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PANEL 1: ANTITRUST ANALYSIS OF DATA

MS. LEVINE: Good morning, and welcome to the Federal Trade Commission’s hearings today. Let’s get started. This event, just some housekeeping moments for you. This event is being live-streamed and videotaped and transcribed, so your appearance today may appear on the FTC website.

If you have questions in the audience today, please write them on some question cards that are going to be circulated, and pass them to my colleagues, who are going to be collecting them by walking around the room, and then they’ll forward them to us, and the panelists can field the answers to those questions.

I’d like to introduce our panelists today, starting on my farthest left. Alex Okuliar is a partner at Orrick and a former adviser to FTC Commissioner Ohlhausen. He’s also been a trial attorney at the Justice Department’s Antitrust Division.

Next to him, Renata Hesse is a partner at Sullivan & Cromwell, and she was previously the Acting Assistant Attorney General and the Principal Deputy Assistant Attorney General and the Chief of the Networks and Technology Section and a trial attorney
at the Antitrust Division at the Justice Department. She’s done it all. And she’s also served a tour of duty at the Federal Communications Commission as well.

Next to her is Allen, the cofounder of the -- Allen Grunes, excuse me, the Cofounder of the Konkurrenz Group here in Washington, D.C. He has spent more than a decade at the Justice Department’s Antitrust Division.

Next to him is Jon Baker of this very institution that we are so grateful that’s hosting us today, American University. He’s a Professor of Law here at the American University Washington College of Law. He is a Former Chief Economist at the Federal Communications Commission, the Director of the Bureau of Economics at the FTC when I was there for my first tour of duty in the late ‘90s, and he also served in the Antitrust Division of the Justice Department as a Special Assistant to the Deputy Assistant Attorney General.

Next to him is Mike Baye, Professor of Business at Indiana University’s Kelley School of Business, a former Director of the Bureau of Economics at the FTC.

And next to him is -- and next to me is
Professor Sokol, Daniel Sokol, who is a Law Professor at the University of Florida, and he is also of counsel in the D.C. office of Wilson Sonsini. I am honored to have all of you here today to answer the hard questions, partly because I want to hear your answers to the thoughtful questions about the antitrust analysis of data and partly because your answering today means that I don’t have to.

Dan, would you like to get us started? I thought we would start with five-minute remarks from each of our panelists and then go to questions.

MR. SOKOL: Thank you very much. Thank you to American University. Thank you also to the FTC. Overall, I think this is one of the really critical missions that the agency plays when you have very difficult issues to really spend the time and to think them through. Without thinking them through, we have errors in both directions, both of cases that we should have brought but we didn’t, but also cases where it turns out as we thought them through, you don’t bring, and I think both are critically important. And creating a framework that you can operationalize is important. I think these hearings aid to that effort.

I’m going to bring that kind of thinking, if
I may, to the question of big data. So I want to focus on both those words -- big and data. Both separately are things that the FTC throughout its 100-plus-year history have thought about. For our particular panel, the question is, is there something different when we put those two words together, "big data," that is, both as an empirical matter, are we seeing something different here that we have not seen before in terms of behavior; and number two, if we are seeing certain things that are different, and even if we’re seeing certain things that are the same, is our actual legal framework capable of dealing with these issues.

So I think there are certain differences between big data and what we’ve seen before. Some of it is simply the amount of data, but what does that mean? I think there’s a data ecosystem that we need to understand better. So this includes data suppliers, data managers, service providers, aggregators, platforms themselves because it turns out all data is not created the same, its availability is different. So we also have a sense that big data -- there’s no one company that can collect all of it in a sense not the way we conceptualize oil like there’s a finite amount.
No, the amount of big data that we’re going
to have in five years time or maybe even three years’
time is literally going to dwarf all the data we’ve
ever had in human history up until this moment. So
number one, let’s start with what does data mean?
We’re going to see a lot more nuance because I think
that nuance matters when we get to issues of
competition. The second issue is what can data do
versus not do -- big data, that is.

