AUSAs. She served on the Financial Fraud Enforcement Task Force that led investigations of global international banks for their conduct in causing the 2008 global financial crisis, resulting in historic multi-billion dollar penalties.

Jonathan Kanter:

She also established a cryptocurrency fraud investigations and prosecution practice. Hetal has supported antitrust prosecution trial teams in Denver and through the Procurement Collusion Strike Force. Of course, the Division has also had talented litigation directors and veteran trial lawyers on staff, whose insights and experience support our civil and criminal trial teams. Their expertise will be deployed to help train junior litigators, supervise trial teams, provide support for special matters like motions to compel or help litigate especially complex matters and unique issues. We are in the process of hiring additional trial lawyers from outside the department to grow our bench and compliment and our internal and extraordinary talent. Our goal is simple, we must be prepared to try cases to a verdict when we think a violation has taken place. And that means our capacity from litigation must grow with the demands of modern antitrust enforcement.

Jonathan Kanter:

In other words, the Division must have the scale to litigate multiples of our current docket. To do so we're institutionalizing shared resources to support trial teams, recognizing the complexity of modern litigation. At bottom, we will work toward a steady state where the Division is not constrained by the cost of litigation. Accordingly, the president's fiscal year '23 budget request for the Division incorporates increase of over \$80 million. We have intend to put that money to good use. This is especially true because the investment in antitrust enforcement pays enormous dividends. In addition to the massive benefits to the economy from competition, the fines that result from our criminal enforcement more than surpass our annual expenditures. Over the most recent 10 fiscal years, the Antitrust Division is

responsible for depositing more than 8.7 billion in criminal antitrust fines and penalties to the Crime Victims Fund. 42% of the \$20.8 billion deposited overall.

Jonathan Kanter:

Division is also responsible for nearly two billion additional contributions to the general treasury fund over that time period. I want to say clearly that we are committed to litigating cases using the whole legislative toolbox that Congress has given us to promote competition. One tool that I think we can use more is Section 8 of the Clayton Act. Section 8 helps prevent collusion before it can occur, by imposing a bright-line rule against interlocking directorates. For too long our Section 8 enforcement has essentially been limited to our merger review process. We are ramping up efforts to identify violations across the broader economy, and we will not hesitate to bring Section 8 cases to break up interlocking directorates. We're also acting in real time to intervene, whenever needed to protect competition, including filing statements of interest in state and federal courts and before federal agencies. On the criminal enforcement side, I'm excited to announce that as of today, the Division is making important updates to its Leniency Program.

Jonathan Kanter:

Leniency is one of the Division's most important enforcement for rooting out cartels because it incentivizes corporations involved in wrongdoing to do the right thing by self-reporting. While these core incentives have not changed, the updates to the leniency policy will further promote accountability. First, under the revised leniency policy, to qualify for leniency, a company must promptly self-report after discovering its wrongful conduct. A company that discovers it committed a crime and then sits on its hands, hoping it goes unnoticed does not deserve leniency. Second, to qualify for leniency, a company must now undertake remedial measures to address the harm it caused and approve its compliance program. Just as important as the changes to the policy is the Division's commitment to making that policy transparent, predictable, and accessible to the public. As of today, the Division's leniency policy lives in the antitrust chapter of the Justice manual, which is easy to find on the DOJ website and is the definitive go-to source for internal policy and guidance across the department.

Jonathan Kanter:

Today, we are also issuing an updated version of the frequently asked questions about our leniency policy. Front and center in our minds when updating that document was the need to simplify and demystify our practices. The FAQs are written in plain language, and we have added nearly 50 FAQs to ensure that they address all the recurring question we receive and then some. This docket will make it even easier for the public to learn about leniency and understand what benefits it provides and what the Division requires in return. When I say the public, I want to emphasize that we are focused on making our policies intelligible to all, outside counsel, in-house counsel, business people, citizens, and all sectors of the economy and all levels of sophistication. There are no unwritten rules to enforcement at the Antitrust Division, we make our enforcement decisions based on transparent and predictable criteria.

Jonathan Kanter:

We need to change the language of antitrust more broadly to make laws more accessible to the public that they protect by facilitating equal access to justice and making our process as transparent, we guarantee just outcomes for all. When it comes to leniency specifically, the easier we make it for the public to understand the program, the more applications we receive and the stronger the program's

incentive structure is, which ultimately improves our enforcement capabilities. As I said earlier, the Division is considering all of the tools at our disposal. That is true across the board when it comes to both civil and criminal enforcement. We take our mandate to enforce the antitrust laws seriously, especially when it comes to making sure we are deterring, detecting, and we're warranted prosecuting the most flagrant pernicious offenses. Robust antitrust enforcement is particularly critical right now, as we've seen time and time again, collusion thrives in consolidated industries.

Jonathan Kanter:

When Congress passed the Sherman Act in 1890, it made Section 2 monopolization a crime just as it did for Section 1. Since the 1970s, Section 2 has been a felony, just like Section 1. In 2004, Congress increased Section 2's criminal penalties in lockstep with the increased penalties for Section 1 crimes. So if the facts in the law, the careful analysis of the department's policies, guiding our use of prosecutorial discretion warrant a criminal Section 2 charge, the Division will not hesitate to enforce the law. Another area where I'm determined to improve is in the language of antitrust as I mentioned before. And we have launched an access to Justice Antitrust Initiative, which we are internally calling AT2J to change the language of antitrust law to make enforcement more accessible and responsive. Antitrust should be accessible to all citizens, consumers, workers, content creators, small businesses, not just large corporations that can afford expensive counsel.

Jonathan Kanter:

This will impact the language in our public statements, investigations, the participants in our public forum. We are already seeing this play out in our review of the merger guidelines alongside our colleagues at the FTC. We are following a rigorous inclusive process in reviewing the merger guidelines, providing transparency throughout and seeking input from a wide array of stakeholders and experts in merger policy, not just attorneys and economists, but also business owners, workers, farmers, and consumers who have been impacted by a corporate consolidation and have substantial expertise given their market experience. We submitted a public request for information presenting several questions regarding merger analysis and we have already received over 275 comments, far outpacing the 51 comments received in the first round of the 2010 guidelines review.

Jonathan Kanter:

Last week, we partnered with the FTC to hold the first of four listening forums to hear directly from those affected by consolidation. And of course we are here today with our international and state counterparts to hear and learn from their experiences. Indeed, this summit, which is being live streamed for free to enhance access and share our policies and direction with the public at large is also a celebration of cooperation and collaboration, as well as a reminder that partnerships among competition, enforcers are transformative. At a case level, cooperation enables us to cover more ground and at a deeper level. Exchanges between teams sharpen our analysis and refine our thinking and give us access to evidence and information to which we not otherwise have access.

Jonathan Kanter:

The macro level, our partnerships are forced multiplier. Individually each of us has our own superpower and it is a force for good when we act together, we are the Avengers. In the world today, the global economy around us needs powerful voices ensuring competitive markets and fair competition. When we work together, that is the competition enforcement community. One of the challenges I've given to my team is to make collaboration among DOJ's competition partners, even better. On the international

side, we are taking a close look at tools like second generation agreements in the international space and continue to work with our partners bilaterally inside multilateral organizations, and in a variety of dialogues. We're also expanding our programs to provide technical assistance and litigation resources to our partners in order to help them meet competition challenges of the modern economy, and to learn from one another.

Jonathan Kanter:

On the domestic front, we are focused on implementing the executive order and promoting competition that Chair Khan mentioned in the American economy. We launched a new initiative to support antitrust enforcement throughout the U.S. government, including new partnerships with the USDA, the Federal Maritime Commission to provide litigation to support for their statutory competition authorities. We also have greatly expanded partnerships and supportive competition with numerous other agencies, including Department of Labor, the Department of Defense, Department of Transportation, and our friends at the CFPB. We are training interagency partners throughout the federal government on the antitrust laws and competition policy. As federal infrastructure spending increases, we're also continuing our efforts to seek out and prosecute procurement collusion through the Procurement Collusion Strike Force. My first step to getting all this done has been to make sure the people are in place to build and support our partnerships.

Jonathan Kanter:

For this I have looked to a strong and talented career staff with a few additions. Created a position of a Policy Director to oversee the Division's policy development work a cross-functional way, including overseeing its international competition policy and the appellate sections. Career attorney, Dave Lawrence has ably stepped into the post. Patty Brink, a mainstay and revered in the antitrust community took on the role of Senior Counsel for International Intergovernment Affairs. Lynda Marshall continues on as our International Chief and Karina Lubell is now chief of our policy group, both lead strong staff teams. Sarah Allen revered to the state antitrust community has joined us as counsel in the front office to focus on our collaboration with state attorneys general, which is absolutely vital to effective enforcement. I've asked all of them to do a deep dive on our resources and present long term plan for growing in our partnerships.

Jonathan Kanter:

We are working through projections of where we want to be, not just tomorrow, but in three years and beyond. These are exciting times for the antitrust and competition law enforcement community. Thank you for joining the summit and to all a happy Antitrust Day. I look forward to today's discussions. Thank you. With that, I'm going to turn it over to Chair Khan, who's going to initiate what promises to be an absolutely fascinating conversation with the head of the CMA, Andrea Coscelli.

Lina Khan:

Great. Thanks so much. So we will now be turning to our interview with Andrea Coscelli, Andrea as everybody knows is the head of the CMA. I'm so excited for this conversation. Andrea, you've had a remarkable seven year tenure at the CMA where you've emerged as a leading figure in the global efforts to ensure that antitrust enforcement and competition policy are responding to the challenges of today. Your time at CMA has been marked by vigorous enforcement and cutting edge research. And the CMA is now widely considered at the vanguard on a host of dimensions ranging from building out institutional capacity and capability to thinking through how competition intersects with issues like resiliency. So as

you near the end of your term at the CMA, I'm so grateful that we have this opportunity for us to hear from you some reflections of your time there, especially on a few critical topics.

Lina Khan:

So let's start with digital markets. This is of course, a major area of focus for jurisdictions around the world and a clear area where the CMA has emerged as a leader. I'd love to hear from you how you've approached this work programmatically from the outside. It's really seem like there's been a multi-prong strategy where the CMA has done these remarkable market studies, remarkably sophisticated deep dives into understanding how specific markets work, disaggregating them, surfacing what are the specific features and different parts of the supply chain that may be leading to tipping. And then that work in turn seems to have enforced both the push for legislative advocacy, as well as the CMA zone enforcement, including in, for example, Sabre/Farelogix, as well as the CMA's action to block Facebook's acquisition of Giphy. Which to my mind seems to be among the first transactions by a dominant digital platform, if not the first that has been outright blocked by a competition authority. So tell us about how you've built this program in the digital space and how you went about harnessing different parts of your toolkit.

Andrea Coscelli:

Right. Good morning, everyone. Lina, Jonathan, thanks a lot for organizing event, which looks very interesting. Thanks for your remarks, and I think a lot of what you said earlier resonates with me. So on the digital side, if we go back four or five years, it seemed pretty clear to us that there was a big gap between what we were able to do as an enforcer and what we should have done given the concerns, given outcomes, given the complaints we were receiving. And so it seemed clear to us that just focusing narrowly on our enforcement program wasn't sufficient because it was just insufficient given the scale and complexity of the issues and that we all know these enforcement programs end up in years of difficult litigation on the narrow issues you go after. So we essentially did two things, one was to strengthen internally in terms of the skillset.

Andrea Coscelli:

So we set up a data unit and tried to recruit data scientists, data engineers, and really tried to build the knowledge base inside the agency to support our program. In parallel, we felt it was really important for our role as an advocate in the UK context, to be very open with our government, that something else needed to happen. And I think the advantage for us there was that in the UK, traditionally there's very successful partnership working between the competition authority and the main regulators, particularly the financial services regulator, the communications regulator, the energy regulator. In many ways there's always been division of labor in a sense the smart regulation for competitive regulation is really critical to the overall outcomes, and it's very much a complement to the enforcement program we are on.

Andrea Coscelli:

And so we decided very early on that we didn't want to focus that much, the institutional design aspect, it wasn't really important to us who was doing what, but we had to be clear with our government that something else needed to happen and we felt that pro-competitive regulation was the right compliment. And we started with, it was a report by Jason Furman and some UK academics three years ago, which was very influential in the UK, and I think globally as well and then we built on it. We did a big piece of work jointly with the other regulators, essentially to prepare a set of policy changes for the

government. We submitted that 18 months ago, the government broadly welcomed it. Since then, they've been consulting on the principles for this regulatory code, which is a number of similarities with the DMA, which obviously was approved in Europe a couple of weeks ago. Some differences as well, in terms of the way things would be implemented would be more bespoke codes for each of the companies as opposed to a single set of practices.

Andrea Coscelli:

And so that's a current state of affairs on legislation, but in parallel, we have a fairly big enforced program. And again, we keep saying publicly that we will use our powers a 100% until the day when we get new powers, which again, I think resonates a lot with what you and Jonathan have been saying. It seems to me, this is the right strategy over the next two or three years for all of us is to do as much we can, but also be very open about what the gaps are, whether some changes are needed. Because I think it's an open question, how much change is needed in legislation? In the sense, I think we all have legislation that came in before the digital economy, obviously the legislators in each of our countries clearly wanted us to be able to deal with issues with consumer detriment and have the right tools.

Andrea Coscelli:

So I think you could argue that our existing laws should be flexible enough to accommodate all of these massive changes in business models. But I think we don't know, we don't know until it goes through a number of court cases and these type of issues. It is possible that the courts might take an overview on some of these issues. I think in that case, it is right that our legislators are very clear and open that changes are needed to make sure we have the right power. So I think that's the strategy and that's what we're saying publicly, but I think we are quite comfortable with the position.

Lina Khan:

That's really helpful to hear. I think as part of this work in digital markets, you in particular were quite quick to recognize that taking a tougher stance on mergers could be critical to

Lina Khan:

... to prevent tipping and could help facilitate eventual contestability, and you've achieved significant success in part, as you just mentioned through bringing on technologists, financial analysts, a broader set of skill sets to the CMA, to broaden the vantage point through which we're understanding how these markets are functioning. It seems that particularly in the area of tech and life sciences, we've seen the CMA willing to bring cases based on dynamic theories of competition. Can you speak to that experience, in particular, of thinking a bit more expansively about some of these theories of harm, and how you were able to push the envelope there?

Andrea Coscelli:

Yes. Again, I think the assumption, and I think it's similar to the assumption you and Jonathan have, is that we obviously have too much concentration in number of markets, and the outcomes today are not what we would like to see. So, if you start from the assumption, clearly mergers in those type of market, just going the wrong direction, essentially, if you have any of these big players buying new players, including early stage acquisitions. The advantage we have in the UK is that traditionally our merger process has always been quite holistic in terms of the way we look at issues, because essentially it's a three step process.

Andrea Coscelli:

The main part is this kind of phase two, where the decisions are taken by a group of independent decision makers, but they're supported by my staff, and essentially they have to apply our merger guidelines. So essentially their exercise is to apply the facts of the specific case to the CMA merger policy. And these panels are a mix of former business people, competition lawyers, economists, consumer advocates. So, it's a good mix of skills. So traditionally, the way we have done merger control has been literally from day one to assemble teams that have lawyers, economists, business experts, now we've added data scientists to that, and we believe it's really important they work together.

Andrea Coscelli:

Essentially there is a single way of looking at the merger. There isn't a separate legal lens or economic lens, it's very much, we need to understand the business facts about the particular case, a particular industry, and we need to understand how the particular transaction fits into the narrative of the way the particular industry is evolving. Now, we all know that there are mergers which in many ways are more standard, where it's very static industries, where it's horizontal overlap, we've been doing this type of mergers for many, many years, so I think we naturally immediately know what lends to apply and essentially we do the exercise.

Andrea Coscelli:

I think what has changed in the last few years is that we're becoming increasingly worried about mergers, where essentially there is dynamic competition where things change quite quickly and where there are significant barriers to enter an expansion. So these are industries where it's difficult to be a key player in the industry, that are limited number of players. And I think this is an area where if you go back five, 10 years in time, probably we are all under enforce because we put too much weight on uncertainty. We put too much weight on the fact that because things were complicated and different companies were doing different things, at the end of the day somehow it will work out.

Andrea Coscelli:

Someone else will come in, someone else will expand and it will deal with whatever problem comes with the transaction. Now, we do very much what you and Jonathan are doing, which is listening exercise with the industry. We go back and look at export studies and what has happened. And I think we all realize as you are doing now, that a number of these industries, these things just didn't work. The transactions happen, there's too much concentration, too much market power and essentially you have a transfer of wealth from consumers to this shareholders of this particular company.

Andrea Coscelli:

So we're now very focused on that aspect, and the way we are looking at the series of harm, again, you go back to basic economics, which is you're trying to look at the evolution of the industry with the merger and without the merger. So essentially think about the merger versus the counter factor where the merger doesn't happen. And, in industries with barriers to enter an expansion, taking out a player can be a significant problem. So, rather than obsessing on the static overlap today, really looking at the portfolio products and just trying to assess how much overlap there is, we think much more in terms of assets and capabilities and strategies and evolution.

Andrea Coscelli:

And when we see essentially a player which has a particular position of strengths in the market taking out an important competitor, we worry. And we think we are able, given our legal framework to write it up, backed up by documents, third party evidence, economic analysis in a way that is clearly something we're happy to defend in court if challenged. So we, as you know for instance, we challenge this saber for logics case in parallel with the DOJ. And it was quite interesting that we won our core challenge, but of course the DOJ lost. In many ways the cases were presented in a very similar way, so it's an interesting point about to some extent, the difference from the courts and the different standards there.

Andrea Coscelli:

As you know, we work closely with your agency on the Illumina PacBio transaction, which was another transaction exactly with these type of issues. And we blocked of a few months ago, the [inaudible 00:37:45] acquisition by Facebook, we were challenged by Facebook and we're going to be in court at the end of the month, defending that decision. And again, that's going to be useful data point because again, our process is very transparent. So you can go and look up on our website, our very detailed decision on the Facebook [inaudible 00:38:03] case. The trial is going to be public.

Andrea Coscelli:

So with the exception of few parts, it might be done confidentially. That the type of challenge coming in from Facebook, it's something that people will be able to see. And the court will have to decide. So, we feel very comfortable. We think in the right place on that, we're working obviously very closely with you, with the DOJ, European Commission and others, but we think this is absolutely the right way of doing it. It's a holistic approach, where you look at the evidence together. We don't believe in separate economic modeling, we don't believe in very traumatic assessments of mergers. We believe very much in grounding it on the economic reality, on the business reality, on what the companies are saying to their own investors, what third parties are saying publicly.

Andrea Coscelli:

We absolutely need consistency between the narrative during the merger review and the narrative in the other four, where the managers, the executives, the investors are talking about the way competition operates in the industry.

Lina Khan:

Yeah. I couldn't agree more, that the closing of the gap between how antitrust enforcers are viewing and assessing transactions and how analysts and investors are viewing them, that we really need to be focused on closing that gap. And it sounds like in the CMAs experience, key to closing that gap was what? Bringing on greater types of skill sets, financial analysts, business strategists? What else have you all been able to do to try to close that gap?

Andrea Coscelli:

Yeah. And that, but also to make sure that our lawyers and our economists will remain very much the core and the engine of the agency. They think that way, and they work together from day one, and there is a single narrative, a single conversation. Because I think, as you know, I'm an economist. I spend a lot of my time working as an economist, but I think, economists can be tremendously powerful if they read the documents, if they understand how the companies think and then apply economics to it. I think, if you have economists somehow separate, trying to model things, which don't quite fit the reality, it's a

lot of waste of energy. So, I think that it's really that embedding, and then that combination that I think is very powerful for merger control.

Lina Khan:

So, I'd love to hear from you how you've approached the issue of merger remedies. As Jonathan mentioned last week, cargo tech abandoned the steel in the face in part of CMA's challenge, which effectively included a rejection of a remedy that the parties have offered. We've seen other instances in which the CMA has rejected remedies, including behavioral remedies. This is of course a big debate within the US, where certain types of behavioral remedies quite clearly, and publicly had limited success, so there is a focus that both the DOJ and FTC are putting on structural remedies, but also asking a deeper question as to, in being able to identify instances in which unlawful transactions cannot be remedied, and having the confidence and comfort as enforcers to say, "It is not our job to remedy illegal transactions."

Lina Khan:

If parties are going to be coming to the agencies with facially anti-competitive deals, that that's, in some instances, something that cannot be remedied. And developing both the analytical tools, but also just the confidence to be able to say no, when no needs to be said. I'd love to hear from you know, how your thinking has evolved on this question of remedies and how the CMA has developed that analytical tool kit.

Andrea Coscelli:

Yeah. What I inherited when I joined the CMA was on the positive side, that strong focus on assessing remedies exposed. So, we have a big study that we keep updating with lots of case studies and then lessons from there. Which already was pointing to the fact that we found quite a few remedies, both on the behavioral side, but also some we say complex divestment didn't quite work. And essentially, the agency had took on too much risk on behalf of consumers and failed, and the consumers paid the price for it. Since then, I have continued that exercise. So we keep looking at previous practice and we do quite a few listening exercise like you.

Andrea Coscelli:

So in many ways, sometimes we come across industries that are not working well, and we go back and look at the potentially a mistake in those transactions that were cleared with [inaudible 00:42:36]. But we also have a fairly big book of behavioral remedies today because we have this markets regime in the UK, which is of course, they are regularized, essentially a rule making tool. So we have intervened over the last 25 years in a number of the industries, and a number of these industries will still have behavioral remedies. And it's a lot of work, it's a lot of effort for the agency to get those sectors in the right place with the rules.

Andrea Coscelli:

So, it seems to us that it's just fundamentally wrong that you have an industry today where competition is delivering for consumers, and you accept remedies that in a sense, in the best case scenario, if everything works 100%, will potentially recreate what you've lost, but there is a lot of risk that you get to the 100%. So realistically you get to 60% or 70% to 50%. So, I think that's just wrong. So we have now decided that it's clear that we're not going to accept that. So, the bar for us, for behavior remedies has

increased very significantly. And in many ways, it's almost an exception that now we would accept behavior remedies.

Andrea Coscelli:

There might be some cases in regulated industries or some cases where, what needs to be fixed is a very small part of the overall transaction in the greatest scheme of things that particular fix might be okay. But certainly would not regard behavior remedies as suitable when they're at the core of a transaction that we find to be problematic. So that's very clear, and that has reflected now our practice in the last few years. On the structure of [inaudible 00:44:08] side, I think we've also moved the bar, because again, we find when we go back and look in time, that very complex remedies are just difficult to execute.

Andrea Coscelli:

Lots of things can happen, and at the end of the day, we're all very clear in our guidance that the remedies need to recreate 100% of what you lose, and 100% of what you lose is a lot. So, I think again, on structural remedies, they should be easy, simple, clear cut, ideally not really being at the core of the transaction. So obviously there are cases where there are geographical dimensions to the cases, and it might be that with divestment in a particular region, a particular area of the country, you fix a problem. There might be issues where there is a mission, a single product line, and the merger is about eight, 10 product lines, and fine, we're happy with that.

Andrea Coscelli:

But certainly, and I think cargo tech was a good example, cases where the remedies go to the very heart of the transaction. They're highly complex, they're highly risky. Honestly, there is no upside for an agency in accepting that. And, we need to be guardians of consumer welfare, of the welfare of consumers. And, it's just not right that we take on this amount of risk, because if things fail, consumers pay, shareholders win, and it's just not our role to do that.

Lina Khan:

So, one big challenge for any competition enforcer, especially in this moment in time when there's just so much demand for our work in so many areas where we could and should be active, is prioritization. And figuring out how to prioritize our case work, particular sectors where we're going to be active. I know the CMA has implemented a pretty refined process for identifying prioritization criteria and the processes for case and market study selection. Can you speak a little bit to that process that you all have?

Andrea Coscelli:

Yes. Roughly when we say internally half of our portfolio is non-discretionary. So obviously mergers, we do regulatory appeals. There are all sorts of things where we have no choice. So half of our portfolio, we have a degree of choice, and that's essentially enforcement and markets work. Enforcement operates probably quite similarly to you and others. There's a lot of incoming information, be it leniency applications, intelligence coming in, complaints on unilateral conduct, [inaudible 00:46:44] cases, and on the market study side, which is a role we have and other agencies don't have, it's in a sense it's generally discretion, so we can choose the kind of industries we get involved in.

Andrea Coscelli:

So, we have decided to have a single monthly meeting where all of these leads from across all these different areas come in. And we, as a leadership team and the CMA and others, we look at the trade offs and agree our program, and every year we have an annual plan, which we discuss with our board with the key concept. So for instance, like many others, obviously we want to do more on climate change and net zero, so we said as a board, this is a big priority, so now we apply that lens to everything coming in, and essentially if something on the enforcement side or on the market side could help with that, we essentially give more weight to.

Andrea Coscelli:

We've been very clear that this is a qualitative assessment. We're looking at the number of factors, and then essentially we rank matters. The reality on the ground as you know, if you try to be an active agency and have multiple touch points with society at large and consumers and government, there is much more coming in than you can actually do. So there is always a bit of this, and I was laughing in my head when Jonathan, I was talking about this very ambitious listening program that you are running, because our experience when we do that is, it quite quickly becomes quite frustrating because you become aware of lots of issue where you would like to do something useful and at some point you can't.

Andrea Coscelli:

So, there's always this balance between using your existing resources the best possible way and ranking things, but also being open with people, because it's quite frustrating for me, as I'm sure for you and Jonathan, that you have businesses or consumer organization coming to us with very real problems, and sometimes you just can't help because you've run out of teams, you run out of things you can do in this particular quarter, this particular semester. So, I think it's very important to do that, but at the same time, all of us have just, we are realistic that we are running programs which have high frictions. It's quite hard for each of us to get a result in the face of clear opposition with lots of lawyers on the other side. So, at the end of the day, we have a limited number of cases we can run at any one point in time.

Lina Khan:

So, one challenge that we're confronting here in the US, especially as we mount litigation in the context of digital markets, is pushing the law to evolve. We have on the books, antitrust law, case law doctrine, that really was created in the context of vastly different markets, vastly different industries. So, embedded in doctrine, you have certain types of assumptions about how markets work, that no longer really correspond to what we're in these digital markets. You all of course have really advanced the collective learning of how some of these markets are working with enormous sophistication, and been able to translate some of that into particular types of theories of harms.

Lina Khan:

But, can you talk to us about what that experience has been like vis avis, trying to explain to judges and explain to courts why they might need to have the law evolve in a particular direction to reflect these market realities? What's that experience been like? Not only doing the learning internally, but also then putting it into practice and getting the successful outcomes in court.

Andrea Coscelli:

Yeah, I'm quite worried to be honest about that, because we have an example of this with our panels, which are not judges, but essentially independent decision makers. And we have run a fairly big program of speakers coming in and open discussions so that they are completely aware of the policy debates. We

haven't done it with the judges in the UK because obviously there's the independence of the judges, and the judges are quite separate from us in a way. We don't have much of an ongoing discussion about policy. And actually, last week I was in Brussels with you and Johnathan and others at the CRA conference, which in many ways I thought it's a very interesting program on policy and lots of good challenges for all of us as enforcers from academics, about things we should do differently.

Andrea Coscelli:

And on the train back, I was reflecting that we literally had, it was one senior European judge on one of the panels, and then maybe there are a couple of judges in attendance, but that element of the community just wasn't there. And in many ways I was thinking they should be there because that was a policy discussion, it wasn't about cases. So it's not really about independence of the judiciary. And I worry that we are all going through this process where we are being challenged, trying to learn, we learn from experience. And our experience when we go to court in the UK, but it's the same in Europe, and I think it's the same with you, is that the discussion, strategically the other side immediately brings back the discussion to the last 20 years of case law.

Andrea Coscelli:

So, there's been all this discussion on policy evolution and the decisions reflect a number of other things, but immediately you are back to discussing decisions over the last 20 years. And we know that these decisions and the judgments have delivered the outcomes we observed today, which we think are not the right ones. So, I worry that there's a community, that it's been a bit of a blind spot. And I think going forward, we should try to find a way that are acceptable to everyone, where judiciary are more involved in some of the policy discussions.

Andrea Coscelli:

Because at the end of the day, these are decision makers and they come to decisions with priors, with knowledge and training and all of it. So I think it's quite irrelevant that we try to work on that side as well, to make sure the case law evolves in the way we think is right.

Lina Khan:

Yeah. I think there are obvious advantages to arguing by analogy in the law, rather than arguing by disanalogy. And so, and so far as we're trying to explain that something is different, I think there are just intrinsic challenges there to vis a vis how the law develops. So, just one final question for you, is I mentioned a key topic for us in the US currently is thinking through how we can really take a whole of government approach to competition policy, and be thinking through outside of just DOJ and FTC, working with enforcers and regulators across sectors. You mentioned that this is something that the CMA in particular has been focused on, including with the financial regulator, with the privacy regulator.

Lina Khan:

I know that ICO and CMA had put out that terrific statement on the relationship between competition and data protection, and how these are actually complimentary agendas. Can you share with us maybe just one or two examples of where you think that type of inter agency work has been particularly successful in any type of criteria by which you think we should be thinking about, where you can be having the maximum impact through these types of relationships?

Andrea Coscelli:

Yeah, absolutely. So, there's a lot of that going on. One is on merger control. Obviously we take the decisions, but we have taken a very conscious approach to having a lot of input from the sector regulators from day one. So, every transaction in regulated sectors will have [inaudible 00:54:29] these from the regulators as part of the case team and make sure we can use 100% of the knowledge sitting with the regulators. On digital, we have, as you mentioned, we created this forum with the comms regulator, with the privacy regulator, financial services regulator. The four of us is called the Digital Regulation Cooperation Forum.

Andrea Coscelli:

We have a very strong program now where we do things together, either bilaterally or all of us. So, we did the work with the ICO and [inaudible 00:55:00] this enforcement case against Google on the privacy sandbox, which has been a significant case for us, and the monitoring now, we're going to do jointly 100% with the privacy regulator. We're working at the moment on a piece of work on algorithms with the other three partners. So, we're going to publish shortly two papers that we've written together, because again, all of us are worrying about the algorithms used by the big tech companies, with slightly different angles. Financial services, privacy, online safety and competition.

Andrea Coscelli:

And again, we think it's very helpful to us and to the community at large, that we are as joined up as possible. But genuinely, every single week in the CMA, there are multiple meetings at all levels with other regulators to do things together. Because at the end of the day, it's all about outcomes, it's all about trying to, which again, I think is exactly what Jonathan was saying, what you have been saying, which is about trying to use the resources we have in the best possible way. There are lots of comments going on. We think, for instance, it's very helpful to have people from us, spending time or moving completely to regulators, to inject a bit of this competition thinking, in the regulators as well.

Andrea Coscelli:

And a lot of these things generate very significant benefits. So, I was certainly very happy to see that that's the approach you are taking, and you're pushing really hard on that. Because certainly for us, it has paid off and it's completely accepted. So, it's not even something that people are discussing. That's the way things have been done for a number of years, that's what I inherited, that's what I did, that's what my success will be doing. And honestly it works. It's a very effective way of using limited resources.

Lina Khan:

Thanks so much Andrea, for your time today. I'll just say, I think the opportunity to work with you and similarly like-minded enforcers has been such a highlight of my first year in this job. And I've so benefited from the intellect, leadership and passion that you've brought to our field. So, we're all so grateful for the collective service that your leadership has provided. So very grateful for that, as well as you're taking the time to participate today.

Andrea Coscelli:

All right. Thank you all. Thank you very much.

Lina Khan:

So with that, we will now turn to the first plenary session, merger guidelines for modern economies. And I will kick it over to my FTC colleague, Ken Merber, and other speakers to come join the Zoom.

Ken Merber:

Welcome everyone to this panel on merger guidelines for modern economies. My name is Ken Merber, and I'm an advisor to the chair in the office of policy planning at the Federal Trade Commission. As you all know, the United States Department of Justice and the Federal Trade Commission are currently considering revisions to our merger guidelines, and we're thrilled to hear today from other enforcers about their experiences reviewing Newark mergers, and to get their perspective about whether merger analysis is keeping up with changes in modern markets, and our understanding of how markets work. And where it doesn't, what changes are warranted. I'm delighted to introduce our fantastic panel members today.

Ken Merber:

We have Gwendolyn Cooley, the Assistant Attorney General in the Wisconsin Attorney General's office and chair of the National Association of Attorney General Antitrust Task Force. We have Andreas Mundt, President of the Bundeskartellamt in Germany since 2009, and the current chair of the ICN steering group. We have Hardin Ratshisusu, Deputy Commissioner of the South African Competition Commission, and we have Ricardo Riesco, the National Economic Prosecutor for Chile. I'd like to start with discussion of where current merger analysis tools are keeping up with changes in the economy, and where they are not. Gwendolyn, I understand that the NAG antitrust task force is planning to submit comments on how the US merger guidelines should be updated. Where do you see issues in the market, that current guidelines are not fully capturing?

Gwendolyn Cooley:

Thank you, Ken. And I will say thank you chair con and AAG Cantor for inviting us. It's a pleasure to join such esteemed panelists, unfortunately not in person this time, but we hope to meet soon. So, the guidelines have rightfully stood as influential authority on the development of antitrust law, and are an important tool for federal and state enforcement. As well as a critical guidepost for merging firms. Some have raised concerns that overly permissive merger enforcement has led to over concentration in many sectors. Hindered the country's economic dynamism and innovation, and potentially resulted in harm to consumers and the competition itself.

Gwendolyn Cooley:

We appreciate invitation to comment on potential revisions to the guidelines, and hope to largely focus on areas where either the current guidelines are silent, or should be updated to reflect the sweeping economic changes, or are improved economic understanding. Potential revisions could better arm federal and state enforcers to halt anti-competitive mergers in their incipiency, as Congress intended. Thoughtful revisions to the guidelines might also dissuade parties from pursuing problematic mergers, while at the same time, giving parties actionable guidance to pursue mergers that are unlikely to be anti competitive, and may promote economic growth.

Gwendolyn Cooley:

Some of the things we are considering in our comments include, and there are 10 of them, at least. Conversations about potential and nascent competition, how do we address that. Presumptions, whether they're appropriate and if so, where. Digital markets and the impact of low or no marginal cost products and how we analyze those. Competition for attention, should we be analyzing that, and if so, how? Special characteristic markets were a feature of the vertical merger guidelines that have been

rescinded by the FTC, but not the DOJ. So we are going to look at vertical mergers, partial mergers, that kind of merging in pieces idea as well as cross market mergers.

Gwendolyn Cooley:

We'll also be looking at non-price effects, failing and flailing firms, and whether the guidelines adequately address those at this point. How we address private equity, acquisitions or divestitures, because that's a tricky area to deal with. As well as remedies, of course. So, we're looking at a lot of different things related to the merger guidelines and hope to be able to provide those comments soon.

Ken Merber:

Terrific Gwendolyn, thank you. That's an excellent overview of a number of topics that I know we're all grappling with. Ricardo, I know your office has been working to revise Chile's merger guidelines, so has been thinking about a lot of these issues as well. Which analytical tools have you found to be effective, and which do you think are in need of an update?

Ricardo Riesco:

Thank you, Ken. It's a pleasure to be here with you in Washington, DC, even if it's still from my hotel room, but I'm very happy to be here, and hope to meet you in person very soon. Well, as a smaller agency that has been doing merger control for almost five years now, we always like to go back to the basics. Why do we have merger guidelines? To explain what we do and how we do it. To courts, because they may review our decisions, to market players because predictability uncertainty or some degree of them, are necessary for the correct functioning of the markets. But at the same time, you don't want your guidelines to turn into a straight jacket.

Ricardo Riesco:

Agencies don't want to have their hands tied in advance, so you need to remain flexible to assess each merger on its own merit. Therefore, until we believe that merger guidelines should provide agencies with as many analytical tools as possible, since all of them at a certain point can be helpful when assessing a merger. The key is to avoid over reliance on a single instrument. And the goal is to achieve consistency by complimenting in your decision, all the available analytical tools. For example, competitive tool like the HHI concentration index, continues to be a good start point for most mergers in brick and mortar markets. But that same tool is not enough for other cases. First for mergers in digital markets, since it does not consider dynamic competition and

Ricardo Riesco:

And therefore can lead you to overlook a killer acquisition for example. Second, for mergers in markets with differentiated products where it is quite difficult to define the relevant market, you need to complement the HHI concentration index with another competitive tool like the calculation of diversion rate just based on a closeness of competition analysis. And even in those mergers you also have to resort to another, to an additional quantitative tool like the calculation of outward pricing pressure indices. Also, all of your quantitative analysis needs to be consistent with your qualitative analysis of the evidence in the docket of the case the internal documents of the parties, interviews, the assessment of the regulatory framework, et cetera. For that reason to be honest we are not very fond of competitive safe harbors or rebuttal presumption. We don't use them in our guide.

Ricardo Riesco:

For example, we just blocked a merger in the health insurance market in Chile where we calculated that the value of the plans would increase by around 5%. And that couldn't be remedied. So we consider that to be a substantial increase in a market which is very sensitive to people. We will see if that decision is upheld by our competition tribunal. In a natural Ken, just like the FTC is calling to make a holistic approach to evaluate the damages or harms that may arise out of a merger, we believe that it's reasonable to make a holistic approach to the different tools available to analyze a merger in any given market.

Ken Merber:

Thanks Ricardo. That was an interesting point. And in particular I noticed you mentioned that the guidelines should contain a variety of different tools so that a tool that's appropriate for the particular transaction that you're looking at can be used. One issue that that raises of course is whether one size fits all approaches in merger guidelines that are common for example in the United States are the right choice. Or if we should instead have something more like industry specific approaches or for some industries in particular.

Ken Merber:

So one industry where this has come up is as an idea is digital markets which is of course a topic I know everyone is interested in addressing. Digital markets can have lots of potentially interesting features from strong network effects to zero monetary price platforms to data as an input in the products that people are providing. So Andreas, your agency last year issued a statement on merger enforcement with Australia's competition and consumer commission and the UK's competition and markets authority which noted the challenges posed by mergers in dynamic markets like big tech. How should enforcers think about these mergers and should merger guidelines provide for a different analysis in these markets?

Andreas:

And many thanks for the opportunity to be with you today even if it... In fact my little contribution starts with a sentence that how happy I am we all meet here in Washington in a face to face meeting. So at least I'm extremely happy to be in Washington. You see me here in the rooms of the Department of Justice where we found a room for this morning. And I'm very happy to talk about mergers a bit in this sense because for the time being everyone talks about abuse control. I mean in Germany we have been talking about this new provision 19a. At the European level we talk about the Digital Markets Act, the DMA. And one is kind of wondering why we talk so little about merger control in the digital economy because we should always have in mind that merger control is still our most powerful tool as competition agencies because it is the key tool that prevents positions of dominance or super dominant positions in certain markets.

Andreas:

So I think we should talk more about mergers in this context. And this is by the way one of the reasons why I was very happy to do this joint statement together with the CMA Andrea [inaudible 01:08:32] and the ACCC Rod Sims on mergers. And yeah, I would like to talk about this for a few minutes. I think during the pandemic the situation in the digital world with regard to concentration even got worse. And this is why policy makers around the globe have been thinking about what we can do better in terms of abuse control but maybe also in terms of mergers. And we thought or I thought that was the right time to draw

conclusion to redefine our position with regard to mergers to look a little bit into the future, is merger control in best shape?

Andreas:

What are the key factors to make it work? Are we on the right track? And this is why you find the key point in this statement. The first one is a reminder. It sounds trivial but I think from time to time, it's good to remember that competition drives functioning markets and economic prosperity also in the digital economy. I mean competition remains the driver of innovation. And I think we should take note of that from time to time. The second point, second key point, we must take note that merger analysis has become increasingly complex in many, many areas. But that complexity that is followed by this uncertainty should not prevent us from stringent merger control. And in the past we used to work with presumptions about the prohibition of mergers. Today I have the impression that we work with a presumption that is driven very much by lawyers and companies that mergers are always good and they always create efficiencies but that is not a presumption for us as agencies.

Andreas:

I firmly believe that efficiencies have to be proved and that the burden of proof, the power for approving them must remain high. A third key point is that merger control is our sharpest war to protect competition and keep markets open. Always remember, a merger changes the market structure forever and it is extremely difficult to repair two concentrated markets by abuse control. That is a herculean task. We have all taken note how lengthy, how resource intensive, how incredibly complex abuse control proceedings are. In former times we always said it's the Mount Everest of competition law, that is still true. These proceedings are paved with the legal and economic obstacles. We have opened our Facebook case in 2016. We issued the decision in 2019. Since 2019 we are before courts now with an extra stop at the European court of justice in Luxembourg and I have no idea when a decision is going to be taken.