So a few general points because I think this
has direct application to competition law. Issues,
number one, is competitive advantage. Overall, we’ve
seen that it’s not so easy for companies to utilize
their data effectively. It’s not what you do with the
data -- or rather it’s not how much data you have,
it’s what you do with the data, where there seem to be
diminishing returns on data size, and we’ve seen that
in terms of companies that have lots of data but don’t
use most of it.

And Alex, who’s on the panel, has a
framework that he works through, and we can sit and
play through some of that. I’d say part of this is
well known to people at the FTC because lots of
companies have come to you as merging parties and
said, wow, if we combine something like our IT
infrastructure, we’ll have a lot of value that we’ll be able to capture very quickly. We call these efficiencies. In practice, we don’t see that often, because it actually turns out it’s really difficult to combine different types of data, so that’s sort of the first premise. And then even when you do combine it, again, it doesn’t always work the way you think it does.

So the third part is, do we have better answers that data provides? In some cases, yes, and in some cases, might there be new competition questions? Maybe. So I’d say right now we still don’t have good empirics across fields, law, economics, marketing, management, information systems. It’s still emerging, and until we have a robust amount of empirical work, what we have are a series of cases and storytelling. And that makes it more difficult for us to generalize new approaches because we just don’t have enough information -- paradoxically, we don’t have a lot of information about lots of information. And that suggests some caution.

That’s not to say that you don’t take cases seriously, you don’t investigate, but it just means that you have to really think through as we’re going to see in the next panel with regards to remedy.
So where does that leave us? Number one, are the general theories of law still workable? The answer is yes, we think by analogy in law, does this case look like some other case? And the second thing is simply context. Where have we been thus far? When we see the actual mergers to date and conduct cases to date, there has, as of yet, not been a case that’s been decided blocked, that is, on merger grounds or a conduct case where we actually have said there’s a big data problem that we need to remedy. Thank you.

MS. LEVINE: All right, Mike, can you give us your opening thoughts? And I’d be interested to hear if you have any responses to Professor Sokol’s points about, you know, about the lack of data, about big data.

DR. BAYE: Absolutely. And let me just begin by saying I’m an economist. In fact, just out of curiosity, how many of you in this room are not a lawyer? Would you raise your hand with me? Excellent. So we got a handful of economists in here. So I’m going to be approaching things from an economic point of view.

MS. LEVINE: You’re assuming that they’re economists because they’re not lawyers. We come in two categories.
DR. BAYE: There’s only two types of people in the world, lawyers and nonlawyers. So I want to offer up what I hope are some high-level thoughts that will complement kind of the legal view that Alex talked about and talk about the economics of big data. And there are kind of four high-level issues that I think are very, very important to contemplate, regardless of how you’re viewing big data issues. Okay?

The first point I want to make is that the adjective "big" in front of data often conjures up the notion that somehow big data is bad. That same principle applies in other aspects of economics where people think big firms are bad and so forth. And the first caveat I want to offer up is as we’re contemplating the legal framework with which we evaluate big data issues in antitrust and even consumer protection that we begin by thinking about nonspeculative theories of harm that are cognizable. We typically think about cognizable in the context of cognizable efficiencies, but with respect to big data, it’s important to recognize that it may be difficult to articulate a theory of harm. Just because something is big doesn’t mean there’s harm, and let me just give you two examples. So one
cognizable theory of harm might be that somehow big
data is going to allow some greedy capitalist to
exploit individual consumers by raising prices.
That’s a theory of harm that you can take to data and
determine whether or not prices rise as a result of
that data.

An alternative theory might be somehow big
data deteriorates product attributes or quality that
you might think of, and the natural issue that you
might think about there is the impact of big data and
security: Is big data going to be protected? Okay?
Those are theories of harm, but it’s important for you
to be able to quantify those theories of harm if
you’re actually going to do things that are in the
public interest because just because someone charges a
high price doesn’t mean they’re doing something
illegal as a matter of law.

Being a monopolist is not a bad thing in
terms of the antitrust law. You may not like it, but
it’s not illegal it to charge high prices.

Competition policy is relevant when two entities merge
and that merger gives them the power to raise prices.
Okay? So from the point of view of merger analysis,
it’s important to ask the question whether somehow
that merger is going to impact the ability of firms to
raise prices.

In that context, one might also want to ask the question if a merger takes place, does it reduce the incentives of the merging entity to protect consumer data? Those are questions that are economic questions that can be contemplated and, of course, there’s alternative theories. On the one hand, you might imagine there are economies of scale in protecting data and that if you have many firms trying to predict data, they’re going to skimp relative to what one big firm would do if it were trying to protect that data. That’s one theory.

Another theory is, gee, if you eliminate competition, then two platforms aren’t going to compete in nonprice attributes to protect consumers’ data. So those are two alternative theories. One says, you know, mergers are bad for privacy; the other one says mergers might be good, and those are things that we can in principle test using data.

So the big point is, it’s important to postulate theories that are testable, theories that we can actually take to data, and it’s important that we not confuse competition issues with other issues like unfairness. Gee, it’s unfair that a firm with big data might be able to do a better job of extracting
rents from its consumers. That in and of itself, as I see it, is not harm to competition. So don’t confuse those issues.

The third thing I want to emphasize is it’s important to recognize, particularly in markets with big data, is they’re very, very frequently associated with platforms that serve multiple participants. So, for example, Amazon doesn’t just serve shoppers like me that spend lots of money on Amazon. It also serves merchants that are trying to get their goods and services into the hands of people like me that like to buy electronic gadgets, for example.

So it’s important to recognize that when we’re contemplating the potentially higher prices that a firm with big data might be able to extract from consumers because it knows a lot more about Mike Baye’s willingness to pay for electronic gadgets, for example, it’s also important to contemplate the potential benefits that are associated with that, for example, Mike Baye being to more easily identify an out-of-print book, or Mike Baye being able to find a better match for a particular product that I’m looking for, or a merchant being able better able to match with a consumer looking for its product, okay?

So oftentimes when we do competitive
analysis, we’re just looking at the price in a market, and I think big data makes that more complex, because there are typically more actors that are attached to the big data, and as an economist, if we’re going to do a right job of evaluating whether a particular business practice is procompetitive or not, it’s important to account not only for all the costs, potential costs of that conduct or that merger or whatever, it’s also important to account for the potential benefits of that.

And the last thing I want to say is that especially in the big data arena, it’s incredibly important to beware of rent-seeking, okay, because individuals in big data markets, when we talk about privacy, and maybe I’ll talk about this in a moment, privacy can impact different players different ways, but platforms’ incentives are typically aligned with the incentives of participants on all sides of the market.

A platform’s privacy policies may disadvantage certain participants on that platform, like some merchants, for example. But if consumers benefit and if the overall social welfare goes up as a result of those policies, one needs to take that into account when the whining merchant that’s harmed by
that privacy policy, for example, comes in and cries foul. Thanks.

MS. LEVINE: Thank you. Right so two housekeeping moments. A reminder to all of us, including me, to press your mic when it’s your turn to talk, and a request for our able timekeeper, keep your sign up a little longer because sometimes we’re so busy, we don’t have a moment to visualize what you’re trying to tell us.

Okay. So, Jon, can you please jump in and give us your thoughts on the antitrust analysis of data and perhaps respond to Mike’s points about the need for theories that are testable and the recognition that unfairness and competition harm may not entirely overlap.

DR. BAKER: Thanks, Gail. There we go. Yeah, I’m good, and no sun in my eyes.

Yeah, so thank you, Gail, and thanks to the FTC for inviting me back to the hearings. And for the most part, the antitrust conversation about the potential competitive concerns arising from big data’s concerned with three areas, privacy as a nonprice dimension of competition, which Mike talked about, potential for close-to-perfect price discrimination, which I think he hinted at at one point, and the need
for access to data as a barrier to entry.

And I want to talk about a fourth potential competitive concern, which I think is also cognizable in Mike’s sense, and that concern is exclusionary. It supposes that a dominant firm has access to more or better data about customers or suppliers than do its rivals, and the concern is that the dominant firm will use that advantage to obtain, maintain, or extend its market power by excluding rivals.

And to keep my example and explanation simple, I’m going to focus on customer information, but supplier information could potentially be used in the same way. And I’m also going to emphasize just one particular exclusionary mechanism involving targeted price-cutting, but there are others and that will probably come up in our discussion later.