Andreas:

So that is an excellent symbol if you want to see where it can get you if you dive into abuse control. Fourth point, we must meet the challenge to keep pace with the innovative dynamics of digital markets. In the German competition law, innovation plays a very special role. And in the statement you also find a clear statement that we have to take into account, especially also the long term protection of innovation that is important also in the digital economy. And in early market phases companies tend to be very innovative. Competition is particularly vulnerable at this stage. So here timely intervention is absolutely crucial. How to come to this timely intervention. Here, we talk about these well known killer acquisitions. The takeover of Maverick companies. We have introduced in Germany the transaction value threshold to catch these mergers but to catch them on a formal basis is one thing. If we have the sufficient tool to assess these kind of mergers, that is a completely different issue because we have again, to look at complex issues.

Andreas:

I just remember the case made our customer where we did not find sufficient evidence for a successful SIEC test also given the fact that the standard of proof for an SIEC is very high. But always remember, past mergers should teach us to be cautious. When we think of Google, DoubleClick, Facebook, Instagram, some of these mergers, we can be pretty sure that these have been mergers that have contributed to the tipping of markets in the past. So in a nutshell, this whole declaration by the three of

us, by the [inaudible 01:14:22] cartel and the ACCC and the CMA, it cannot really be compared of course to guidelines for mergers, for merger guidelines but they are kind of an overwhelming arch, an overwhelming program of which you have to think when you approach mergers especially in the digital economy. And that we have to make better use from my perspective of merger control in this area, even it is complex. But again, abuse cases are by far more complex.

Ken Merber:

Thanks Andreas. I think we can all certainly agree that abuse cases are far more complex than merger control and making it important to look for ways to avoid situations where abuse is likely. Harden, I'd like to turn to you to get your perspective on how you've been looking at competition in digital markets. And in particular, what types of evidence have you found to be especially useful when you're assessing competitive dynamics in those markets?

Harden:

Thank you. Thank you Ken for this opportunity and invitation. And I'm glad to share this discussion with this esteemed group of leading forces around the world. I'll be building on what Andreas said and of course the previous speakers as well because you are asking me a broad question but I think there's a specific question around merger control. Because as you know, there is a view that says the current rules and frameworks that we have are adequate. And there is the view that suggests that the rules are inadequate. And when I look at this and from South Africa's point of view, we have had a few merger transactions of a global nation. And the most recent one was Google Fitbit where we considered it's approved with conditions in various jurisdictions but there's always been a concern whether as competition authorities we are assessing these transactions properly.

Harden:

We have applied traditional tools of defining markets, finding narrow markets, where there could be concerns. And there is a suggestion that we need to rethink that. That rather than looking at these narrow markets we should look at ecosystems in these market. So you could find that the traditional tools, the snip test we use is not maybe most suited for the challenges we are facing in digital markets. It happened with Facebook, WhatsApp, we all approved it as competition authorities. But as Andreas is pointing out that I think some transactions led to the tipping of the markets. But as authorities who could not do much about it which to me suggests that through platforms such as the ICN we probably need to maybe have a working team on this Andreas to relook at this much more carefully. Whether we need a new standard or not.

Harden:

I think it's good that the US is reviewing the guidelines. I think that will definitely influence this discussion because I think we don't have adequate tools to deal with these gatekeepers as they are now often called. We are able to address issues that arise in a narrow sort of in our local jurisdictions. So transactions that have local effects. I think we have looked at a couple in South Africa. Those are easy to address. But these transactions of a global nation, when I look at the effects it has been very difficult to attribute adverse effects in a narrow market. So when we look at these individually as authorities it becomes difficult to make a case you can win in court that this transaction would have a significant effect in our jurisdiction. So I speak for South Africa in that regard.

Harden:

So this is a challenge we face when we look at this transaction. So I would think there may be, there is definitely a need to review that. And broadly with digital markets, we have decided to adopt a cautious approach. We are conducting a marketing inquiry currently in this space but this is for online intermediation. But at the same time, we are following developments elsewhere. And I think Europe is the one where with the DMA once you look at the DMA it does point to the issues that we should be thinking up about, particularly as we tackle the power of gatekeepers. But this will require, and we always say this at the ICN [inaudible 01:20:45] OECD that we can only achieve this if we coordinate and cooperate as authorities. I've seen that the coordination and corporation has been very difficult.

Harden:

Now lastly, I can point this with this Google Fitbit transaction. We had a very good team of investigators working together. But when it was coming towards the end there was no alignment in terms of the kind of decision we should be taking at a global level. And I think you've seen reactions in Australia around this deal. It was the assessment had not even been concluded I believe in the US when we were about to decide on these transactions. And I've seen some transactions, not in digital markets where we are beginning to have this coordination issue. And I think this is there's been the AON transaction and the recent transaction it's the... I'll remember the names for you but there's a transaction now that was blocked in the UK as well as the US, approved in the EU and many other jurisdictions as well in South Africa. So we just need, it's good that Andreas is here but I think it helps that we have to do something about this at the enforcers level. Thank you very much.

Ken Merber:

Thank you Harden. I think yes, Andreas has a key role in that process of international cooperation and events like this are also hopefully a key way for us to ensure that we're all sharing some of the best ideas. The next topic I wanted to touch on within the topic of digital markets. For Ricardo, large technology firms are often engaged in quite a number, a large number of acquisitions. And I wanted to ask whether you've seen any distinctive acquisition strategies from these firms. And if so, whether you think it warrants any kind of sector specific approach.

Ricardo Riesco:

Ken, sorry, first of all I wanted to confirm that you can hear me.

Ken Merber:

Yes.

Ricardo Riesco:

Okay. Thank you. Thank you for your question. Well once again Ken I think it all comes down to what you expect from your merger guidelines. I mean, just a general analytical framework or a detailed set of rules. Of course...

Ken Merber:

I think I at least have lost Ricardo for the moment unfortunately. So with apologies I guess we'll move on. So one, I guess Gwendolyn I'd throw open two questions to you and you can choose which one to answer. One is the one I just posed to Ricardo. Or alternatively, one thing I had wanted to mention that you mentioned is part of the comments that we're likely to see from the state attorneys general relates to potential nascent competitors in digital markets. So drawing on your anticipated comments and your

own experience, how do you analyze mergers involving the acquisition of potential and nascent competitors? And to what extent do you think that analysis needs to be differentiated in digital markets as compared to others?

Gwendolyn:

So I will combine both of your questions and say that I think that the guidelines should be general. They should not be very like in this particular kind of case, you cannot anticipate all of the potential deals that are out there. That said, what we can do is provide transparency on some of the tools. I appreciate the chair saying, the chair of con saying in her comments just now, I apologize for that, that the states are at the vanguard of this issue. You'll see some similarities between the state's potential comments and some contrasts with my international colleagues. So as for nascent competition, I think the concern is that despite the anti-competitive harms that some of these mergers have enabled, as Harden said, they have become nearly impossible to challenge. And so we're thinking about ways to make that more straightforward for enforcers but also to make that transparent for the regulated community so that they can see kind of what are we thinking about.

Gwendolyn:

Some of those things might include evidentiary issues. What should be taken account? Do we use direct evidence from ordinary course documents like the acquiring party internal documentations showing what the purpose of the acquisition is. Is it a killer acquisition? Is that their intent? Do the business plans of the nascent competitor show that they expect to grow their market share? Things like that. We're also thinking about one of my least favorite named doctrines, the actual potential competition doctrine which should be called the pre-nascent doctrine or something else. But I guess but for the merger one of the parties would've entered the market. Differing from the Chilean approach the states will likely have some thoughts on presumptions. But I would say that presumptions don't mean that a merger should necessarily be blocked, it's a presumption. It, the structural presumption is a valuable tool for courts enforcers in the regulated community. And we consider a presumption where a dominant firm attempts to acquire a potential competitor that could be presumed anti-competitive. Which would be of course rebuttable because it's just a presumption.

Gwendolyn:

Another thing that we all want to do of course is think about some of those economic assessments of quality standards that gets to that kind of low or no marginal cost issue. And there there's a number of tests that we could use, particularly for digital markets. Digital markets that might be worth considering including the SSNIP test, small but significant non-transitory increasing cost test. And then the similar tests for quality small but significant non-transitory decrease in quality test. We could also look at whether we talk about attention markets, that's a popular thing right now.

Gwendolyn:

Attention SSNIP test so we can compare how much time I spend on Instagram versus something else. And variations on the regular SSNIP test, potentially ones that focus on monetary prices of related or bundled goods. So those generally we're thinking a lot about these kinds of transactions and how we determine which ones are problematic and which are not. And how specifically we show that to a court providing parent to merging parties about what we're doing. Because we're very conscious in the States as litigators that we have to make the arguments and then one of the purposes of the merger guidelines

is for courts to say, okay, you're following what your guidelines say. I think that's rational. And then whether the courts then accept that that's something that we would like to see continue to develop.

Ken Merber:

Thank you Gwendolyn. One additional area outside of digital markets that a lot of attention has recently been focused involves labor markets. And Harden I understand that South Africa has its own approach to the analysis of labor issues in merger review. So how do you think about labor issues when you're reviewing a merger and to what extent does that set of issues require a separate framework?

Harden:

Thank you Ken for that. I think this is one area that we have been looking at for some time. So since the enactment of the Competition Act, the new act in 1998. So in merger control we not only look at the effect that the merger would have on competition or the efficiency enhancing gains that we could see, but we look at the impact on what is generally termed the public interest. So this is done within the authority. And one of the factors that we look at aside issues on the broader impact on the sector the ownership of them and so forth. We look at employment. And this is where we have had the interface with the business as well as the labor unions and employees. When we consider the effect of the merger on those employees.

Harden:

And the reason being, and if you look at South Africa and we've explained these several platforms that for us employment is a big consideration given the current challenges and the inflexibilities we're seeing in the labor market that the high levels of unemployment that we see there is a reason to prioritize these particular questions. So how do we do this? We really ensure that the transaction does not unfairly change the balance. This is like the bargaining balance from the employees to the employers, being the firms merging. So we try to safeguard some of those benefits that employees would've gained during the process. We ensure that the mergers parties do bring on board the labor representatives when they deal with these mergers. And to the extent that we can safeguard some of the challenges, including loss of jobs, loss of benefits. We then remedy those through the various conditions we impose on transaction. So if you look at South Africa, most conditions that you find in mergers are in relation to employment issues.

Harden:

But in most cases it's really to require firms to limit the extent that a merger might have on employment. So we do put moratorium on retrenchments and so forth for a limited period of roughly two years. But this is really to be conscious of what a transaction can do to that bargaining balance between the employers and the employees in a context of a major transaction. But as I've said Ken, this has been a controversial, somewhat controversial issue at this platforms but there is context to it in South Africa and it is not I don't say what we do here that it is a standard for everyone. I think it does depend on the challenges we face at a point in time and how we prioritize the use of the tools at our disposal. Thank you. Thank you very much.

Ken Merber:

Thanks Harden. I appreciate getting that perspective from a legal regime that's a little different from I think what we have in the US. Although I did notice that in part of your answer you mentioned that one of the issues that's being addressed is the change in bargaining power between the employer and the

employees that results from the merger. And I think that's an interesting topic for us to consider in pretty much any of our regimes in so far as it's reflecting an increase in market power that the employers have. So I think we are lucky enough to have Ricardo back. So Ricardo, just before you cut out I think we missed pretty much your entire answer to the question I had posed.

Ken Merber:

But let me pose a slightly broader question to you now that you're back. We've been talking a little bit about whether we need one size fits all rules or if we need some sector specific rules or factor specific rules for certain transactions. And we've talked about it in the context of digital markets and just now in the context of labor markets a little bit. So in either of those contexts we would love to get your thoughts on whether there are appropriately specific rules that should be adopted for those or other contexts. And then also to the extent that we missed your answer on the unique acquisition strategies that you might be seeing in digital markets, we would love to get your thoughts on that as well.

Ricardo Riesco:

Thank you again and my apologies because my internet connection went down completely. Well again, I think it all comes down as I was saying to what you expect from your guidelines, from your merger guidelines. To be like a general analytical framework or a detailed set of rules. Of course, both options have their pros and cons. But the more specific your guidelines for any given industry, the more costly for the agency and the more likely I think that the marketplace and the courts will hold you accountable if you don't follow your guidelines strictly regardless of the possible specificities of a merger. But even

Ricardo Riesco:

Even if you have general guidelines, you always need to recognize market specificities and different industry dynamics. In other words, if you don't have a special guideline for digital markets, that doesn't mean that the agency can do whatever it wants when assessing a merger in the digital world. For example, in our new merger guidelines, while they are general in character, they do have a chapter recognizing that mergers in the digital market have some particular elements that differ from the analysis of mergers in traditional markets. Digital markets are driven by dynamic competition, network effects in digital markets are stronger, digital markets are prone to tipping, incumbents in digital markets can make a strategic use of data to prevent entry, etc, etc.

Ricardo Riesco:

Also, and this is also very relevant, at least in smaller jurisdiction like ours, agencies are following and do analyze and consider very carefully the precedents and guidelines issued by larger authorities in the US, Europe and individual countries like the United Kingdom, Germany, Australia, among others. Instances like this and the ABA spring meeting are extremely important for agencies to try to build a common understanding as to how to enforce antitrust law. Even when we may not have specific guidelines relating to certain industry or to digital markets, there is, so to say, a cumulative positive effect of specific guidelines issued by larger jurisdictions. This is very important to know when we are dealing with market players making transactions on a global scale like digital platforms.

Ken Merber:

Thanks Ricardo. We've been talking about digital markets for a while, and I want to shift gears slightly to talk about one of the other significant changes in the economy that is ongoing, which is the COVID pandemic, which we've all been reminded of today. The pandemic, in addition to inconveniencing us

today, has of course caused enormous human suffering and devastation to many businesses. Andreas, in your statement with the CMA and the ACCC you also addressed how the pandemic was affecting merger review and particularly how you'd look at failing firm defenses during a pandemic or a crisis like this. How has that impact on the business community affected your merger review program and approach, particularly in terms of the failing firm defense?

Andreas:

Yeah, Ken. Two brief remarks. One, I must respond to this issue of international corporation in this issue, just very, very briefly because Hardin addressed me directly. I could not agree more. Let's put it this way. I think we talk about companies with a global business case. We talk about companies which can create, let's put it this way, harmful effects, not only for a couple of consumers, thousands, no, for millions of consumers at the same time around the globe, because the business model is the same wherever you go.

Andreas:

That cries for cooperation also between competition agencies, with regard to the developing of new theories of harm, which was by the way, the content of most of the reports that we have seen, be it the Furman report, be it the French report, be it the German report, be it the Crémer-Montjoye-Schweitzer report at the level of the European Commission, everyone called for new theories of harm. We should take that series and develop these new theories of harm together. One point.

Andreas:

The other point, we always find it extremely difficult to find the right remedies in these kind of cases, in global merger cases between digital companies. I think here's a huge scope for corporation to find the right remedies. I needed to say that. We do a lot of this respect in the fora of the OECD, but even more maybe at the level of the ICN, where we take a very practical approach on how we better cooperate together in this issue.

Andreas:

This having said, I always thought that the pandemic would trigger more cases where the failing firm defense would play a role in Germany. To be frank, at least in Germany, this did not happen. What we saw were a couple of takeovers from companies that were in a serious situation and where a takeover was needed in order to guarantee that this company could do work also in the future, also to save the jobs, we had just had that question with regard to Hardin. That was issue.

Andreas:

But to be frank, we have not in cases where the failing firm defense really has played a role. It was in the discussion, but it hasn't played a role in a way that it was the reason for clearing the merger. This is what I understand by a failing firm defense that under any other aspect, you must block that merger, but having the effect of a failing firm defense, you have to let it go. What we had was a huge debate about the failing firm defense if we were taken it too narrow, because if you take it here as a defense, the preconditions for failing firm defense are very narrow. There was a debate about that. But in the very end, since we didn't have the cases, this discussion was not brought to an end in a way that we said, "Okay, we have to open it up."

Andreas:

In a nutshell, we have seen mergers that happened in a quite delicate situation for some of the companies, but the failing firm defense in the very end was not claimed by the parties. We either did not see it, or we saw in some cases, but maybe not as the argument that it was a failing division defense. That is another issue also not easy to assess, but in the very end, we always cleared the mergers on the basis that went not that deep down into this question of failing firm.

Andreas:

But to be frank, I think all these questions will come back on our tables now with the war in Ukraine, which gets many, many European companies into trouble. It is hard to see that the same questions that we had to answer two years ago will now come back to our table for this reason. But the situation is very much the same. The ECN has already published a joint statement by which we said that we would take a similar approach to the pandemic approach with regard to the Ukraine war. That is very much likely. And maybe under these conditions, we might also see more failing firm defense cases, but again, we did not see them in the past. Thank you.

Ken Merber:

Thank you, Andreas. Since our start time shifted slightly, I think we are coming up on very close to our allotted time. I just wanted to give everyone a chance for a closing remark. In particular, I think the merger guidelines certainly in the US and in other jurisdictions as well, they work within existing legislative frameworks. I'd like to give each of you a chance to address what you think are the most important developments that you'd like to see, either in the guidelines or more generally, in merger control. Why don't we start with [Gwendolyn 01:44:59]?

Gwendolyn:

Well, thank you, Ken. I have again appreciated, and I know the states appreciate being invited to participate on this panel. I think from litigation perspective, short of legislative action or a shift in how we think about cases, the states recognize that we need to prove what courts want us to prove. The attorneys general are really viewing things from a holistic perspective and would like to get the mechanics in good working order.

Gwendolyn:

When we talk about legislative change, I don't know that the attorneys general really speak with one voice on what we would like to see next. But I'll note that there are some things that there are a lot of agreements on. Zooming out from merger control, thinking about the state should be able to choose their own venue. That's something that's really important to the states. 52 attorneys general sent a letter to Congress indicating that, and we appreciated the letter from Chair, Khan in support of that.

Gwendolyn:

We would also like to be able to get merger notice under the Hart-Scott-Rodino Act that would certainly lessen the burden on the federal agencies if there are mergers that are of particular local interests, but also allows us to share resources, and that's more efficient for both business and for state enforcement. I think generally the guidelines are there to provide transparency about what the federal agencies and their state counterparts will be looking at and to provide the courts with some kind of benchmark, as we've heard, to see how we think about mergers. I think that's what we're hoping for, for the future of state enforcement.

Ken Merber:

Thank you, Gwendolyn. Hardin, can you share some of your top priorities for progress moving forward with guidelines?

Harden:

All right. Thank you very much, Ken, for that. This is quite interesting because building on what Ricardo was saying, that when the larger jurisdictions sets these rules, they not only just apply to your jurisdiction as the US. I can say, Gwendolyn, in South Africa, the courts have looked regularly to the US, and the guidelines the horizontal major guidelines have been very influential in South Africa, including the safe harbor that were there from early on around HHIs, when would you determine that a concentration is potentially harmful to the competitive process?

Harden:

That becomes a very, very important. When we are having these new emerging issues, I think it would be very helpful for a leading, such as the US, even if you do not prescribe specific rules for these issues, but to recognize them because this now the US would then set the tone and that tone would cascade all the way to our jurisdictions. We will see that also at the ICN.

Harden:

If you look at what Andreas said on failing, we have a standard there on failing as an example. By the way, Andreas in South Africa, firms do not in invoke that because the test is strict, it's standard, global standard. It's strict. We are not finding firms claiming failing firm defense. Because we have public interest provision, they say, "Well, we want to save jobs." They don't say the firm is failing because immediately they say the firm is failing, there are certain requirements they should meet, which many firms are not meeting. But this is why we have a standard, and it helps for us to address these issues in a very consistent way across.

Harden:

I think it's just to say... for South Africa, as an example, we don't have horizontal merger guidelines. We've done this deliberately. From 1998, we've been thinking about this, but we realize that a lot of developments are happening and we want to develop jurisprudence drawing on best practices. At some point we'll develop guidelines. But I think leading agents, such as the US, as you say even here in your country, the guidelines are quite influential courts. They're not just influential in your courts. They're also influential in our courts. I think just bear that in mind, that if you listen to the voices, global voices and the concerns, and they sort of find a way in your thinking, I think that would be not just for the good of the United States, but it'll be for the good of the world. I will leave it here. Thanks for hosting us in Washington. We look forward to seeing you soon. Thank you.

Ken Merber:

Thanks. We're running out of time. Ricardo and then Andreas, I'd like to give you both a chance to close, but if you confine yourselves to just a minute for our time constraints, that would be great. Thanks.