Selective discounting is a more attractive exclusionary strategy than across-the-board price-cutting because it’s a less costly means of exclusion. And I want to illustrate the exclusionary possibilities of the asymmetric availability of data with two hypothetical examples involving Amazon’s shopping platform, and I’m picking Amazon because the examples involving retail products tend to be easy to grasp and they avoid complications that you might get
into when consumers are not charged directly for
services.

But the stories I’m telling here are purely
hypothetical. I have no idea whether Amazon actually
does any of this, and I’m well aware that Amazon’s
platform has grown large and successful by providing
consumers and merchants and manufacturers with a
marketplace that they all value.

So the first example is concerned with harm
to competition among platforms. So suppose that
Amazon can identify occasional Amazon shoppers who are
-- they shop occasionally on Amazon but they’re the
best online customers of Best Buy, Macy’s, Staples, or
Walmart, other platforms, and that Amazon can target
those shoppers with low prices. And suppose further
that the rival platforms don’t know nearly as much
about household preferences as does Amazon, so they
can’t practically target Amazon’s best customers in
return.

So selective -- so we’re talking about
selective and targeted price cuts to potential
customers by Amazon. Now, that might seem like -- I’m
sorry, yeah, to customers of the platforms that are --
to the rival platforms. Customers -- targeting them
with selective price cuts. And that might seem like a
pure benefit to competition, and in some cases, it no
doubt would be, but it could also harm competition
when it was employed by a dominant platform to
exclude.

If Amazon can take away from its rivals a
substantial group of their frequent customers, it may
be able to raise its rivals’ marginal costs of
attracting additional sales, and the rival platforms
could be led to raise prices to avoid losses or they
may choose to compete less aggressively with Amazon to
induce it to back off.

Either way, Amazon might be able maintain,
obtain, extend, you know, enhance market power in
online shopping, and all online shoppers might end up
paying more, regardless of which shopping platform
they use. Amazon might not even need to implement
targeted price cuts to induce its rivals to back off
competitively or at least not often, because once
Amazon has the ability to selectively target customers
of a rival platform that lacks a comparable ability to
target Amazon’s customers and the rivals recognize
that ability, the threat of selective discounting
might be enough to induce the rivals to avoid
provoking Amazon by under cutting Amazon’s prices. And
even if the threats are enough, selective targeting
might be an inexpensive exclusionary strategy because
the dominant firm doesn’t have to reduce its price to
its existing customers, only the customers likely to
purchase from rivals.

And I can spin out a second hypothetical
example involving ways in which Amazon could harm
competition among firms participating on just one side
of its platform that’s pretty similar to that
involving -- I was going to use an example of the
private-label diaper business where it could target a
rival diaper manufacturer’s customers in sort of a
similar way with selective discounting.

But I see my sign about the time, and we’ll
just jump on to say that if Amazon with its superior
access to data is better able than its rivals to
identify customers that are likely to buy from others
and target them with discounts, you know, it could
make its rivals less aggressive competitors and just
whether those rivals are sellers on one side of its
platform like, say, rival diaper manufacturers, or
whether those rivals are other platforms, which is my
longer example, so you could get prices to rise either
just for diapers or across the platform as a whole.

If I had more time, I’d say something about
the underlying economics, but instead I’ll just simply
say that the exclusionary potential I’ve highlighted
wouldn’t arise unless the dominant firm is less
vulnerable to targeted discounting than its rivals and
an advantage and access to customer or supplier data
could make that possible. Thanks.

MS. LEVINE: And to be clear, we’re going to
have time to develop a lot of these ideas throughout
the course of the panel.

DR. BAKER: Good.

MS. LEVINE: So thank you for the teaser.

It’s a great way to start the conversation.

DR. BAKER: Thank you, Gail.

MS. LEVINE: Sure. Thank you.

Allen, can you give us your thoughts on the
issue generally and then comment a little bit on what
you think the rest of the world is doing and whether
you think there’s a time sensitivity for action here.