Ricardo Riesco:

Thank you, Ken. Well, first I would like to see that the budgets of agencies are substantially increased. The FTC recently said that it's severely understaffed. Either to say the same about the FNE. I think that the financial resources assigned to the agencies do not match the importance and complexity of their task.

Ricardo Riesco:

Second, touching on what Andreas and Hardin were saying about international collaboration, but going a bit further, perhaps. I would like to see more uniformity, emerging control. I refer to more substantive uniformity, but also to more procedural uniformity to have a common substantive standard; that we all require the same information when notifying a merger, that we all have the same procedural framework for analysis, et cetera. In a globalized world, it's just not efficient to have different sets of rules, depending on each jurisdiction.

Ricardo Riesco:

In Chile, for example, roughly 40% of our cases are international mergers. You can't imagine the pressure smaller agencies like ours face when a transnational merger has already been approved by larger jurisdictions. I'm confident that we will be able to sit down and to come to international agreements on this matters. Also, we should do for a potential example regulation of digital platforms. Thank you.

Ken Merber:

Thank you, Ricardo. Andreas?

Andreas:

Yeah, Ken. Many thank thanks. We've seen lots of changes in abuse control recently. Why? In order to reduce the complexity of our cases and to help us to bring our cases through the courts. What we see in mergers is it is very difficult to bring our cases through courts as well. I would like to remind me of a recent judgment by European courts on Telefonica/Hutchinson, which makes it very difficult to block a merger where companies reduce the players in the market for free. To prove in the SIEC, we have just had a very similar decision in Germany in the area of furnitures.

Andreas:

If it is like that, and we see these kind of complex cases, merger cases, which we are unable to bring through the courts, I wonder why the legislator is not thinking about reducing the complexity of merger control as well.

Andreas:

There are solutions that need to be discussed. We could lower the threshold. As far as Europe, as Germany is concerned, we could lower the threshold for an intervention under the SIEC test. We could maybe work more with a shift of the burden of proof, especially in the digital economy. Maybe I would like to mention it, maybe we can think at least a little bit about working also with per se rules to very limited extent. Given the fact, and here I come back to what Hardin has just mentioned, that all competition agencies around the globe suffer from insufficient resources, and we have to bring our cases through the courts with these resources, and we must get a chance to do that.

Andreas:

This is why I think we should do our utmost, also the legislator, maybe to reduce the complexity of merger cases in order to be able to do so, because this is what we are expected to deliver. It's impact on the markets. If this is so, we must seriously discuss how to improve our performance in this respect.

Ken Merber:

Thank you so much. We have reached the end of our time and possibly gone a little over. I want to thank the panel so much for your insightful views and for your flexibility and the switch to a virtual panel after you've all arrived in DC. I hope you have a chance to enjoy the city, at least. We have a short break now, followed by a panel on theories of harm in non-horizontal mergers. Thanks very much everyone for participating in the panel and for listening.

Andreas:

Many thanks, goodbye. See you.

Harden:

Bye.

Ricardo Riesco:

Thank you.

Gwendolyn Cooley:

Great. Okay, well, thank you. Thank you so much to the folks handling the technical backend on short notice of this now virtual panel. I think we have an absolutely tremendous panel on theories of harm and non horizontal mergers here today. I have to say, I'm David Lawrence, I'm the Policy Director at the Antitrust Division, and I am like a kid in a candy store moderating this panel. I have been working on issues related to merger policy in our guidelines, and especially, non-horizontal mergers for something like six years. I've been in hundreds of conversations. I have never had the privilege of discussing this issue with such distinguished expert and experienced enforcers.

Gwendolyn Cooley:

What our panel brings to the discussion today, and it will be so valuable to those of us at the DOJ and FTC thinking about these issues, is experience working the cases and understanding the application of these theories to the facts on the ground.

Gwendolyn Cooley:

With that, let me briefly introduce our incredible series of panelists. Many need no introduction. Director-General Olivier Guersent of the European Commission's Directorate General for Competition. He's been in that role since January 2020, but he's been at the European Commission since 1992. I understand the history of the success of the European Commission in building one of the world's leading merger enforcement programs is a history with Director-General Guersent closely involved at every step of the way. He's been in all manner of positions throughout the agency and has an incredibly impressive resume and credible experience here. We thank you for being on the panel.

Gwendolyn Cooley:

We also have Director-General Michal Cohen of the Israel Competition Authority. She holds a variety of advanced degrees, especially in economics and law, and specialized in the Economic Development department in the Israeli state attorney general's office, where she began her work as a lawyer. She joined the Israeli Competition Authority in 2006 as deputy chief legal counsel for criminal affairs. I love that connection between economic thinking and legal thinking that is so important in this area. In December 2018, she was appointed the authority's chief legal counsel, and in January 2022, appointed the director general. Welcome to the panel.

Michal Cohen:

Thank you.

Gwendolyn Cooley:

We are also privileged to have Commissioner Reiko Aoki of the Japan Fair Trade Commission, who's a former executive vice president at Kyushu University. She's conducted tremendous research on the economics of very complex areas that intersect with what we are talking about, patents and patent pools, standards, innovation, and political economy. She's also been actively involved in science, technology and innovation policy, and has a host of impressive prior accomplishments and academic credentials that I think will serve us very well in this discussion.

Gwendolyn Cooley:

As I said, I am a kid in a candy store before I start and turn it over to this panel, I should give a note on terminology, particularly with international audiences where there's translation. The title of this panel refers to no-horizontal mergers. A more elucidating title, I could not think of. Sometimes these are called vertical mergers. I know when we were doing the vertical merger guidelines, they said, "Well, they're vertical, but it's also diagonal, it's also complimentary." But I think it gets down to... and I think we all have a shared understanding, we're talking about mergers that impede competition by depriving other market participants of the ability to bring their full competitive strength.

Gwendolyn Cooley:

I think my sense is that's what we're talking about here today. There's a number of ways that can happen. That goes to my first question. If by definition, we're talking about mergers where there isn't direct head-to-head competition in a market, a narrowly defined market, what are the mechanisms of harm that we should be concerned about? Perhaps I'll turn to you, Director-General Guersent first, to address this question.

Michal Cohen:

Well, thank you very much, Dave, and thank you to the DOJ and the FTC for the invitation. It's great to be... I was about to say face to face, but okay, well, we'll see that later. Well, we have a long story in the commission in what we call in the non-real measures. Our framework for the assessment of these mergers is quite well established. We have set it out in 2008 in our non-horizontal merger guidelines, which have served us well for the last 13 years and then still do.

Michal Cohen:

We have used this framework in recent years in virtually all our major reviews in the digital sector. I'm going to focus on this. These mergers actually rarely raise concerns based on horizontal overlaps. They usually do not remove a direct competitor, but instead companies in digital sector often acquire players

who are active in upstream, downstream, or adjacent markets to theirs, thus expanding their ecosystem. In these mergers, what we examined is whether the combined entity is likely to foreclose rivals in any of the markets where it'll be active post transactions by leveraging power in an upstream/downstream on neighboring markets.

Michal Cohen:

When we find so, well, then we intervene as I will try to show. Let me give you examples, because you're right, I mean, it's the best way to see things in reality. I'd like to focus on two recent merger cases, Meta/Kustomer and Google/Fitbit.

Michal Cohen:

In Meta/Kustomer, the issue was the acquisition of a so-called customer relationship management software, so-called CRM, which helps business to unify all communications; phone, email, messaging, in one single channel. Meta's communication services; Instagram, WhatsApp, Messenger, are of course important inputs into any CRM tool. That's why we found that there is a vertical relationship between the activities of Meta and Kustomer's. The concern was that after the transaction, meta would have the ability but also the incentive to engage in foreclosure strategies vis-a-vis Kustomer's close rivals and any new entrants.

Michal Cohen:

They could have done that by denying or degrading access to the application programming interfaces, APIs for Meta's communication services. What we found in investigation is that such a would have an impact on prices, would have an impact on quality and innovation, as well in the CRM software market. We therefore intervened by accepting a comprehensive commitment by Meta to ensure for Kustomer's rivals, a free and comparable access to WhatsApp and Messenger, among other things. I will not comment on the issue of this type of remedy. Maybe we'll go to that later.

Michal Cohen:

Now, for Google/Fitbit, that's different because that was essentially a conglomerate merger. Put it differently, the concerns here links to the integration of Fitbit into Google broader ecosystem. Fitbit is a wearable, it's watches for health, basically, monitoring and Google supplies the operating system, which is used in smartphones and Fitbits of these wearable devices, and these devices connect with the user's smartphone.

Michal Cohen:

The two markets were more complimentary, and therefore it was more of a conglomerate merger. We had the concern that after the transaction, Google could put Fitbit's rivals at a disadvantage by also degrading interoperability of their wearables withing Android-operated smartphones. Here again, we intervene by accepting commitments from Google ensuring free access to the Android APIs. With future proof, these commitments, making sure that we'll cover also any future APIs of Google. This is challenging of course, because these are cases in which at least in Europe, the burden of proof is extremely high to prohibit, and there is no very obvious, clear structural remedy. These two cases are quite good example of this.

Gwendolyn Cooley:

Well, thank you for that. I should turn next to Emilio, who I neglected to give a brief bio at the beginning, but brings a state enforcer's perspective to this that is so valuable to us. Emilio is the Supervising Deputy Attorney General for the competition unit of the Healthcare Rights and Access Section of the California Office of the Attorney General, which has been heavily involved in non-horizontal healthcare mergers. I'll let him speak to some of the detail but I think it'll be very valuable for us to hear about. Emilio, why don't I pass the microphone to you to hear about theories of harm in the mergers you've reviewed in this context?

Emilio:

Thank you, David. I want to thank Chair, Khan and Assistant Attorney General Kanter for the opportunity to appear with this esteem panel. In talking about non-horizontal mergers, I've been very fortunate to head a unit that's been doing, not just a lot of thinking about various types of non-horizontal mergers, thinking that is being used, as Gwendolyn pointed out, to help the states a number of points for their feedback on merger guidelines, but also in the trenches in looking at various non-horizontal mergers.

Emilio:

As Gwendolyn previewed, our unit has been looking at non-horizontal mergers in three areas: vertical, partial mergers and conglomerate mergers, or what we would call in the healthcare area, cross market mergers. We've also been doing a lot of thinking and have addressed issues that involve private equity group mergers as well, and non-price effects. But I'm going to focus non horizontal mergers here today.

Emilio:

In talking about vertical mergers, it may help to level set from our perspective, what exactly is a vertical merger? To keep it very simple, think of a hospital. A hospital is very limited without the physician group to refer patients to that hospital. You can have a physician group that is independent of a hospital, this is very common in the United States, or you can have a physician group that has been affiliated into a particular hospital, that basically is under the control of that particular hospital. That is what we would consider to be a vertical merger. As the director general of the European commission just pointed out, vertical mergers can have all kinds of potential anti-competitive effects, such as foreclosure, for example. That's a

Emilio:

That's a very common one, but there are many other effects as well. And the literature is very clear about that. One thing that I want to point out before I move on is that oftentimes people think with respect to vertical mergers, well, okay, great, there are downstream effects such as foreclosure, such as an increase in prices, such as a reduction in choice, but really, we should only focus on horizontal mergers. Why should we care about vertical mergers? And at the end of the day, the reason why we should care about vertical mergers is not just because of the anti-competitive effects that accompany those mergers directly. So for example, if you acquire a physician group, you can raise prices or you might lower quality for example, or limit access, but that can be horizontal effects too, as well. And I'll talk about that in a moment when I get to partial mergers, but I think that's an important point that we shouldn't forget about when we talk about non-horizontal mergers. Then in talking about partial mergers.

Emilio:

So this is what Gwendolyn referred to as merging in pieces. And so, you can have a circumstance. In fact, we faced one of these cases here in California, where you have an insurance company that also has its own provider arm that goes and acquires an interest in a hospital that's being run by another healthcare system, a system that is independent of this insurance company. And so, the question there with this acquisition of the hospital, right, it wasn't a complete acquisition. It was what we thought was a change in control for a share in the company of only 30%. That is the company that would control the hospital. And the question is what happens to the rivals of this insurance company that also need to use this hospital, which was a key hospital in the area. And so, yes, there were vertical effects that we looked at such as foreclosure, for example, in making our recommendation to the general, for what to do about this particular transaction, and by general, I mean the attorney general of our state, but there were horizontal implications as well.

Emilio:

So what happens when you have a hospital with a large market share pairing up with an insurer with a large market share, not just for rivals of the hospital, but for rivals of that insurance company as well. And so, finally, there are what we call conglomerate mergers, and here we have learned a lot from our European counterparts. Basically, what we are talking about is tying or bundling. And so, to give you an example, imagine Los Angeles County, a large county, and imagine a hospital with market power acquiring another hospital that has unexercised market power. It could have been charging higher prices, but it just hasn't been because this hospital has been responsive to the community. And so, what happens to that merger after it takes place? Well, this is the potential for what we call cross-market merger effects. So these two hospitals, they're going to have customers in common like large employers in LA county.

Emilio:

For example, the state of California, they're going to have insurers in common, right? That have to offer adequate networks for that particular county. And so, that gives the potential for leveraging or bundling, that is that you can basically tie the two hospitals together and you can increase prices on the total of both hospitals. Now this, if you look at American antitrust law, these are viable theories that have been supported by case law. And I believe that to be true for our European counterparts as well. Now there's a rigor that you need to bring to this, but that rigor exist. There have been studies that have shown that these types of mergers increase prices. And ultimately, as you see the growth of large healthcare systems, they also lead to less choice as well as other potential anti-competitive effects. So this is also an aspect of non-horizontal mergers that we all need to think about.

Emilio:

And one last quick point. I've been focusing on healthcare. That's what my unit does. And I'm very lucky to have the team that I have, but it's not just hospital mergers or provider mergers. So if for those who've been following closely, NVIDIA Arm, for example, or an ongoing case that we can't speak about, which is change United, you can see these effects in a variety of different industries. And so, as Gwendolyn pointed out at the top of the hour, it is important for us to think about merger guidelines that address all of these effects.

Gwendolyn Cooley:

Thank you so much. And I admire your background is a very cheerful scene. I'd much rather be there than here in my attic. I think the discussion thus far underscores maybe what I started with about we

use a catchall phrase like non-horizontal because there are so many concerns to think through in this context. And maybe I'll jump to you, Director General Cohen, to speak a little bit more about some of these concerns, the range of them and the specific experience you've had with them.

Director General Cohen:

Okay. So first and foremost, I'd like to thank you for the opportunity to be here today, also by virtual mode, and to share some of our views on this issue. Well, in Israel, the issue of non-horizontal mergers competitive effects is at the center of attention. We do handle, of course, vertical mergers that raise a competitive concern. However, I find that dealing with what I will call also conglomerate mergers is even more challenging. The conglomerate mergers I want to focus on are in cases in which the merging parties do not compete but serve the same clients as we said before here. First, I must say that the interplay between concerns and efficiencies is delicate. We are well aware that these type of mergers often generate efficiencies such as economics of scale and scope and internalization of externalities. And I don't want to prevent crucial efficiency gains of course.

Director General Cohen:

But I find that some concerns such mergers raise require more attention, in particular concerns of competitors' foreclosure through tying and bundling or concerns about price effects resulting from the merged entities increased bargaining power. What we referred to as conglomerate concerns has been currently debated in the context of the digital arena. I would like to share some of our dilemmas in Israel regarding similar concerns as they're actually a rise in different and more traditional sector. These concerns are part of the heated public debate in Israel about the cost of living and claims of anti-competitive practices in Israel's retail and grocery sector.

Director General Cohen:

This sector is dominated by a few large food and grocery suppliers that offer supermarkets a broad portfolio of products. The discussion is focused on leveraging their market power to exclude competitors from the supermarket's portfolio, for example, through tying arrangement or tailored discounts. And the argument is that if a retailer is dependent on a dominant supplier who has market power in a given market, a given product market, that retailer may be under pressure to withhold shelf space from a dominant supplier's competitors. Such pressure may also be directed towards other products of the supplier's portfolio regarding which the supplier does not have market power. And that's leveraging its market power.

Director General Cohen:

In many cases, I think the cost of engaging in such strategies could be quite low and any short-term losses are likely to be recouped. And naturally, if such claims about practices in the industry indeed have merit, then that may have implication on merger policy as well. For example, what do you do with a supplier who already have market power in several product markets in its portfolio when they seek to enlarge the scope of their offering by merging with other suppliers and when both serve the same retailers? So should the concern that the dominant supplier might leverage their market power to foreclose competition in the acquired market service as grounds to block the merger? And is there a point in time where a supplier become too dominant in too many markets and retailers, the supermarkets become too dependent on them to justify a policy blocking that supplier from merging with the additional supplier?

Director General Cohen:

And what about mergers when a supplier who already has a large portfolio acquires another supplier who has market power in a given market? Should one block a merger on the grounds that the acquired market power might be leveraged to foreclose competition in the markets in which the acquiring company operates? Well, these are the types of dilemmas we currently face. I want to say some few more words about the possibility that ex-post enforcement might solve these problems that may arise from a merger. I think that drawing conclusions about merger policy from past enforcement experience is challenging. It is hard to tell if retailer's decision to dedicate much of their shelf space to a dominant supplier's product is a result of anti-competitive practices, or rather a result of a genuine consumer preference or other legitimate reason. And even when you do become quite suspicious, it's very hard to uncover evidence of these kinds of practices in this sector.

Director General Cohen:

The suppliers are in constant contact with retailers. They are daily communicated. They in daily communication, both written and oral concerning price discounts, promotions, and it's therefore very hard to paint a clear picture and to really discern between legitimate and anti-competitive practices. And again, I think the bigger the supplier and the broader its portfolio, the easier is to conceal any anti-competitive contact in its numerous dealing with retailers. So this is part of the reason why I think ex-post enforcement is not a good remedy in such cases. And at the end of the day, we need to deal with these types of merger on a case-to-case basis, to the extent that market is more concentrated and the portfolios of few players in the market are broader. This should lead us to prefer blocking merger would raise these concerns and to ensure that we do not clear a harmful merger. Thank you.

Gwendolyn Cooley:

Thank you so much. And let me ask briefly, thinking about the supermarket example you gave and this question of a supermarket that's already too dominant gaining this control. I was intrigued by your mention at the outset of how this is a concern because of issues in the retail sector in general. Can you tie the theory down for us to the question of who is harmed and how. What are we solving for?

Director General Cohen:

Of course. Well, if we want to increase competition in a specific product market, it could be each product in the supermarket. So what we can see that small players who wants to, I don't know, just produce sweets. Okay. And if we have a large supplier who has in his portfolio sweets and butter, and I don't know, and cleaning stuff and whatever it is, and it ties the sweets with all this basket in with regard to the retailers. So, smaller competitors cannot find place on the shelf because it's all F with the bigger supplier portfolio, because the retailer is afraid to get mixed with this supplier. So we cannot see competition in the different product markets because of these tying and bundling stuff.

Gwendolyn Cooley:

I see. So less opportunity for chocolatiers and fewer options for consumers to purchase chocolates.

Director General Cohen:

Of course.

Gwendolyn Cooley:

Yeah. So I should turn to Commissioner Aoki who I've saved for last because the Japan Fair Trade Commission has a wide range of experience here, but including with an area that is so important related to confidential information, which is sort of a sub-variant of the sort of concerns we've been talking about. So please go ahead, Commissioner.

Commissioner Aoki:

Thank you. Thank you. First of all, I'd like to thank my the opportunity to join this distinguished panel and also to David for chairing the session in the wonderful [inaudible 02:22:16] How quickly the to online and [inaudible 02:22:38] the new merger guidelines is help or promote the capacity to and the ability to innovate the economy, to innovate in the future. Thank you. And now I'll answer David [inaudible 02:22:58] in addition to input for some experience with theory of harm, what would that we call sharing confidential information, which is using rivals' confidential information to force the ri-

Gwendolyn Cooley:

Commissioner Aoki, are you with us? I think we lost you for a second.

Commissioner Aoki:

Yes, I'm terribly sorry. I think I closed out Zoom by mistake.

Gwendolyn Cooley:

Ah, I see.

Commissioner Aoki:

... my incompetence, sorry. So can I start with an example of the case?

Gwendolyn Cooley:

Yes, please, please.

Commissioner Aoki:

Okay. An example of the case, FTC count input, foreclosure and confidential information sharing with acquisition of Ultmarc by M3. Ultmarc is provider of medical information database, and M3 manages a medical information platform. The platform is used by pharmaceutical companies to disseminate pharmaceutical product information to doctors. So there is an upstream market of medical data and downstream market of medical information platform accessed by doctors and pharmaceutical companies. Ultmarc is the sole provider of the detailed database about doctors. Pharmaceutical companies choose platforms that had this medical database. There was concern for input foreclosure if Ultmarc refuses to provide the database to other platforms.

Commissioner Aoki:

Ultmarc also shares trade secrets with firms that buy data from Ultmarc. It was conceivable that the new merge firm would use this information for exclusionary practices or predation in the downstream market. The merger was approved with commitment, which included commitment to provide the data now into future clients and information firewall. Full conglomerate mergers possible through [inaudible 02:25:46] of form that we looked at or foreclosure by tying and bundling and restricting competition through sharing of confidential information. Tying and bundling can involve making two products or

services technically bundled, making it impossible to use them separately, and sharing confidential information could be obtaining technical information in the process of corporation to achieve interoperability.

Commissioner Aoki:

Jeff TC had such concerns in case of Salesforce.com and Slack Technology Incorporated merger. It was possible that Salesforce could integrate Slack into CRM software, where he had more than half of the market share in Japan. Salesforce makes API connection possible through apps change. However, so the sharing of information would be a concern. However, Jeff TC determined that foreclosure by tying and bundling was not likely given competitive pressure in the market. And there was little incentive for Salesforce to use information, and thus was no danger of restricting competition and we approved the merger. Thank you.

Gwendolyn Cooley:

Thank you so much. And it's interesting across our panelists that we've had some differences and I think these differences you see around the world with respect to behavioral remedies and how they can be monitored, whether they're effective vis-à-vis structural remedies. Not a topic we can fully expand on today, but maybe I'll ask the question, how much do your own legal regimes and the expectations in those legal regimes for whether or not you'd think about those remedies influence the way you approach them? And I'll start with the European Commission here.

Michal Cohen:

Well, thank you, Dave. Well, the thing is, I mean, we are subjected to quite strong legal review by our codes. And of course, it is clear that we are the ones that have to prove our case. We are also the ones that have to prove that the remedies are ineffective. And actually, as I mentioned, our guidelines, in my first intervention, or guidelines resulted from two quite severe defeats in the EU court, in two famous cases [foreign language 02:28:40] and [foreign language 02:28:42], which is even more famous. So, that's the background. Secondly, in EU we have, of course, a clear preference for structural remedies. Behavioral remedies are not forbidden, but there are usually, I mean, let's say it's more complicated to make them helpful and solving the problem. It requires a lot of monitoring. And of course, it opens the way out a lot of deviant, potentially deviant behavior by the merging parties post mergers.

Michal Cohen:

So a lot of resources to make sure it works, so clearly structural remedies are favored. This said, in the type of cases I have described in my first intervention, Google Fitbit, Meta customer, there is no structural, well, the structural remedies to undo the measure. So it's akin to a prohibition really. And there we are in a kind of limbo because these cases of course have a much more high evidentiary burden than straight or reasonable cases. So, and at the same time, it is difficult in our legal system to simply reject a remedy that on paper release is effective on the grounds that it is costly for us to monitor which it is because it's not a small dimension of that question that we need to mobilize considerable resources of a long period of time for monitoring remedies of the past instead of investigating the problems of today and tomorrow.

Michal Cohen:

So for us as an agency, it's a real trade-off, but that's the way we're living in. And so we've been trying to minimize the problem and the tension by going to what we call cause high structural remedies, which

are in a sense behavioral because access remedies are behavioral, but making them as structural as possible and as self-executable as possible. And this is the way we deal with the issue in the EU at the moment. But it's a difficult problem, I mean, as in the first panel, it was referred to the joint declaration by a [inaudible 02:31:17] the ACCC and the CMA, which was very much a strong plea for being requiring and demanding on this type of mergers while at the same time ACCC cleared it without remedies. The other two were not competent because we dealt with it. So it's really a difficult question, I think, for us and for everybody around the world.

Gwendolyn Cooley:

Sure. And Director General Cohen, could you perhaps elaborate a little bit on the Israeli perspective on this question? Oh, you're on mute.

Director General Cohen:

With regard to remedies in verticals or non-results. For any merger, we just find out that any behavioral remedies just does not work. And we are in a very, very strictly way preferred just divestitures. And this also, in many cases, does not work and have many, many problems. So actually, unless we know, unless something really fits as good to outweigh the concerns, we will object the merger and we will not try to go on remedies that will not work. And we will find, in a few years, we will find all the problems that arise from them.

Gwendolyn Cooley:

I see, I see. And I can't believe how fast the clock is ticking here. And we need to shift to the question, with all the complexities of these theories of harm and the issues they have for the marketplace, how do we draft guidelines? That's the question of the day that Asset DOJ and FTC are asking all of you. We have the good fortune of, I think at least two agencies, that have dealt with this question closely, and I'd like to start with Commissioner Aoki, as I know that JFTC undertook a revision process in 2019.

Commissioner Aoki:

Yes, we did. The theories of harm that we considered in our guidelines were vertical mergers in both foreclosure, downstream foreclosure, sharing of information for our vertical mergers. And for conglomerate, we considered time bundling a probation of confidential information, among others. We added these items to the 2019 revisional merger guidelines. We had conducted several merger reviews where we examined market flow foreclosure in detail, and we've reflected the knowledge we had accumulated in the guidelines, specifically for non-horizontal mergers. We stated the basic principles of non-horizontal mergers, theories of harm, safe harbor standards, explanation of the theory of harm, competitive pressure, factors relevant to potential competition.

Commissioner Aoki:

We also put special effort into explaining theory of harm. We used hypothetical examples and diagrams, which have been well received. And in our 2019 guidelines remain clear that we will review cases that do not meet the review standards, but if the value is large, acquisition of Fitbit and Google is such a case, domestic sales did not meet the review special, but we viewed the case because we thought there could be great effect on competition. Also in the revised guidelines, we also encourage mergers with value of over 40 million Yen to consult with JFTC, even if it is under the review standard, if the significant effect on domestic market is anticipated. And effect on domestic market includes research and development base. And we also made it clear when we pay special attention to startups. Thanks.

Gwendolyn Cooley:

Thank you so much. And I think the use of graphics and charts is an interesting and strikes me as a useful innovation, particularly when talking about complex market structures, like this area leads to. Director General Garsant, I know that you have some experience with the use of guidelines in this context. Any advice for us in the United States as we're reworking our vertical guidelines to how to make the most useful document?

Michal Cohen:

Well, no, well, no, I have no advice. I can maybe tell you what we're doing and why. I mean, as I just said, we put that into guidelines because we needed to clarify things after we have had two very serious setback in court, and that's where the non-horizontal merger guidelines in the EU originate. So it was primarily about reflecting the case to EU courts and explaining our decision practice, which I think is good. I mean, I don't like guidelines. Sometimes we have to do this, but that kind of setting for the futures when you do not have any decision practice behind you. I prefer guidelines which sort of clarify what is it you've been meaning to do during a number of years of decisions and case law of the courts.

Michal Cohen:

So this is the kind of guidelines we're talking about here. And with mainly two aspects, I would say, and I think these are maybe aspects that should be in any guidelines. First of all, to set the principles regarding competitive harm in non-horizontal mergers. I think it's important. This is basically your first two questions, and then what is it we're after and why? So this is what we're trying to do in our non-horizontal merger guidelines. And as much as possible with examples in the decision practice or in case whatever we did this because of that, et cetera.

Michal Cohen:

So also acknowledging they do not until usually a loss of direct competition between the parties. And they also quite often provide substantial scope for efficiencies, which all merger guidelines acknowledge. Nevertheless, there are circumstances in which these non-horizontal mergers can have anti-competitive effects. And in particular, as a result of the foreclosure of rivals, either in one of the markets where one of the measuring bodies or both are active, or sometimes in markets in which none of the measuring bodies is yet active, but they have the incentive and the ability to [inaudible 02:38:57]. So, that's the first thing we're trying to do. And as I said, with as many examples as we can. And the second thing is to set the analytical framework and explain it to our audience.

Michal Cohen:

And there, as I said, we have a pretty strict control by the courts. So it's clear that three steps, does the combined entity have the ability to foreclose competitors? Does the combined entity have the economic incentive to do so? And if the answer to the first two question is, yes, well then is there an appreciable impact on competition of any such foreclosure? And we need to cumulatively prove these three steps in order for us to have a case, and here as well, we give examples of circumstances where each of these criteria would be met based on the student practice. So, that's basically it. And we have applied

Michal Cohen:

... this framework in a large number of cases, in our decision practice for the last 12 years, from medical devices to aviation, from IT software as I said, to sunglasses. And I may come back on this in a minute, because that's an interesting case, semiconductor, financial services, really a wide variety of cases. One

last one, maybe I talked about the standard for review, it's very important for me that we are detailed in the guidelines, as well as in our decisions of course, in what are the mechanisms that we see leading to foreclosure. At least, in the EU, we have to. If we don't do that, the court will say we've not been specific enough, and probably would not prove our case to the satisfaction. How the combined entity could deploy which strategies, and how likely they are, that is really the core of what we need to show, because this is our legal obligation to issue recent decision in every case, and that this legal decision which [inaudible 02:41:25] basically.

Michal Cohen:

And the court in the EU requires direct and convincing evidence, for any age of [inaudible 02:41:34] theories of harm. And actually, we have also the reverse burden, because then it also to be convinced of the reason why we dismissed competition concerns, when we do not interview, because we have challenges in both cases. In a nutshell, that's what we're trying to do with the guidelines.

Gwendolyn Cooley:

Sure. Thank you so much, and just hearing about that experience, it's very helpful as we're working through a process ourselves. We only have a few minutes here and I want to give each of our panelists a quick final word here, and I'll start with Deputy Attorney General Varanini. I know we've only scratched the surface of your knowledge and thoughts here, anything you want to put top of mind for the US enforcers, as we consider this question.

Emilio:

Yes, David. And again, thank you for the opportunity to speak here today. First of all, on the remedies issue, I think we have to be a bit careful, echoing the point that Director General of the European Commission, where [inaudible 02:42:37] said, if we decide that we're going to rule out behavioral remedies, and California's done a lot of work on really beefing those up, including the use of a monitor, then we risk a number of mergers with anti-competitive effects, basically being unremedied. This is an echo of this point that the courts will look to whether or not there are less restrictive alternatives to a divestiture, or to flat out barring the merger. And so I think in merger guidelines, we need to think about not ruling out potential remedies here, that could be very efficacious, and the states could be important partners in that respect.

Emilio:

Second of all, I do agree with Commissioner Aoki, that there's a broader set of vertical effects here that we need to consider, including competitively sensitive information, different types of foreclosure, both input foreclosure, customer foreclosure, and the difficulties of entering. And these can be the basis of presumptions. I know we haven't had much time to talk about that, but there's been seminal work done on how these types of effects, with a company that has a substantial place in the market, can be anti-competitive. And this is an American thing to be sure, but these can be reflected in terms of potential presumptions, for example, or guidance to the courts.

Emilio:

Finally, we haven't had much of a chance to talk about efficiencies. Efficiencies should be merger specific, and that includes the efficiency of eliminating double marginalization. This is the idea that basically when you have two companies come together that are in a vertical arrangement, one upstream, and the other downstream, that basically they will come together and seek profits that, the

profits jointly will be less than each of them would be seeking individually, and that can benefit the market.

Emilio:

However, there have been a number of studies that state that you don't necessarily see these effects at all. In fact, in the healthcare space, for example, one would think, okay, a hospital and a physician group tie up, they would at least use the same electronic system for medical records, yet in many cases they don't. And so like any other efficiency, and like what I believe the other panelists are all saying, you should have to prove those efficiencies if you're going to recognize efficiencies at all, which is an open issue here in the United States.

Emilio:

Those would be my thoughts to conclude. And just one on final point, I am just speaking for myself, not on behalf of California, and certainly not on behalf of the Attorney General or on behalf of the National Association of Attorneys General. I just wanted to make sure to get that disclaimer out at the end. Thank you very much.

Gwendolyn Cooley:

Thanks. Disclaimer or none, tremendously valuable thoughts. Thank you for that, Commissioner Aoki. Any final thoughts for us?

Commissioner Aoki:

Well, again, I'd like to thank the chairman and AAG for having this event, and accumulating and consolidating all the information that has been accumulated, that various enforcers have. And I think this is a wonderful way to look into the future, particularly when the firms are becoming very global. It's very important for enforcers to be able to think globally. Each systems are different, but the basic idea mechanism of theory of harm is going to be the same. Thank you very much, and I look forward to the new guidelines. Thanks.

Gwendolyn Cooley:

Thank you. Thank you. And Director General Cohen.

Director General Cohen:

Yes. I just want to share a few words with regard to how specific should we be in courts, for example, by showing exactly how the anti-competitive mechanism will work, or how harm will occur. I just want to say that I don't think we should have the burden to provide in very specific. We can say, we can give example of what the emerge entity could do, but I think it's very hard to tell in advance exactly how the harm will occur. And I just want to, from the Israeli experience, that we have had more than few cases when parties try to convince us that they are unable to exercise market power post-merger, maybe because the prices are regulated, or maybe because they seem unable to price or quality discriminate. But we also know from experience that the dominant firms are likely to find a way to exercise the power in the manners that sometimes cannot be predicted, and we should not take this burden as an agency. And of course I want to thank you very much for this panel, and for the possibility to participate and hear all this discussion.

Gwendolyn Cooley:

Thank you so much. And it's such an important point to have some humility about how much we can predict in terms of the specifics of how the effects play out. Director General [inaudible 02:48:12] one final thought in under 30 seconds, if you have it.

Michal Cohen:

Yes. First of all, I agree with what Michal just said, that's unfortunately not the view of our judges. We still have to put some subjected to quite stricter burden. A last word simply for... A number of these mergers, with quite a potential for detrimental effects, below there other screens, at least of operations in Europe, in particular in the digital world, but also in pharma, for example. And this is why we have challenged Illumina and Grail merger. Although we do not have competence of none of the EU national conventional authorities at competence by virtue of their thresholds. This is sub-judiciary, and it'll be quite interesting to see, because if we lose that case in court on the business, that we do not have competence, I think we'll need to think about revising all measure regulation.

Gwendolyn Cooley:

Thank you. Thank you so much. And I'm glad actually you mentioned the courts again, because that's come up a number of times. And so I guess I'll just give my concluding thought that this panel helps underlie, is the importance of the law, what our legislature, respectively, and the courts help to refine and define the way we exercise these value judgements. And I have to say, as we're undertaking this effort, I worked very closely in the 2020 effort in the United States. And I think that's one area we really failed. That document doesn't interact with decades of case law and with the [inaudible 02:49:56] amendments here in the United States. And so bringing together this kind of thinking, understanding the policy, but also of course understanding the legal framework, that's unique to each jurisdiction is so important.

Gwendolyn Cooley:

Let me just thank our panelists again. I know that there's actually a very large digital audience out there, and I've been getting emails from people within the agency who so appreciate all of your remarks. I'll let that serve as the applause. Thank you all.

Michal Cohen:

Thank you, Dave.

Director General Cohen:

Thank you.

Commissioner Aoki:

Thank you.

Emilio:

Thank you, David.

Doha Mekki:

Good afternoon everyone. My name is Doha Mekki, and I'm the Principal Deputy Assistant Attorney General at the DOJ's Antitrust Division.

Doha Mekki:

This afternoon, I have the honor of moderating a discussion among distinguished US Antitrust and Consumer Protection Forces. Let me briefly introduce them, although I will freely admit that these individuals really need no introduction.

Doha Mekki:

First up is Rohit Chopra. He was confirmed in September to lead the US Consumer Financial Protection Bureau. He previously served as commissioner of the FTC, where he worked to reinvigorate antitrust enforcement, halt abuses of small businesses, reject no fault settlements in fraud cases, and strengthen sanctions against repeat offenders.

Doha Mekki:

Next up is Jonathan Kanter, who serves as the Assistant Attorney General in charge of the Antitrust Division at the DOJ. AAG Kanter brings more than 20 years of Antitrust experience to the DOJ, including significant thought leadership, and work to advance the cause of antitrust enforcement and digital markets.

Doha Mekki:

Lina Khan serves as the chair of the FTC. Before her confirmation last June, Chair Khan was an associate professor at Columbia law school. She previously served as council to the US House Judiciary Committee subcommittee on antitrust, commercial and administrative law, and served as an advisor to former FTC commissioner Rohit Chopra.

Doha Mekki:

And finally, there's be Becca Slaughter, who has been a federal trade commissioner since 2018. In her current role, she has advocated for more robust antitrust enforcement, as well as enforcement of privacy and consumer protection laws and rules. Before joining the FTC, Commissioner Slaughter served as chief council to Senator and current majority leader, Chuck Schumer of New York.

Doha Mekki:

We have a lot to cover today. And so I'm going to dive in. The first question goes to AAG Kanter. You were confirmed four and a half months ago, and in fact, I know better than most that you have hit the ground running. In addition to authorizing a number of civil lawsuits and criminal charges, you've also innovated several initiatives to empower division staff, to have a positive impact on the substantive development of the antitrust laws. Some of my favorites have focused on access to justice and faster access to courts. Can you describe these initiative, why they're important for the administration of the antitrust laws?

Jonathan Kanter:

Sure. Thank you, Doha. And it's hard to believe it's only been four and a half months. The first four and a half months have been along four and a half years, for sure. But we have hit the ground running, and we're doing so many amazing things. I was talking about earlier, our program, which we're calling ET2J, which is like R2D2, but for antitrust, is really focused on changing the language of antitrust, so that we can make it more accessible to the citizens that we protect, and make it more participatory. And so we're thinking about it in a number of different ways.

Jonathan Kanter:

One is the words that we use, the language that we use can be exclusionary, and technocratic. And while they're instances and times when it's necessary to be technical, the fact of the matter is the problems that we're addressing are quite easy to see from afar, and don't need to be as technocratic as we perhaps made them in the past. And if we want real input from the expertise that exists in the market, then we have to make an effort to broaden our aperture, so that we can engage with a wider range of interests, and market participants and affected parties. That's a really important initiative that is underway, and that we are building out.

Jonathan Kanter:

And so in addition, I would say we're also making sure that we're being direct and weighing in with courts on cases where we're active participants, but also matters where there are third parties in litigation, but the issues are affecting the interests of the American public at large. And so for us, it's extremely important that we are working in as real-time away as possible, to make sure that when issues are presented, we have the ability either go to court or another federal agency, to weigh in. There have been some examples, notable examples, including the participation that we had in various reports coming out of Department of Defense, Labor. We filed an important brief in NLRB proceeding relating to the gig economy. And this is an area where we are looking for additional opportunities.

Doha Mekki:

I'm going to share Khan next. You have led the FTC for nearly 10 months, as you wrap up your first year on the job, what issues are you most looking forward to tackling in your second year as chair?

Lina Khan:

Thanks so much, Doha. It's really fantastic to be here with so many people I admire, all in one panel.

Lina Khan:

Look, there's an enormous amount of work to be done. And I think all of us appreciate how these windows of opportunity, where there's a big mandate for change, that can be quite fleeting and rare. We really feel like a big responsibility to take full advantage of it. I'm looking forward to the commission returning to full strength, hopefully in short order. We've unfortunately been a commissioner short since then Commissioner Chopra left to go head up the CFPB. And I think the key priority is really ensuring that we're using the full set of tools that Congress gave us. On the antitrust side, this includes section five of the FTC Act, which prohibits unfair methods of competition. And this was a provision that was really key to the creation of the FTC, which Congress felt compelled to do after the standard oil decision. And lawmakers were really frustrated that the law was only being developed through the courts, in ways that Congress worried could become unmoored from the actual text, and the statutes that Congress passed.

Lina Khan:

And so core to the FTC's creation was the FTC being an expert administrative agency, with this special section five authority that really extended beyond the four corners of the Sherman Act, and the Clayton act. And so I think it's incumbent on us to be using that authority, to be identifying where some of the gaps in the laws that we currently see, where we should really be bringing standalone section five claims. So that's something that really is top of mind.

Lina Khan:

Another tool that the Congress gave us is substantive rule making authority. So market-wide rules in several instances can provide greater predictability, promote more efficient enforcement, and also help promote public participation in the creation of substantive antitrust rules. This is not an authority that the FTC has really used on the competition side. And so it's one that we're closely examining, to see if there are particular types of areas where creating market-wide rules on the competition front could be the beneficial to the public.