MR. GRUNES: Sure. Thank you, Gail. I’m
trying to keep within the five minutes, and I’ll
probably fail miserably. So the first point obviously
is that the competition issues raised by big data
aren’t going away. There are going to be more mergers
where data plays a significant role one way or
another, and there’s going to be more occasions to
consider the collection, use, and possible misuse of
data when looking at dominant firm conduct. I think we also are in a position, I’d argue a little bit different from Danny in that we’re now -- we have a growing body of decisions in closing statements, so it’s possible to look back and see if there are lessons to be learned. You can see DOJ grappling with access to data as a competitive issue in its 2010 closing statement in the Microsoft-Yahoo agreement. You can see the FTC staff asking questions about the competitive significance of large volumes of data Google was collecting from users in the half of its staff memorandum that was inadvertently released. These obviously are not easy issues, they’re factual, technical -- and technical challenges to understanding the industries, both in terms of their business models and their competitive strategies. I think there’s been progress in the past five years. There’s more understanding about the way digital markets work. The German, French, and Japanese competition authorities have produced reports on big data, and the Australian authority is in the process of doing so. Really great work has been done by the OECD on the digital economy and big data, and then I and Maurice Stucke hopefully have helped advance the
discussion a little bit through our book Big Data and Competition Policy. And, so, it’s a long book. I have five minutes. I offer the book as part of the record in this proceeding.

Okay, but on the other hand, so in 2016, the then-Chair of the FTC gave a speech in which he said that the 2007 investigation of the Google-DoubleClick merger was instructive on how to analyze mergers involving competition between -- of firms with sizable collections of personal data. I think that was a step backward. I think I’d hold out that investigation as what can happen if you don’t have strong merger enforcement in data-driven industries. Not only were these two companies in adjacent markets but they were starting to get into each other’s market, so that’s a big issue here.

Another issue with that is you had competitors complaining. So, you know, Danny says we don’t know enough about these markets. Well, in that case, the competitors probably were the ones who knew the most about the markets and could articulate the exclusionary risk the best, but the FTC relegated the views of competitors to a footnote as, you know, it’s sort of the usual agency hostility to views of competitors. Maybe not the right decision.
Just last month, Makan Delrahim -- so I don’t want to just pick on the FTC. Last month, Makan Delrahim gave a speech in Haifa, in which he repeated a number of the myths about big data that Maurice Stucke and I have discussed in our book and that most European competition authorities now reject. Okay, so the moral of the story, first read our book; second, the rest of the world is moving forward, and the FTC and the DOJ should not be left behind.

I’ll spend less than one minute on, you know, what is big data and is it different. The only thing I’ll point out here is there are a number of definitions of big data, but what they tend to have in common are what are typically called the 4 Vs, which are the volume of data; the velocity, which is the speed of data gathering and processing; variety, which is the ability to combine data from multiple sources; and value, which is how can you extract commercially valuable information.

So I’m not going to spend any more time on that, but I do want to get finally to the question of the timing of government action. So assume there’s a problem, when is it right to intervene. So it’s an institutional problem with fast-changing industries being too late to the dance, all right?. You know,
this was potentially identified as a problem in the Microsoft case that DOJ brought. You kind of get there and the bad stuff is already happening and you can’t go back in time.

Germany recently -- one of their ministries recently issued a report suggesting that earlier intervention may be warranted in data-intensive markets, and the suggestion there was if markets are likely to tip to a winner through powerful network effects, for example, it may be important and appropriate for the Government to intervene and challenge anticompetitive restraints and mergers before that point is reached.

If you intervene too late, you can’t restore the lost competition, and if you don’t intervene at all on the grounds that competition is for the market, you may end up with a persistent market power problem.

Last thought on this, the argument for earlier intervention may be supported by what’s been called the now-casting radar, which is something that big data enables. That’s the ability of a company, particularly a platform company, to discover competitive threats at an early stage through data and analytics, and then to take steps to destroy them, for example, merge with them, copy them, whatever, before
they’ve had a chance to take off. That companies are able to move this early also seems to me to justify an earlier governmental response. Thanks.

MS. LEVINE: All right. Thank you, Allen.

These are provocative and challenging views of some proposed frameworks for analyzing these issues.