Lina Khan:

Another key tool that Congress gave us, is market wide inquiries under our 6B authority. So last December, we kicked off an inquiry into supply chain disruptions, looking at what are some of the key potential power asymmetries that may be contributing to these disruptions, are these disruptions having a disparate impact, such that some types of wholesalers or suppliers, you're being impacted in different ways than others. I'm excited to see that inquiry through. We've also been having discussions, including at a public meeting recently around initiating a 6B into PBMs, which are these middle men in the healthcare industry. And I would through our open meetings, where we've been collecting a lot of comments, we've heard a lot about the role of PBMs, in particular concern around both their impact, impact of their business practices on independent pharmacies, but also on drug costs, including insulin pricing. And so this is, I think, an area that's of great interest at the commission level, and something that we are really, and to continue building out.

Lina Khan:

And then I'll say, just generally, on the enforcements front, we have a whole set of cases in the pipeline that I think are extremely exciting. We're really looking to prioritize impact and reach, which means focusing on dominant firms whose unlawful conduct would be harming a great number of people. And then we're also, of course, thinking of about ways to be developing the law, to tackle new types of circumstances, such as for example roll up strategies that we see by private equity firms. That's some of what is on deck. And then of course, looking forward to seeing some of the projects we've already started through to fruition, including the revision of the merger guidelines, which I see as a phenomenally important project for both of our agencies.

Doha Mekki:

That's really terrific. What I appreciate most hearing your and AAG Kanter's remarks, just now is the remarkable symmetries, bringing antitrust into the realm of ordinary people, and making it accessible to ordinary. And also focusing on enforcement that has the greatest impact on the greatest number of Americans, which is really terrific.

Doha Mekki:

Director Chopra, it was not too long ago that you were a commissioner at the FTC. In what ways did your work at the FTC help prepare you to lead the CFPB? And how to competition issues feature in your work with the bureau?

Rohit Chopra:

And such a great question, Doha. And I'll share my thanks for all the work of my colleagues, and special thanks to Chair Khan and Commissioner Slaughter, who I miss very much. Let me just share that, in some ways the FTC is really at the center of what is happening in the United States when it comes to policing

markets, to make sure that they don't abuse consumers and their data, and that actually every entrepreneur and small business has a chance to actually compete, and we don't live in a system of corporate royalty. I'll say this though, we have to be thinking about these values in every single agency in the government. The Biden Administration has actually launched a whole of government approach to promoting competition, and at the CFPB, which is a primarily a financial services regulator, Congress specifically directs us to ensure that markets are fair, transparent, and competitive.

Rohit Chopra:

And competitive markets are ones that have all of the features of almost frictionless entry, of dynamism, of ways that actually incumbents don't have a choke hold on what is happening when it comes to products and services. We are thinking very ambitiously about what does it mean for small players and large players alike, to be able to compete and to be able to win.

Rohit Chopra:

One of the things that many of us across the globe are thinking about in financial services, is open banking, the ability for financial infrastructure and data, not just to serve the benefit of big incumbents and big banks, but for everybody, for data to be able to not be used as a way to be weaponized and lock people out, but as a way for more people to participate. Under the authorizing laws that the CFPB has to administer, one includes an unused rule making authority, to promote open banking and consumer control of data. That is going to be something that I'm going to be looking to implement, and think about ways we can have a more open and competitive financial services ecosystem.

Rohit Chopra:

Doha, I'll also add that really at a moment right now, where with the interest rate environment evolving, obviously geopolitical issues, the M&A outlook seems extremely strong, particularly when it comes to banking. I do expect that there will be a robust pipeline of proposed banking mergers, that justice department works with the banking regulators to review those applications. And one of the things we are doing is we are launching a reboot, to think about how do we update the Bank Merger Act guidance. In particular, there is a requirement for regulators to consider the effect of a merger on financial stability. And I think the pandemic really has put a lot of this into clear focus, that all of us need to be thinking about system resilience, and the impact of excessive concentration and how that could have negative systemic effects.

Rohit Chopra:

We're looking forward to working with the justice department to review that guidance, all of the regulators are, and also to make sure that we understand what is the impact on small businesses and consumers after those mergers. One of the things we're noticing is that there are serious systems issues and breakdowns, which ultimately have impacts on individual families. We're looking at this in the totality to make sure we understand the full range of harms, the impacts on market structure, and how we can Sue our work to make sure everyone benefits, not just the few.

Doha Mekki:

That's fascinating, Director Chopra. Bank mergers are obviously an area that the Antitrust Division and the bank regulators share jurisdiction over. And I'm aware that over the past 30 years, the banking industry has consolidated quite a bit. In December, the FDIC called for public comment on the

implementing regulations of the Bank Merger Act. And I wonder what you hope to accomplish with those revisions.

Rohit Chopra:

Yeah, it's a great question. The FDIC recently, the board we've to initiate a review of the Bank Merger Act. The Bank Merger Act not only asked to look at traditional measures of competitive effects, but also more specifically puts the burden on bank merger applicants to show that there is not a detrimental effect on the needs and convenience of communities, as well as will not pose excessive risk to financial stability. In our own request for information, we are asking market participants and others, to really be thinking about the question of a very large bank mergers, especially ones over a hundred billion dollars in assets, and how we might think of whether those mergers may or may not impact broader financial stability. My personal goal is that we can update the Bank Merger Act policy guidance, to give all financial institutions a clear sense of the analytical framework we will use when it's assessing those applications for decision.

Doha Mekki:

AAG Khan, I'm coming back to you. How do you think the Antitrust Division and the bank regulators like director Chopra, can work together to promote competition in the banking industry?

Jonathan Kanter:

Yeah. Thank you. And echo the remarks from director Chopra, very much agree with those noble objectives. As we think about competition, it's important for us to understand the entire range of benefits that flow from competition, especially in the context of banking and the most I think one of the areas where we can increase our focus is resilience, and competitive markets are more resilient than markets that suffer from a lack of competition. And when you think about resilience in the context of banking, it relates to the ability to have local community banks and regional banks that can support local businesses, that take an interest in their local communities and invest in those communities, which create more competitive markets, because they're investing in local businesses. And so, as we think about the effect of concentration, it's important for us as experts in competition policy and competition economics, understand the full range of impacts that will flow from corporate concentration in the banking industry.

Doha Mekki:

Commissioner Slaughter, the FTC recently challenged the proposed merger of lifespan corporate, and Care New England health system, the largest and second largest healthcare providers in Rhode Island. I was interested to see that the decision was unanimous and challenging, but in a concurring statement, you and Chair Khan raised an additional allegation about substantial lessening of competition in a relevant labor market. I'm curious, what were the labor market dynamics at issue, to the extent you can talk about them, and why did you want to proceed on a labor theory?

Rebecca Slaughter:

Thanks so much for the question. I think this is a really important case. I actually think I can't probably talk about the specific dynamics, without getting into non-public information, unfortunately. But what you can take away from our statement, is that there was an investigation into the labor market dynamics in this case, which is a really big deal and really important. And Chair Khan and I found that that investigation produced enough evidence to have supported a claim that the merger would've

substantially reduced competition in input labor market. And that is also very material and not something that has happened a lot in the past. I think it marks a real turning point in how we're thinking about mergers, not just from the traditional output markets, including in health care, but also from the input markets and from labor specifically.

Rebecca Slaughter:

In one sense, labor is like many other inputs, but in another sense, it's very different. And this goes to something that AAG Kanter was talking about, and director Chopra, and Chair Khan. And I want to associate myself with all of their remarks, which is how does antitrust policy, competition policy affect real people in their real lives, every day. And there's almost no way that's more material than getting fair value for your labor, as a person. We think a lot about the effect of concentration on consumers, but if you are a consumer who has diminished purchasing power because of wage suppression, low prices aren't going to mean that much to you because you still can't access markets. And so we want to make sure that people are getting fair compensation for their labor, and there's real competition for labor. And that is true, whether we're looking at quite an issue like a merger, or a topic that I know everyone on this panel has talked a lot about, which is non-compete clauses that restrict labor mobility, and other terms and conditions contracts that may restrict labor mobility or agreements between employers.

Rebecca Slaughter:

I think making sure that's a priority is consistent with what my colleagues have talked about, which is thinking about how these sometimes very complex sounding academic-y, economic topics, are really at the end of the day about real people's real lives and their ability to participate meaningfully in our economy. And then the final point I'll make is, this also goes to the point about how the priority of and whole of government approach to competition. The way I think about it is, not just in terms of the specific provisions that director Chopra talked about, that mandate a look at competition, but anything government does may affect competition, or the competitive nature of markets. And if we are not taking an open-eyed look at that, we could inadvertently throughout government, be perpetuating policies that inhibit competition, and reduce competition. And instead, if we are applying a competition lines to all of the policies, we could be expanding competition and making markets more accessible and more competitive.

Rohit Chopra:

Doha, can I just add, I totally agree with Commissioner Slaughter on that point. And with respect to labor, people don't identify just as a consumer, they are a worker, they may be a small business operator, they are family members. And I think that it's important that we understand that, and incorporate

Rohit Chopra:

Get that and how we actually approach some of these problems. Specifically this issue of coercive practices, targeting workers, particularly where an entity has market power. One of the areas that many consumer regulators are dealing with now is something called, in the US, training repayment arrangements. So this is where a worker... When they're signing up, they may also have to agree that they are taking out a debt like instrument that they may have to pay back if they leave. And in fact, it functionally serves as a way to deter them from seeking higher wages and a better job elsewhere because of a potentially large balloon payment that they may face.

Rohit Chopra:

This is another way in which, we can prevent labor competition by trapping workers in their place and not allowing them to, at least in the United States and many major economies right now, enjoy the benefits of a labor market that has a lot of demand right now. So I think it's so important what we're hearing, that to think about this holistically, rather than narrow technocratic slices of the world. And that's just more reason why all of us in the United States are looking really to the FTC and to the DOJ to help be that central node about how we think through some of these problems.

Jonathan Kanter:

I add, Director Chopra that, I think in order to improve along the lines that you just described, we need to start thinking about how we talk about the problems. And as I was mentioning before, I think the taxonomy, the language that has been built around antitrust enforcement has become impenetrable. Even when talking about items that are rather simple or that have residents with individual citizens and workers, and craters and small businesses. And so until we really re-think, perhaps radically re-think, language we use, it's going to be difficult to break from that technocratic cycle.

Jonathan Kanter:

And again, it's not to shine expertise, we should be embracing expertise but when you're trying to understand how markets function, expertise is often generated by the people who were closest to the markets. For example, Chair Con and I had a listening session on merger guidelines with folks in the agriculture space. And we heard from farmers, we heard from small grocery store owners, these are experts. These are real experts who are living and breathing these issues on a daily basis. And I think in order to be well inform, we have to tap into that expertise. But to do that, we have to think about, or rethink, how we talk about antitrust enforcement and how we go about soliciting impact and including more voices in the conversation.

Doha Mekki:

I really appreciate all of these remarks and I would be remiss if I didn't note a couple of things. The first it's been remarkable to see the scholarship around labor competition issues become the actual practice of agencies. I remember roughly around 2017 and 2018 when labor economists were sounding the alarm about reduced labor dynamism and union participation, and the effects of non-competes and other provisions on worker mobility and really articulated a skepticism towards training justifications and other issues that Director Chopra touched on. And it has been fascinating to see over just four years.

Doha Mekki:

To circle back to your comments Commissioner Slaughter, I mean, it sounds like the FTC staff issued process on labor market harms and evaluated the labor market harms and potentially engaged with a recommendation on whether to proceed on a labor market theory. And sounds like, there were at least two votes at the commission in favor of proceeding on that theory and that's really interesting. And the second thing is, of course, today we have a double header in the antitrust division in Texas, the first criminal wage fixing trial is opening. And out in Colorado, the first labor market allocation case is proceeding. So two criminal trials starting today, and again, probably a reflection of the evolution of the antitrust laws in this really important area. Just to-

Rebecca Slaughter:

Can I just jump in?

Doha Mekki:

Sure.

Rebecca Slaughter:

I think it is important for everyone watching this panel to understand how much credit you personally deserve for your leadership on these issues. I think a lot of it may have been behind the scenes to the general public but very visible to the rest of us and that evolution in the thought leadership and the scholarship I think is due in no small part to your dogged persistence of these issues. So I just want to add my personal thanks to you and give you the credit publicly that you very much deserve on this.

Jonathan Kanter:

Okay. Thank you, Commissioner Slaughter. I can say first hand that I've seen that as well. And [Doha 03:17:46] has been the intellectual and engine behind so many of these efforts and along with others at the department of justice. But it is an amazing testament to her ability to take these issues on at a time when they seemed quite far away and impenetrable. And now here we are, as Doha mentioned, with real results and real trials.

Doha Mekki:

Thanks. I will say embarrassing the moderator is against the rules expressly and so I'm going to pivot just a bit. So coming back to you Commissioner Slaughter, you recently urged the commission to consider dusting off and deploying the tend to create a monopoly of language of section seven. That could obviously apply to things like serial acquisitions, conglomerate mergers, private equity led industry consolidation. I'm curious, could you tell us more about your thinking on that and what the tend to create a monopoly language means to you?

Rebecca Slaughter:

Sure. So I think very consistent with what Chair Con said at the beginning, about identifying the tools that we have that have gone unutilized or underutilized over time, looking at our whole statutory language backdrop and making sure that we are really giving meaning to everything Congress told us to do is an important. And it's always struck me as interesting that when we consider Section 7 Clayton Act challenges, we always talk about whether a merger is likely to substantially lessen competition but we leave out that second prong of Section 7 which says, "Or tend to create a monopoly." Although I will give the department of justice credit because I noticed that language in their recent complaint in the United case. But there isn't a lot of jurisprudence around it, we could query why that is. I think we tend to focus on substantially less.

Rebecca Slaughter:

And then when I started talking about this with folks, there was a lot of attention paid to well, monopoly is the issue, like what is the test for monopoly? But I think that really reads out the tend to part of Section 7. The rule against surplusage, the basic Canon of statutory interpretation says, "You have to treat each word in a statute as though it has its own meaning." And when these two phrases are separated by an or not an and, it suggests that there is not a perfect overlap between substantially lessen competition and tend to create a monopoly because the loss is to think about both.

Rebecca Slaughter:

So we should be thinking about what are the types of circumstances where a specific transaction may not in and of itself substantially lessen competition but might contribute to a market condition that is significantly more concentrated away from atomistic competition toward monopoly competition. And so you mentioned three categories that I think are worth thinking about, I'm sure many people with great ideas have thoughts on this. And I know it is a topic for which we are soliciting comment on the merger guidelines and so I really encourage thought and consideration to that. And my goal is to help move that conversation forward and really think about what is our obligation as parts of our oath of office and our statutory duty to give real meaning to all of the language Congress instructed us to use.

Lina Khan:

And if I could just weigh in here to say, I think the type of exercise that Commissioner Slaughter just walked us through in terms of just basic statutory interpretation of the actual text of the statutes the Congress has charged just with enforcing. I think that's actually an exercise that is somewhat underutilized in the antitrust context where basic canons of statutory interpretation and especially given the shift towards favoring textualism in the courts. It's something that hasn't quite been implemented in the context of antitrust, where I think we do have opportunity and runway to really be looking at the text closely, at the statutes that Congress actually passed, given that there have been widespread concerns that antitrust doctrine has now evolved in ways that have become unmoored from the actual underlying values that Congress should really seeking to advance through these statutes. So I would just do a big plus one for that as a general exercise, as we're looking at our statutes across the board, where the plain meaning of the text really matters. And that's something that we as enforcers need to keep top of mind.

Rebecca Slaughter:

And can I just piggyback-

Rohit Chopra:

Oh, go ahead.

Rebecca Slaughter:

I was just going to say, an area where we also engage in this exercise that I'm very proud of the Chair and Director Chopra and I issued a statement this summer on section five, going back to what the Chair talked about at the beginning and the FTC standalone Section 5 authority. And in that statement, we really walked through the text, the structure and the history of that language to explain why it would be inappropriate to read it as solely confined to the bounds of the Sherman and the Clayton Act prescription. So I think that exercise of statutory interpretation is when we're really engaged in across the board. And I think we care very much about rooting that analysis in the text, the structure and the history of the language that we're charged with enforcing and interpreting.

Rohit Chopra:

Yeah. And if I could just add, I think that what Commissioner Slaughter has read in some ways is going back to the basics, which is in the laws of the United States, proposing an anti-competitive merger as a crime. And we need to remember this is not an application that they're filing, this is law enforcement. And when they engage in that, it needs to be prosecuted and there needs to be appropriate fencing in and an injunction to stop it from having happening again. And one of the things we did, I was happy

about before I left the commission, is Commissioner Slaughter, Chair Con and I reversed the policy put in place by the Clinton administration to not pursue prior approvals in injunctions during merger challenges.

Rohit Chopra:

And now I have seen a number of instances where the commission is now requiring in these anti-competitive mergers, that they can't just sort of try and run away. That if they do it and even if it settles, that in the appropriate market, they will need to get approval of commission so that we know we won't have to expend the resources, time, energy, cost, all of it to once again, investigate the same merger again. So there are ways in which we can all across the government be looking to deter these deals before they even get out of the boardroom.

Doha Mekki:

This is fascinating. So the name I've assigned to this process of going back to statutory basics is the new textualism. And so I wonder if anyone has thought about what is the legal difference between Section 2's prohibition on monopoly and Section 7's tend to create a monopoly language.

Jonathan Kanter:

Sure. I'm happy to take a stab at that. I think there are a number of differences. Section 7 is an incipency statute. And the purpose of Section 7 is to say, "Well, we don't want corporate concentration to harm competition or tend to create a monopoly." Meaning that if there's a risk that the transaction itself will lead to monopoly conditions, in addition to substantially lessening competition. Then the idea is we want to get out ahead of that and prevent that market concentration. And so I think, whereas monopolization addresses specific kinds of acts and furtherance of a monopoly. The Section 7 is broader because it says, "Well, we don't want to experience monopoly conditions as a result of concentration." And that concentration can come about. And this is actually in a lot of discussion around the passing of the Clayton Act and the [Selacafraga 03:26:25] Act, but that it could be in the context of single acquisitions or a series of acquisitions and in serial acquisitions.

Jonathan Kanter:

So I think the Section 7 tend to create a monopoly language is broader than even the Section 2. And it's something I very much agree with Commissioner Slaughter and spoken about. We need to be more thoughtful about how we address it. And I'm pleased that the department now in our... The last two merger filings, we have mentioned tend to create a monopoly, including in the verse tech case as well, where the firms, as we allege would have 80% of them market, that would seem that the merger would tend to great a monopoly.

Lina Khan:

And I would just say, I think there are additional opportunities to be really reading the Clayton Act in particular, very closely to identify what are provisions that courts might be tempted to collapse onto Sherman Act interpretation that actually were intent for very different purposes. So I think one other provision that comes to mind is Section 3, where there is prohibition on certain types of tying. Where I think we've seen sometimes a trend in the courts to kind of collapse the analysis of tying under section... Under the Clayton Act at the same way that tying is interpreted under the Sherman Act. So I think we really need to be on guard as enforcers and really recall that these are two separate statutes and try to push back where we think courts might be mistaken in trying to collapse what ought to be different

statutory schemes onto just one type of interpretation. So I think there's a broader opportunity here to be engaging in this type of analysis.

Doha Mekki:

I also think this is why it's so important not to take settlements in the first instance, right? The opportunities that are lost by going to courts and updating the interpretation of the antitrust laws and making sure that the content of a violation matches the actual business conduct of the modern economy is really important. And so I would only echo all these remarks.

Rohit Chopra:

Doha, just also a number of jurisdictions around the world actually used the words abusive quite a bit. We have obviously abusive superior bargaining position in Japan and other jurisdictions, in the European union abusive dominance is a concept. In the United States, we do have some laws that are in the periphery of the antitrust laws that actually prevent this kind of abusive or oppressive nature inside and outside of commercial regulation. In financial services, Congress passed along 2010 to forbid abusive acts or practices in consumer financial services and products. And one of the ways that we've been trying to develop that jurisprudence is to make clear when there is lock-in or dominance or where a consumer is coerced into a certain type of product, that certain types of fees or practices may be unlawful under that. It's something that we are trying to make sure we're building that jurisprudence but also looking to the text and enforcing the law is written to ensure that it doesn't deviate too far from where Congress intended.