Renata, do you want to speak to the frame that exists and whether you feel like it’s a good fit for the issues we’re discussing today?

MS. HESSE: Sure, Gail. Thanks. And thanks to Chairman Simons and Bilal and Gail and Katie for organizing us and for inviting me to join you today.

Listening to everyone talk, I thought it was sort of interesting that, you know, part of what people are -- the question people are asking is, do we need new tools, do we need to think about data markets differently. But the debate that’s actually going on here is a pretty classic one between, I’ll say, different etiological camps, and I don’t mean Republicans versus Democrats or conservative versus liberal. It’s just there’s a spectrum of views in antitrust about how interventionist competition enforcement authority should be, and you’re seeing that, I think, play out across this group of people.

So just to note, it’s sort of -- it sounds
kind of like the same debate applied to a different
and new market. So I tend to think -- I usually find
myself in the middle of those two poles, and I tend to
think that we shouldn’t just sit back and not do
anything and not think about whether or not these are
markets and analyze them, and I think part of what the
FTC is doing here is making sure there’s a forum for
us to be able to do that and for us to have the
cornerstone, which I think is an important one to
have.

I think it’s important for competition
authorities to reflect on how they’ve been doing
things and whether or not how they’ve been doing
things continues to work. And I think these hearings
are a part of a process that’s an important one for
the agencies to go through.

So you’ve been hearing a lot from this group
about what’s been going on, and the truth is that
there’s not that much that has been going on, I don’t
think, that relates directly to data as an antitrust
market. Allen is absolutely correct, I think, to say
the antitrust agencies around the world, in the U.S.
and elsewhere, have been, quote-unquote, grappling
with this. What do we do with these giant sets of
data? What role should they have in our analysis of
competition issues?

And I think the places where you’ve seen them directly come into play have not been as an antitrust market that’s been defined but instead have been looking at barriers to entry, thinking about exclusionary conduct, and potentially considering data-related issues as a component of horizontal competition, for example, I think it was actually in the Google-DoubleClick, might have been AdMob, where Commissioner Harbour said, well, wait a minute, we should think about privacy policies and was there competition going on between these two agencies around what the privacy policies look like.

You know, I think Jon is right, you can think about exclusionary conduct in this context and that data does potentially play a role in exclusionary conduct, but I will tell you, having worked on many of the exclusionary conduct cases, at least at DOJ over the years, those are very, very hard cases, and it doesn’t mean we shouldn’t try, but they are difficult cases analytically and they’re difficult to prove.

And the fundamental reason for that is that the U.S. construct is around what Mike said at the beginning. It’s not bad for you to have monopoly
power and to exploit that monopoly power as long as
you didn’t get it unlawfully and as long as you aren’t
doing something with it that’s bad. And that’s how,
you know, traditionally we thought about exclusionary
conduct.

So there are lots of questions floating
around. I’m a believer in using the competition
toolbox where it fits but not trying to stretch it to
places where it doesn’t fit. And I’m not sure we know
exactly where data fits into that paradigm. Does it
fit into the normal paradigm, or are we trying to
stretch it out, stretch the paradigm out in a way that
maybe doesn’t work?

I also believe -- and this is going to be a
little bit at odds with what Allen said, that
notwithstanding the fact that markets -- dynamic
markets do change very fast and, therefore, there is
some possibility of things happening before the
agencies can get a handle on them, that it’s also
important to have -- to approach markets like this
carefully so that we don’t disrupt the innovation
paradigm. And I think with that, I will stop.

MS. LEVINE: Renata, thanks so much.

All right, Alex, I know that we’ve been
talking a lot about competition law, naturally. I
think that you’ve said you wanted to address not just
competition law but also matters of consumer
protection law, so can you give us your thoughts
there?

MR. OKULIAR: Great. Thanks a lot, Gail.
And good morning, everyone. Thank you to American
University and to the FTC for holding these important
hearings. Thanks to Bilal and to Dan and Derek, Gail,
to the FTC staff for the tremendous job you’re doing
in organizing these and for inviting me to
participate. I really appreciate it.