Doha Mekki:

This is fascinating. With just five minutes left on the panel, I want to shift to legislation. So I suspect everyone here would agree that we have an obligation to push enforcement to the boundaries of what Congress has permitted. But no doubt, Congress is thinking about general reforms, as well as legislation that would limit the range of permissible conduct in certain sectors, most notably in the digital market, and limiting the permissible behavior of large tech companies. In your opinion, what is the most significant reform that Congress could legislate to boost antitrust enforcement and why?

Lina Khan:

I would say one overarching principle that comes to mind is clear, bright line rules that are reducing the need for us to really be showcasing harm in instances where it's transparently obvious, instances where we have to go out and recruit economists, expensive people to testify for us, where we're easily spending millions and millions of dollars. Which can really both strain our agency budgets but also significantly limit the number of cases that we're able to bring. So I would say generally, a shift in favor of greater presumptions and bright line rules would just enhance administrability, such that bringing these cases would be much more straightforward for us. And I think we'd be able to bring more cases even given the existing budgets we would have.

Lina Khan:

I would also say that, going back to this conversation earlier around. The importance of ensuring that our enforcement and the way we talk about antitrust is really honoring the fact that these decisions that are being made are affecting, in very real terms, the day to day lives of everyday people. I would also say that the kind of ambiguity and shift away from presumptions and bright line rules also does a disservice to that goal because it really empowers only the richest and most well-resourced firms to be able to test

the limits of the law. And so I would say that clarity, bright line rules also further is the kind of democratic application of the law, where it's clear for everybody, not just the richest firms, what the boundaries of the law actually are.

Rebecca Slaughter:

Piggyback on what the Chair said, I agree entirely with that. And one thing that has always frustrated or troubled me is the public narrative that the FTC or DOJ has approved a particular merger. Because as my colleagues all know, we don't actually get to do that. We can choose whether to challenge merger but we don't approve anything. But if that's going to be the public narrative, I'd love for the statutes to line up to that, consistent with what the Chair said. Have presumptions, give us the opportunity to actually approve if that's what the expectation is of us and set the bar so that we are not engaging in extremely time consuming, extremely expensive investigations. Where we have to weigh not only what is right on the merits but how resource intensive and eventual litigation is.

Rebecca Slaughter:

Something that strikes me all the time is the number of merger challenges we file that result in abandonments, it is shockingly high. And what that says to me is parties are sort of daring us. They know we don't have the resources to investigate everything. They know we don't... They know that they can sort of roll the dice and see if they're going to end up in the case that we really investigate because they know the merger is illegal when we challenge it, they know they're going to lose, so they're going to walk away. That's not a great condition and I would like to see that shifted.

Doha Mekki:

I would only add that the same problems are present and letter of intent deals that are often very aggressive... And sometimes it seems like parties take a pay and prey position and see if the agencies come after them, which is extremely time consuming. And I agree with the instinct to want clear lines and presumptions in our antitrust enforcement.

Rohit Chopra:

Can I just also, as a side member, observe that the agencies across the world are not really well suited to deal with the volatility and the business cycle and rate environments? Where deal flow was gang busters last year and it's going to be very, very strong this year too. But agency staff at many of these agencies stays the same. And so that's really hard when it comes to planning, to being agile and it just raises the stakes for agencies to be working together. Like on bank mergers, the DOJ has to work hand in hand with the banking regulators so they're not duplicating efforts. It's important to work with other jurisdictions, whether it be states in the United States or others around the globe to make sure that we are adjusting, reacting and able to use resources effectively. Because of course merging parties will use a lot of money and political clout to push through illegal mergers and we need to be prepared for that regardless of whether deal flow is busy or light.

Doha Mekki:

OK. That concludes our panel discussion. I want to thank our distinguished guests for an interesting discussion today. I think conversations like this one are incredibly important in our work as an important exercise in the administration of public law. And of course we know that people are the objects of the law solicitude. And so conversations like this, that bring antitrust and consumer protection issues directly to the public and engage with policy stakeholders, antitrust experts, and others who are

affected by the decisions that agencies make is really essential for transparency, predictability, and public engagement. So we will now break for lunch and return at 2:05 Eastern, for a conversation about whole of government competition policy and enter agency collaboration that will be led by Patty Frank at the DOJ. Thanks everyone.

Lina Khan:

Thanks Doha.

Patty Frank:

We're going to get this panel rolling by moving right to the panelists. Now what we're talking about here is how agencies are working, competition agencies are working with other agencies within their government to promote competition. So Margarida, can you start? Margarida is the president of Portuguese Competition Authority. Could you start by telling us about how your agency works with other agencies within the government?

Margarida:

Sure. Thank you, Patty. So the legislator foresaw a number of formal cooperation moments between us, the Competition Authority, and several sector regulators. And among these moments, there are duties of communication, for example, during mergers. So for example, if there is a merger happening in a regulated sector, the Competition Authority always seeks an opinion from the sector regulator that it incorporates into its own competitive analysis or competitive review of the merger. There is this opinion that is sought with sector regulators, it is not a binding opinion with the exception of the regulator for media. So if the media regulator has a negative opinion on the merger, it can block actually the merger. So it conveys that opinion and we stopped the proceeding. Otherwise it's an opinion that we take into it, they are opinions that we take into account during the merger review.

Margarida:

Likewise, in antitrust proceedings, we also notify... And this is provided for in the law. We also notify sector regulators when we open a proceeding against companies in the regulated sector. So this means that when we open the proceeding, we communicate that opening, we receive whatever information the regulator wants to give us and before we take a decision, before we with decide on the case, we seek, again, that opinion from the sector regulator that we then incorporate into our final decision. Then there are other formal cooperation moments, for example, participation from the Competition Authority in public consultations, carried out by sector regulators and participation by the Competition Authority in several advisory committees in these sector regulators as well. But this is formal. Okay?

Margarida:

Actually, it has brought a lot of awareness about our competition concerns to other sector regulators over time. So I'm talking about, we review about 50 to 60 mergers every year and of these about 20 to 25, actually benefit from a sector regulator opinion because they take place in the regulated sector. But beyond all of this, the Competition Authority has sought also to go further and to establish informal cooperation mechanisms with sector regulators. For example, by signing MOU memorandum understanding with some of these sector regulators.

Margarida:

For example, one of them is the former regulator and they're good reasons for which we sought that memorandum understanding because there may be issues for the Competition Authority in which we benefit from their understanding and their eyes on the ground really. Then there are also initiatives, for example, in public procurement, we not only signed an MOU with the agency that manages a very large database, that I'll maybe talk about later, for public procurement. This is a nationwide database with over 12 years track record. So there's a lot of information that we can analyze and screen for the benefit of our own investigations. And this MOU actually allowed for quicker access to this database. But I really want to say that when we established a strategy against bid rigging and public procurement, we reached out to a lot of stakeholders and a lot of sector regulators as well, so that we could train them to be aware of signs of bid rigging in their own procedures.

Margarida:

And this actually paid, but I'll talk about it a little bit later because there's much to be said about it and we learned a lot in the process, along with our peers. And then finally, what we did also was to establish a number of initiatives. So for example, seminars with sector regulators. In which we explain what we do, explain what their mission is, explain what kinds of infringement can happen in their own regulated sector. So we give examples if not from our own jurisdiction, from other places in the world where a competition infringement was found. So that they can be more quickly aware of similar signs when they are supervising their own sector.

Margarida:

And this has really paid a lot for us in the sense that a significant number of infringement has, or basically [indesure 03:43:20] of infringement have been put forward to us. I want to say as well that recently we did one of these seminars with the equivalent of your labor department, for no coach infringements. And that's pretty new for us as well. And this has been very rewarding in terms of creating a much larger awareness among these sector regulators, so that we can investigate a lot more. But I will... Maybe I will stop here and Patty,

Margarida:

If you want me to help you out, I can.

Patty Brink:

Thank you. Thank you so much, but I think I've resolved all my problems.

Margarida:

Okay.

Patty Brink:

Thank you so much for jumping in. And I did want to just briefly, as we get going, discuss a little bit of what's been going on in the US on this whole of government and really having the competition agency work directly with so many other agencies to help promote competition. And one of the things that has happened and really the focal point of this approach has been president Biden's executive order on promoting competition in the American economy, which was signed last summer. And it's funny, Margarita, many of the things that you were talking about are efforts that we are also undertaking under this executive order.

Patty Brink:

We are strengthening our partnerships with our other federal agencies and working with them to really understand the role that competition plays in their own specific industries. We're also working with them to promote pro-competitive rule-making and to make sure that competition is taken into account whenever there are regulations imposed in their industries.

Patty Brink:

And also, in the same way you were talking about the seminars, we're doing all kinds of discussions with the agencies to help them particularly identify collusion in public procurement in the same way that you've been talking. So that's really been a really inspiring change of focus within the US government to really make sure that all of the agencies, not just the competition agency, but all of the agencies are really focused on competition.

Patty Brink:

So taking a little bit of a step back to introduce everybody who's here just in good order, I want to introduce Liz Brady who is longtime state enforcer, a longtime partner of ours. And she's currently serving as the co-director of the Florida state attorney General's office. Also with us is Dr. Willard Mwemba is the CEO of COMESA's competition commission. And before he came to COMESA, he spent many years working in the competition authority in Zambia. And then finally with us is José Manuel Haro Zepeda who has served for many years in what looked like a variety of executive positions within the Mexican government. And he is currently the head of investigatory authority of COFECE.

Patty Brink:

So what we're really looking for here is more information about how your competition agencies work with the other agencies in your government. So I think we'll turn now to Dr. Mwemba to explain COMESA and how COMESA works with other agencies.

Dr. Willard Mwemba:

Thank you so much, Pat. It does appear I'm a little bit of an outcast on the panel in that I'm not coming from a specific country, but in any case, I think what I'm talking about still relates to the subject of discussion this afternoon. I'm almost saying this evening because back home now people are sleeping. So I was almost saying this evening. Okay. So just for introduction now, COMESA means the Common Market for Eastern and Southern Africa, and it covers or includes 21 member states. So for those of you a bit familiar with the African map, it covers the territory beginning from the Southern tip of Africa in Eswatini all the way to the Northern tip of Africa in Tunisia, Tunis. So quite an impressive geographical coverage of 12 million square kilometers and the population of about 583 million people as of 2019 statistics. I'm a little bit outdated. Sorry for that. But you have an idea of the population.

Dr. Willard Mwemba:

Now, the basic aim of COMESA is regional integration or the creation of a single market. So among the rules that are there are the dismantling of trade and tariff and non-tariff barriers, but of course, it was then realized that dismantling tariff and non-tariff barriers was not enough to facilitate free trade. There was need to have a regional competition agency created in order to ensure that private businesses do not then erect these barriers to trade by engaging in anti-competitive practices. So that is how the COMESA Competition Commission was created to regulate competition in all these 21 member countries as long as conduct that is being looked at has a regional dimension.

Dr. Willard Mwemba:

Now, in our operations as the COMESA Competition Commission, we do work very closely with the national competition authorities of the member states. So in terms of the inter-agency collaboration, ours the inter-agency collaboration is more with the national competition authorities of member states. And this is done or mandated or prescribed by law. Our law is very clear that in whatever we do, we should work very closely with the national competition authorities. And then our law has also given us the mandate to develop and disseminate competition policy in the common markets.

Dr. Willard Mwemba:

So for example, if we're dealing with government regulations of certain member states that we think may inhibit competition and free trade among member states, we are able to discuss with those governments, advocate. Look, if it's a regulation, you cannot just go in and say, "The government we are taking you to task, or we are going to fine you for this." But we do advocate and speak to the anti-competitive nature of those regulations and try to bring in government to sense that certain regulations may affect competition.

Dr. Willard Mwemba:

Then also, nothing stops us from working directly with sector regulators in those member states. So yes, we do work straight or directly with the national competition authorities mostly for convenience because it would be too much on our part to be working with different sector regulators in different member states, the 21 member states of COMESA. So it is more convenient for us to work with the national competition authorities who then bring the sector regulators on board. So the structure is that whenever we have an issue, we'll directly engage the national competition authority in that member state. And if the matter borders on some sector regulatory jurisdiction, then that member state will bring on board that sector regulator as we are discussing the best way forward.

Dr. Willard Mwemba:

However, we are beginning also to directly work with sector regulators in certain countries where some sector regulators have direct mandate on competition regulation. So not just on technical regulation, but on competition, as we know it, market regulations. So in those countries like Egypt, for example, where we have the Central Bank of Egypt having direct mandate on competition matters in the financial banking sector in Egypt, we are able to work with them so directly and resolve any issues that arise.

Dr. Willard Mwemba:

And the last one, Pat, as [Margherita 03:51:57] said, I don't know where I should end, but I'm sure there will be more questions as we proceed, so I'll be able to clarify on other issues, but the last one also, what we've done, despite the law mandating us to work with national competition authorities and in some cases directly sector regulators in certain countries, what we have done also to enhance this inter-agency collaboration, which I think has worked very well in the case of COMESA, most of you have been following our progress, you'll see that we have done quite a lot in a short period of time a situation that was not expected when we commenced our operations around 2013 because it was expected that there will be a lot of resistance from member states due to anticipated setting of jurisdiction, which is not the case, of course.

Dr. Willard Mwemba:

So one of the things that has helped us so much is also in addition to the law itself that mandates us to work together, we have entered into MOUs with the national competition authorities. And these MOUs have simply spelled out step-by-step modalities and approaches of working together. As a result, we have seen so many cases that we would not have been aware of that have happened in one member state with regional consequences being referred to us by national competition authorities. I have in mind the national competition authority of Mauritius, Zambia, Eswatini, Zimbabwe and Kenya, having referred to a certain significant cases that were taking place in their territory, but had consequences at regional level.

Dr. Willard Mwemba:

So I think in a nutshell that is how we collaborate with agencies, national competition authorities at national level and indeed where needs be with sector regulators.

Patty Brink:

Thank you. That sounds very important and very challenging at the same time.

Dr. Willard Mwemba:

Yes, it is.

Patty Brink:

Terrific. Why don't we turn to Manuel to talk about Mexico and the relationships that COFECE has with various regulators and sectoral regulators?

José Manuel Haro Zepeda:

Thank you, Patty. Well, I want to thank to the FTC and the DOJ for organizing this important summit. I am sure that everybody here and all over world is going to have a lot of learning from this summit. First, I would like to share with you the ways that we can work with other agencies or regulators under the approach of the investigative authority. And today I am going to describe three of these schemes or ways to collaborate. In Mexico, there are many markets in which it's possible to establish price regulation, but to do that, a special procedure from COFECE is needed in order to conclude if there are or not competition conditions in the market.

José Manuel Haro Zepeda:

Once we have done that, the related agency or regulator is able to establish the optimal regulation scheme. For example, in this kind of procedures we have a preliminary statement of the lack of competitions conditions in the retail market of propane gas. In the second place, we have another procedure that it is related to determine the presence of barrier to competitions, which could be any behavioral, structural, or regulatory characteristic that is generating distortions in the market. Regarding this, I would like to share with you two types of regulatory barriers to competition, because this kind of barriers have a close relationship between the competition authority, another regulatory or another agency.

José Manuel Haro Zepeda:

With this purpose, I want to share with you a couple of examples. The first one took place in the market of freight services in Sinaloa state of Mexico, which is the main producer of corn in my country. In this

case, we observed that the local regulations were affecting the market conditions. Let me explain a little bit more about this. In this case, the regulation was limiting the geographical territories that a specific firm could serve, creating some kind of exclusive territory.

José Manuel Haro Zepeda:

Additionally, the regulation was limiting the number of available permits or licenses. Something that it's really, really interesting is that the public servant in charge of authorizing the licenses was literally a participant of this market, creating an interesting conflict with really bad incentives to behave in a bad manner. Another aspect that I would like to point out is in these cases, that vertically integration was forbidden. For instance, any kind of corn producer wasn't allowed to use its own means to transport the crops due to the fact that it was forced to hire the service with a permit holder in this industry. In this way, the commission ordered to the government and the Congress of the state to modify the permit allocation scheme in order to avoid this kind of barriers to competition.

José Manuel Haro Zepeda:

The second example is related to the market of raw milk in the state of Chihuahua, Mexico. In this case, the creation of an inspection protocol was identified, and this protocol was some kind of a void in the wholesale trade of raw milk from other states to Chihuahua. This protocol didn't have any kind of real sanitary justification. So regarding this, we observed that the prices in Chihuahua state rose up around 4% regarding this or as a consequence of this protocol. So in this way, COFECE recommended changes in regulation in order to restore competition. The interesting issue with these two procedures is that they were made in corporation with the ministry of economy in benefit of the Mexican consumers.

José Manuel Haro Zepeda:

Finally, regarding investigation of anti-competitive conducts, several agencies can cooperate with us in several ways. Some regulators have special knowledge of the market and have access to specific information in the market like prices, sales, or the integration of economic groups. In this case, this makes the regulators key to help us to identify possible relations to the law.

José Manuel Haro Zepeda:

Additionally, I would say that the regulator have experts in their market. I mean, they have a broad experience of what is happening in the market, how it works and who participates in it. This is especially helpful when we begin an investigation since regulator help shorten the group of where to look in, and this kind of expertise support us in the way that we could have any kind of strategic advice.

José Manuel Haro Zepeda:

In this regard, we had a cartel case. Sorry, but I cannot share many specific details of this, but this case comes from a close relation with regulators. Let me explain why this case is really, really important. First, the regulator was who detected the conclusive pattern, and this helped us to start an investigation with strong evidence. Due to the expertise they have in the market, their complaint not only helped us to identify the cartel, it also gave us a good reference point in order to use more efficiently our investigative tools.

José Manuel Haro Zepeda:

Secondly, we have coordinated and conducted simultaneous downgrades. I want to point out here that each of them it's related only with the legal mandate, which is something really important due to the

safe conditions in Mexico. Knowing the importance of cooperation with agencies, COFECE has several corporation agreements with other public authorities, including the ministry of economy, the central bank, the Tax Administration Service, which is some kind of ... It's the Mexican version of the IRS, and the energy regulatory among several others.

José Manuel Haro Zepeda:

So as a final thought, I would like to summarize by saying that the relationship with other agencies is fundamental since a bad regulation scheme could be harmful to consumers without any chance of generate efficiencies, and they could be analyzing the detection and prosecution of any kind of anti-competitive conduct as well. Thank you, Patty.

Patty Brink:

Thank you, Manuel. Really interesting the way that your competition agency COFECE worked with the regulators to get real change that may in some ways have been greater than you could have gotten from a specific enforcement action. And that's really interesting, and it's a terrific example of what we're talking about.

Patty Brink:

I want to move next to Liz. And Liz, if you could talk a little bit about the ways in which the multi-state group works with each other and with federal agencies.

Ken Merber:

Sure. Sure, Patty. First, I'd like to join with my fellow conversationalists and thank the FTC and DOJ for including me in today's conversation. I think it's always useful when enforcers not just different parts of the country, but different parts of the world can share their experience and their learning. I would also like to make clear that my comments today are my own and do not reflect those of the Florida Attorney General or the National Association of Attorneys General, or the attorney general of any other state.

Ken Merber:

As I'm sure many of the listeners know, the US has a unique form of government where we have federalism. And so in addition to our federal antitrust enforcers, the DOJ and the FTC, each of the many states and actually jurisdictions, I believe there are 54 in all, have separate antitrust authority. Now, not surprisingly, the resources available to each individual state varies greatly. Florida, for example, has a separate consumer and a separate antitrust division. And we have relatively vast amount of resources. However, in some other states it may be that consumer and antitrust are combined into a single unit and indeed in some instances, even a single person. So you can imagine pursuing antitrust cases that affect your economies if you are essentially halftime employee with consumer, and antitrust responsibilities are very difficult.

Ken Merber:

So what the states have done over the years is we have through the National Association of Attorneys General established a task force in which we can come together to share learning, pool resources when we can and take on bigger cases than we otherwise could. The task force is chaired by attorneys general and a state enforcer who actually you had an opportunity to hear from this morning. Our current task force chair is Gwendolyn Cooley with the Wisconsin AG's office.

Ken Merber:

And one of the things that the task force does is we form working groups. And in our working groups we can look at industries in-depth and share complaints across borders. To some extent, it's very similar to the way our US enforcers work with their cross border enforcers. I mean, we live in a world and an economy that doesn't always know geographical borders. Companies that do business in the US do business in other jurisdictions. Mergers don't just impact one of us. They often impact all of us. It is the same when it comes to state enforcement. There are often investigations that involve a group of states that are affected regionally. There can be initiatives with various federal agencies. We also submit comments.

Ken Merber:

In fact, I think Gwendolyn referred to this earlier that we are ... I believe Emilio did as well. We are considering whether the AG should comment on the proposed change in merger guidelines. We also submit amicus briefs in support of issues that we believe are important to our law enforcement role, and not last but not least, we also bring cases, sometimes very big cases. The one that comes to mind now is our generic drugs or generic pharmaceutical case where DOJ actually has a parallel criminal investigation and have indicted several companies. But we, as a multi-state group, have sued on behalf of consumers and in our law enforcement capacity and on behalf of our purchasing agencies.

Ken Merber:

Back to the procurement, we buy a lot of stuff to recover ill-gotten gains from the perpetrators of this. And of course, other well-known cases, Google. Many on Google. We've brought three actions against Google in various combinations of state groups, sometimes with DOJ, sometimes without the DOJ, sometimes parallel with the FTC, sometimes not parallel with the FTC.

Ken Merber:

In addition to cooperating with each other, we also try to cooperate when possible with our federal counterparts. Now, as everybody knows, this can't always be easy because reasonable minds can differ. But what we try to do is at least get ourselves and our federal cohorts on the same timeline. And in this regard, we generally go through what's known as a waiver process where we seek from the parties who are being investigated or the merging parties their permission to talk to the federal enforcement authorities that's also looking at the transactions so that we will be in the same timeframe and using the same facts.

Ken Merber:

Well, we are separate sovereigns, and we do on occasion all land on exactly the same spot, but as I'm sure everybody who works in the sphere of international enforcement knows, sometimes we don't always land on the same spot. And we see that we need to maybe diverge a little bit in what our remedies are. So in some ways I view the state and state dynamic among the state as single entities and also as the states as they function with the Department of Justice and the FTCs in many ways the same as the federal enforcers and the European Community. And everybody around the world deals with other sovereigns who are looking at issues that affect their economies and sometimes the same ways and sometimes in different ways. And I'll turn it back over to Patty.

Patty Brink:

Terrific. Thank you so much, Liz. I think I'd like to hone in on a specific area in which competition agencies work with other agencies within their regions or within their countries, and that's specifically in the area of public procurement.

Patty Brink:

I think we can all agree that protecting the integrity of the public spending is one of the most important responsibilities of competition agencies. In the US, what we've done toward that is in 2019 we launched a group called the Procurement Collusion Strike Force, and it's a really coordinated response with our law enforcement partners to try to stop cartel fraud in procurement at federal state and local levels.

Patty Brink:

So through the PCSF, our prosecutors and our law enforcement partners work to deter crimes such as bid rigging, and then if they do happen, detect, investigate, and prosecute cartels. And in fall of 2020, we expanded this effort globally to work with our international partners.

Patty Brink:

So I think it would be interesting to hear from the panelists about what your agency has done to combat bid rigging or other kind of program conduct that affects these public programs. And another thing I'm really interested in is data on procurement, which is so important to enforcement.

Patty Brink:

So can you talk about how your agency obtains that access to the data, and then if you are able to obtain access to data, how is it used? I think we're going to start ... Liz, if you don't mind going back to you to talk about the ways in which states work with your department of transportation and with DOJ on looking for cartels in public procurement.

Ken Merber:

Sure. Certainly over the years, and I think as Patty pointed out, I am a long-term or long time state enforcer. And we have over the years worked in conjunction with Department of Justice and did what we would call the red flags of collusion road show where state enforcers hand-in-hand with federal enforcers did a road tour of the State of Florida meeting with people who are responsible, people on the ground in counties and municipalities who do the every day buying for the state and reminding them that we all want to be good stewards. Sometimes, though, it's not easy, particularly when you are dealing with an economy that is continually consolidating.

Ken Merber:

Oftentimes you don't, as a procurement officer, have the kind of reach for bids that you would like. And so we meet with these individuals and give them tips as to how to expand their reach and get additional bidders into the bidding process as well as pointing out, as Patty mentioned, the importance of looking at the data and analyzing the data. And over the years, that has been, I think, the biggest challenge.

Ken Merber:

Wouldn't it be nice if we all had some big national database where we could push a button and see what all the road contracting bids over the past six months have been? We've tried various ways. We collect bids, we look at public data, but I don't think we have come up with that perfect mechanism for which

we can coordinate data. But I do think that over the next decade or so I think that is going to be our most important tool is the ability to gather large amounts of data and to be able to spot trends and patterns in bidding that would not have occurred if not for collusion.

Ken Merber:

And I'm certainly interested to hear what my co-panelists across the globe are doing to overcome these huge burdens, because the data out there it's just massive. I mean, there's just so much of it and to collect it, to keep it current and to analyze it as a government agency and not as a private agency. Sure, there are lots of private data aggregators, but they come with their own anti-competitive risks as well. So certainly, I'd like to hear what others have to say as to how to handle the data morass.

Patty Brink:

I think the good news is, at least from our planning call, we have a good success story on this. So Margherita, can you tell us about what's going on in Portugal?

Margarida:

Sure. Thank you, Patty. And thank you, Liz, as well. It's very insightful to hear you. And we have some points in common, especially starting with the roadshow and the people we talked to, but let me say that indeed when we looked at what our strategy should be regarding public procurement and combating bid rigging in public procurement, the fact that public procurement represents about 10% of GDP in general in OECD countries, and 20% of public spending is very important to us, it was really a big drive. And that coupled with the fact that we regularly had complaints from different ministries and different agencies about [inaudible 04:14:06] that there was bid rigging led us to set up a road show, but it's still going on, really.

Margarida:

It was set up in 2016. It never ends because people change, people move from places. And so we need to get down to really the public officers that opened the bids and go through it and may detect these signs of bid rigging.

Margarida:

I want to say that we really started with different agencies in different ministries in Portugal and then went down to municipalities. So we don't have a federal level, but we have a national level and then went to the local level. And this is something we keep doing because there's always something coming up. What we did, first of all, was to set up the road show in a way that we first try to explain how a bid can be set up in a way that is more protected or less prone to bid rigging. So the design is really important. And then even that doesn't work, if you detect signs, how should you contact us?

Margarida:

But more importantly, and even before that, what are the signs? What are the main signs of collusion? And we have a package that we hand to every participant with a checklist for these important signs, which typically are signs of collusion. And we've seen not only an improvement in the number of complaints that we receive, but also the quality and improvement in the quality of the complaints that we receive, because evidence is really important so that if we can get that evidence in the best possible way from

Margarida:

... from these people on the ground. It's all the better, all the best, and all the better for us in terms of pursuing the investigation. For example, one of the success stories we had was one case in railway maintenance. There was a cartel that was set up in this area. It was signaled to us by the court of auditors, which would be, I think, the government accountability office, or at least parts of it would be the government accountability office in the US. And they suspected the cartel, they signaled to us, and we investigate it in 2017, '18. And it ended up with a sanction to the companies involved, including barring some of them from participating in for the bids for a period of up to two years so that the sanction is dissuasive enough.

Margarida:

Then I want to say, going back also to the challenges of the database. We set up this strategy, this roadshow. But at the same time, the legislator granted us access to our nationwide database for public procurement. This is something that is done electronically for at least since 2008 or '09. And so there's quite a big track record already that we can analyze. The problem is data is not always perfectly inserted by companies participating in the bid. And so part of our work, and that's what we've achieved through the MOU that assigned with the agency that manages the database, is to work with them so that they work on the filters when for accepting the data from companies participating in the public procurement procedure.

Margarida:

For example, if they don't insert the data correctly, the application would tell them that they should insert it correctly. They would have to stop and go back and insert it in a way that is perfect, I would say. But I have to say as well, that in terms of the challenges we encountered, we saw that it was much more difficult, for example, in direct awards to have detail enough for some of our investigations. Information is less detailed in the case of direct awards. But of course, in other cases, there are more numerous data points that cover the entire procedure for different companies. In that sense, it's much richer for us when we're investigating.

Margarida:

Overall, I want to say, and then I'll stop here, is that access to the database is really, really interesting. Because when we receive a complaint from one public agency, we can go and check whether the data tells us that these signs of collusion may be true. But it also gives us signs of collusion in other procedures, not just the one from the public agency that is complaining to us. There are ways to go back in time, and to investigate a lot more than is being communicated to us. I'll stop here.

Patty Brink:

Terrific. Thank you so much. That's really fascinating. I'm taking the moderator's prerogative, and going over a little bit, just because each of these panelists really has so much to share. And I just want to really ask two specific questions. Manuel, I'd like you to talk a little bit about what Mexico's done, and [COFACE's 04:20:28] done on procurement. And then Dr. Mwemba, if I could go back to you. And in our call, you talked about what you had done on regulations in the competition in agricultural markets. And I really think everybody would like to hear about that. I'm throwing it right to you, Manuel.

José Manuel Haro Zepeda:

Thank you, Patty. We have done a lot of work cooperating with other agencies to promote competition in procurement processes, and combating anti-competitive practices in public tenders. We have worked in two ways. One is throughout advocacy actions, and the other is related to enforcement actions. There are occasions in which we have given advice to contracting authorities prior to the tender. In aspects such as the design and execution of the procedure, to create a contest that is as competitive as possible.

José Manuel Haro Zepeda:

Additionally, we have issued several documents related to this 2016 COFACE issue that a public document with 41 recommendations to foster competition in public contracting. These recommendations are directed to public procurement officials to help them designing competitive tenders, and detect possible cases of bid rigging. In general terms, this document includes aspects such as the best practices in the preparations, design, and execution of public tenders. Additionally, if scale of the institution is large enough, we are recommending to the creation of high internal intelligence unit to make easier the detection of any anti-competitive conduct. Additionally, in 2018, we issued a document in which the commission gathers the major lessons acquired throughout bid rigging cases. The main one lessons are collusion often take place in market studies made prior to the public tender.

José Manuel Haro Zepeda:

Another one is that a proper design of the tender is the best mean to ensure competition. Additionally, procurement mechanisms that are not based on tender increase the possibilities of collusion. And finally, as always, transparency in the procedures is key to create pro-competitive procedures. From the size of the enforcement actions, we have a lot to share with you. We are aware of the importance of being proactive in the detection of, and prosecution of collusion in public procurement. However, I think that there are many, many challenges that we have faced in this process. The first issue is related to the lack of information caused by the direct award of contracts, which is a way of allocating contracts widely used by the current government. In this case, that makes bid rigging cases detection difficult, since it's hard to detect patterns in direct contracts, as we can't observe the behavior of the market participants.

José Manuel Haro Zepeda:

The second issue is related to limitations or inconsistencies in information. Even though we have a database called Compranet, which is a database that distorts all information of public tenders, we constantly face the issue of not being able to work efficiently with the available information in the database. There are constant irregularities on how the information is presented and reported. From simple mistakes when the agencies capturing the names of the undertakens, to the predominant use of low quality PDF files rather than databases. Even though the documents, another example that from my perspective is relevant to share with you is that even though the documents come from a public tender of the same institution, sometimes it is possible to see that the format, that the way or the format in which the bids are stored is quite different, provided that it is harder to obtain information of quality to ensure that this public tender is going in a good way.

José Manuel Haro Zepeda:

To fight back these challenges, we have invested a lot of resources in building up routines and algorithms that clean the information to the point in which it is visible to analyze it. This effort not only implies buying new technology tools, such as computers or any specific software, it also implies the necessity of hiring more specialized people in data science management. But sadly, considering the budget restrictions that face the authority, sometimes it's not possible, hiring new colleagues. So we

have been working in training programs in order to be able to figure out these new challenges that we have been facing. As a final reflection, I think that even though we can build up algorithms that are suitable to detect collusion in public procurement, maybe they could be useless if we don't have access to quality information. Therefore, perhaps we maybe need to spend more time in this task. Thank you, Patty.

Patty Brink:

Thank you so much, Manuel. I think that your last observation is certainly something that is really recognized in the US, and something that the members of the Procurement Collusion Strike Force really heartily agree with. If we could finish up, Willard, with just a brief description of what COMESA's been doing in protecting competition in agricultural market. You're mute.

Dr. Willard Mwemba:

Am I audible now?

Patty Brink:

Yes, you are.

Dr. Willard Mwemba:

Okay. Thank you, Pat. I'm somehow tempted also to comment on public procurement. I'll do it very fast before I come to the agri markets. From the COMESA Competition point of view, what is our view on this issue of public procurement? The first point I would love to share with the listeners here is that we are a relatively new institution, as you may know. We are only about... Well, I don't know if nine years is new. But we still call ourselves new. We started with low-hanging fruits, for example, territory restrictions, [inaudible 04:27:33] in terms of market allocations, and the like, because those were low-hanging fruits. Public procurement bid rigging is quite a complicated subject, especially when you're dealing with interstate public procurement. However, have we just closed our eyes and are chickened out because of that complication and complex nature of regulating bid rigging in as far as interstate regulation is concerned? No.

Dr. Willard Mwemba:

And what is it that we have begun doing to ensure that we up our game as well in this issue of bid rigging in public procurement at regional level? First of all, we have observed that public procurement is quite compartmentalized, it's quite jurisdiction specific in our member states. Usually it is very difficult to establish a regional dimension. Most of these will have a national dimension. However, we are now seeing a situation where similar companies are bidding for public projects like roads, construction of schools, hospitals. We are beginning to see a pattern of the very same companies doing these big projects in all these member states. And that is beginning to open our eyes and our minds that if there's a possibility of bid rigging, then this affects multi companies. And then the other thing that we've done is to establish what is called the restrictive business practices network.

Dr. Willard Mwemba:

In this restrictive business practices network, there is a lot of sharing of data in realtime. For example, if there's an investigation on bid rigging in a certain member state, it will easily be shared with other players or other members in other member states in this network to which the COMESA Competition Commission is a part. And in fact, we coordinate that. And then the other thing that we are doing also

knowing that public procurement, bid rigging in public procurement, especially in resource constraint countries, poor countries, most of the countries in COMESA are less developed countries. Such losses of money through bid rigging actually exacerbates poverty. What we are doing now is also to ensure that the judiciary plays a bigger role in interpreting the laws, and coming up with judgments really that establishes a precedent to avoid and prevent would-be offenders.

Dr. Willard Mwemba:

For example, in the next three weeks, we'll be having a regional judges workshop in Livingstone, Zambia, where we've brought together all the main judges are responsible for commission competition cases in all the member states, and beyond actually, to discuss some of these matters of public procurement, the things that they now need to look at when they are looking at these cases, and things like that. And then the last point, part on this is that, as I said, we've just begun applying our minds on this. We are now initiating studies. Not an investigation, but studies. And in those studies, it is expected that a lot of information may be [inaudible 04:30:43], which may point to certain practices taking place in this public procurement. Such studies have helped, actually as you know, I worked for the Zambian Competition Authority before. We had once busted a cartel, a big rigging public procurement of fertilizer, which is bought by the government, and then subsidized to give to the small scale farmers.

Dr. Willard Mwemba:

In that scenario, we had engaged in a study that showed a strains of public, a bidding in this fertilizer. And we were able to conclude [inaudible 04:31:14] using economic evidence and data that there was bid rigging there, and the cartel was busted. And a lot of money was saved. The World Bank estimated that about 20 million US dollars per year was lost as a result of that bid rigging that took place for so many, many, many years. \$20 million per year was being lost, and that was saved as a result of that investigation. We are going that route as well at regional level, initiate studies and see what comes out of there. Now, quickly in agriculture, what is it that we are doing? We have observed part that most of our citizens in the common market are actually involved in agriculture. Agriculture is the mainstay of the economy.

Dr. Willard Mwemba:

But we have also realized that most of these farmers have never, ever graduated into being a medium or even commercial farmers. They've remained peasant farmers from the time I was born, some of them I found them peasant farmers. They are still peasant farmers. Some of them, as I said last time, they've even receded into much, much poverty. I don't know the level that you'd put them now if they go beyond being a peasant farmer. The question is, why? And then we have seen multinationals that are purchasing the product of these peasant farmers, keeping on posting huge, huge profits year after year. What we've come to observe, number one, is that there is lots of margin squeeze in the study that we are carrying out with the University of Johannesburg.

Dr. Willard Mwemba:

There's lots of margin squeeze. These multinationals, when they're buying the input from these farmers, they buy them at very constrained prices. When they process those inputs and sell the final product, they sell them at a very exorbitant price. That is what that study is revealing. The study is also revealing that this kind of scenario is exacerbated by government regulation, that have somehow protected these agricultural market, with the aim of having these markets grow. They protect them and shield them from foreign competition. We have seen this in a number of countries. I may not mention the countries

here, but I may mention the product, maize marketing in some countries, sugar and milk in other countries. The government have protected these sectors with regulation by law, hoping that the sector will grow as a result of this protection.

Dr. Willard Mwemba:

Our view is different. We are seeing as a result of this protection, in fact, the sector remains stagnant and abusive, because they're not mindful of end competition, or discipline from foreign companies that may come in. We are advocating and talking to different government officials in these countries, showing them the long-term effects of having these protection, these agencies, and lack of competition in those sectors, showing them the poverty that is being exacerbated by the law, and small scale farmers who are in these value chains. And we hope that if that is taken into account in the long run, most likely the scenario may be reversed. Thank you so much, Pat.

Patty Brink:

Thank you so much. And thank you so much for giving us a very concrete example of the way that competition can benefit individual people within your countries. Thank you so much to all the panelists. I really appreciate all of your insight, and wisdom, and experiences. And also, apologies for running a little bit late. At this point, I would like to turn the mic over to Commissioner Rebecca Slaughter from the Federal Trade Commission, who will give us some closing remarks. Thank you everyone.

Dr. Willard Mwemba:

Thank you, Pat.

José Manuel Haro Zepeda:

Thank you.

Patty Brink:

Thank you.

Rebecca Slaughter:

Thank you so much, Patty, and the rest of that excellent panel. And thank you to everyone for joining us today. It is really my pleasure to close out the public portion of this event with a few concluding thoughts. And before I get to those, I want to give appreciation to Chair Khan, AAG Kanter for organizing this incredibly important event, and to all of the staff who work so diligently behind the screens. Behind the screens. Well, behind the scenes, and now also behind their screens, not only to put the event together, but to pivot to a virtual format so nimbly and agilely. And I think that is something that they're very good at, and a great example and metaphor for what we need to be doing as enforcers in this incredibly important moment.

Rebecca Slaughter:

So a couple concluding thoughts. Events like this that draw together international and state partners with the US Federal Enforcers really send home the message about why it is so important for us to work together. And I think of it in two ways. The first thing I think about is a story that my children love. The story of Swimmy the Fish, which is about a little tiny fish whose whole family gets eaten by much larger fish. And he goes out and discovers a new school of fish who are too afraid to go play in the open ocean

because the big fish are going to come and get them. And Swimmy teaches them how they can swim in formation, and work together, and look like a bigger fish in order to scare off the evil tuna.

Rebecca Slaughter:

And I think about that a lot when I think about partnership with state AGs, and partnership with international enforcers. I think all of us are under-resourced. We are daunted by the challenging task that we have in front of us. And we are vastly outmatched by companies that have lots and lots of money to use towards getting bigger and bigger. But when we work together, we are much more powerful and much more effective. We also can learn from each other. And that's what events like today are incredibly valuable for. Hearing from the chair in her conversation with Andrea [Kachelli 04:37:41] about the work the UK is doing in digital markets, hearing about other jurisdiction's experience with guidelines, with labor markets, with whole of government approaches to competition. This is incredibly informative to us as we think about the best way to execute our mission.

Rebecca Slaughter:

And sometimes we see things that we need to do similarly, sometimes we think we see things where we have differences in statutory authority. But either way, we really benefit from understanding what is working well and what is not working well in other jurisdictions. And the final point I'll make about what is really valuable about events like today's is that they really incorporate what I heard AAG Kanter and Chair Khan talk a lot about earlier today, too, which is bringing anti-trust and competition work that can seem so esoteric and technocratic directly to people in a public, free forum that is participatory, where you can really hear from your enforcers. And we can all work to try to talk about these issues in ways that people understand their effect on day-to-day lives of real people, because that's why this work matters at the end of the day.

Rebecca Slaughter:

So we have a huge task in front of us. High at the top of the list is the rethink of the merger guidelines, which is something we heard a lot of great input about today, or continuing to work on. The comment period is still open, so I will join my colleagues in encouraging participation. And finally, close by noting that I know I and my colleagues take very seriously our obligation to act in this moment. To not just talk, to talk to people, but not just talk, to really deliver on the learning that we've developed on our statutory obligations, and to fight as hard as we can on behalf of our constituents, which is the American people. So thank you to our colleagues for internationally, and domestically for your participation today. And I look forward to more events like this in the future.