So I’m going to take a step back, as Gail
mentioned, and I’m going to talk a little bit about
some guiding principles and also about some analytical
frameworks to consider when discussing issues related
to data analytics. As I think Mike mentioned, you
know, big data offers enormous commercial promise for
the economy. A lot of people, including McKinsey,
have estimated that the uplift to the economy will be
in the trillions of dollars.

And we can already see some of this
occurring with a lot of the apps that people have
today, personal digital assistants and the like, as
well as in the commercial context. Analytics have
been tremendous in wringing additional efficiencies
out of, for example, the retail supply chain. But big data also presents some highly publicized potential risks, including to personal privacy, and in some circumstances potentially to competition. So in the face of this breakthrough technology and the dynamic changes that are going across industries and across markets, from my perspective, it’s imperative that antitrust enforcers maintain enforcement policies that continue to foster competitive dynamism and innovation in these businesses while still protecting consumers.

This is best achieved by creating at a high level and maintaining a stable enforcement environment that offers predictability, transparency, and fairness to all stakeholders. Those are the hallmarks of good government, and by applying traditional antitrust analytical tools and principles, including the consumer welfare standard to reduce the likelihood of overenforcement, particularly in situations of speculative or difficult-to-assemble harms.

So now, more specifically, I’d like to go through and outline very briefly two enforcement proposals for analyzing big data issues in keeping with the aforementioned goals, and these are models or frameworks that I’ve had the good fortune to work on
with multiple distinguished colleagues.

So first, when an enforcer is confronted by a harm that touches on personal data, one of the initial questions has always been, which body of law is best suited to address that particular harm? And this is a particular issue within the FTC, given the agency’s broad mandate. Given the enormous volume of sensitive personal information being absorbed and used for data analytics in some industries in particular, many enforcers, academics, and consumer advocates have suggested blending consumer protection, privacy, and antitrust, as we’ve discussed a little bit earlier this morning.

So while concerns about use of personal data are understandable and important, former Commissioner Ohlhausen and I suggested in a 2015 article that it would actually be most effective for antitrust and privacy, in particular, to remain in separate spheres, except to the extent that privacy protection is an existing dimension of competition.

We offer a three-step analysis for agencies to consider in choosing between antitrust and privacy or consumer protection laws as a matter of institutional preference. So first, you ask what is the character of the harm? Is it commercial,
personal, otherwise? Harm to consumer welfare or
maybe economic efficiency is better addressed through
antitrust, whereas personal individual harms are
likely better addressed through consumer protection or
privacy laws.

Second, you would ask does the harm arise
from the terms of the particular bargain struck
between an individual consumer and the company? Does
it go to the integrity of that bargain? If so, then
it’s likely that a consumer protection or privacy law
is better equipped to address the problem.

And then, finally, we would ask, does the
remedy that’s available under the law effectively
address the potential harm? And this goes a little
bit to what we were talking about with Google-
DoubleClick, but if an agency were to block, for
example, a merger out of concerns that a merged data
set would create privacy problems, it would likely not
stop the ability of the parties -- the very same
parties -- from sharing that very same data by
contract. However, this sharing arrangement, if it
violates the privacy policies of the parties or the
terms of use, could be Section 5 violation.

So turning from this first framework, which
is sort of a high-level framework to decide between
which body of law, if you assume that the enforcer chooses antitrust, there’s a second framework that I worked on with -- in an article last year with Greg Sivinski and Lars Kjolbye. We outlined a four-pronged analytical screen within antitrust for determining the competitive significance of data that tracks the logic of these prior matters that antitrust enforcers have already brought by treating data as an asset for analytical purposes.

And within this rubric, we ask, first, do the parties own or control the relevant data? It’s unlikely that you would have a competitive problem where the relevant party is only a processor, for example, of the data. Second, is the relevant data already commercially available as a product or as an input for downstream products? The agencies have a lot of experience dealing with these types of situations. Third, is the relevant data proprietary and captive to the owners’ or controllers’ own products and services?

These are more complex questions, but it’s difficult to see where a captive data set that is not currently available to third parties in the stream of commerce is likely to present a competition issue. It’s difficult to see that scenario.
And then, finally, is the relevant data unique or do reasonably available substitutes for the data exist? And this has been the key question in a number of cases brought by the agencies, including Thomson Reuters and others.

So using these screens would help maintain doctrinal stability and continuity in antitrust as well as other laws and provide good guidance for market participants and promote continued predictability, transparency, and fairness in applying the law, which I think is critically important where you have these type of dynamic changes across multiple industries.

Thanks so much for your attention. I look forward to the discussion.

MS. LEVINE: Terrific. Thanks, Alex. And I’m not letting you off the hook so quickly. I wanted to ask a question to you about sort of the -- maybe about the premise of our conversation today about the antitrust analysis of data, particularly big data.

Just a housekeeping matter, this is the Q&A portion of our panel, so I’ll be pitching questions to our panelists. This is your time to write in those questions on those note cards and pass them forward so we can -- we would be happy to entertain those, too.
So, Alex, let me just quickly ask you what you think of the notion of generalizing about big data. Some of the panelists today have already alluded to the notion that not all data is equally valuable. Should we be asking about the antitrust analysis of big data or data generally, or should we instead be asking about the competitive harms that come from the use of data?

MR. OKULIAR: So I would tend to hew to the latter question looking at harms. I think that for purposes of panel discussions and the like, it is easy parlance to refer to big data very generally. However, it really isn’t accurate to say that all data is created equal or that there’s something unique in particular about the sheer size of a data set that makes for a unique competitive problem.

First, there are numerous different kinds of data, and not all data are fungible. You have behavioral, you have transactional data, you have ambient or environmental data. They’re all fundamentally different forms of data. And the value that is associated with data depends very heavily on its intended use, right? So not only is the data characteristically different or can be characteristically different across different types of
data, it also depends upon how someone is going to effectively monetize or use that data where you might have a competitive issue.

Some data actually has no commercial value under virtually any circumstances. Some data has commercial value only for a limited period of time. I think Allen was talking earlier about volume, velocity, variety, and value. You know, data is only good for -- it can get still stale, some of it very quickly, and after that point, it has no commercial value. So associating that data with other data does not necessarily mean that you’ve changed the competitive dynamic in any given industry or market.

One of the things to really look for is, you know, most data is an input into machine learning or into AI, and that tends to be how it’s monetized through those analytics. But the type of data that’s desirable for purposes of most analytics is data that provides a multiplicity of signals and that offers multidimensionality for purposes of dynamic experimentation in machine learning, meaning that the machine learning is going through and looking at different patterns and different scenarios within the data to arrive at some type of -- go through an analytical process and arrive at some type of a work
And, so, having different forms of data is critically important. The other point to make here is that the agencies have looked at data deal -- you know, deals involving data, deals involving data markets, many, many, many times. And what has been most critical in each one of those deals, for example, Thompson Reuters or Dun & Bradstreet-QED, which involved a merger of two companies that provided educational data, is whether or not the data sets actually have reasonable substitutes. Are they somehow very unique?

And given the fact that -- and what we mean by “unique” is not just are the data themselves unique but is the data actually something that could be collected reasonably by another competitor? Is it, as they say, nonrivalrous? Is it nonexclusive? And very often data is.

So those are all considerations that have formed part of the analysis that the agencies have gone through, both in looking at mergers and then in conduct matters. And in those circumstances, they’ve been able to arrive at what I think are reasoned and thorough examinations of the markets and conclusions that at least for purposes of some deals remedy the
potential harm. And they didn’t have to -- or didn’t have to modify or think about their analysis differently by virtue of associating the word "big" with data. It’s really just data.

MS. LEVINE: Thanks so much.

I want to build on one of your observations in asking a question of you, Mike. Allen mentioned that, you know, the question is whether data sets have reasonable substitutes or whether they can be easily collected by a rival. So there’s been some commentary around the concept that there’s evidence that consumer -- a suggestion about evidence that there -- that consumers may not -- may be pretty readily willing to trade loose data policies for lower prices, for better services, suggesting that a rival could do just what Alex suggested, which is collect the information afresh.

So two questions for you. Is that true in many contexts, any contexts, all contexts? And then does that make a difference to the question about whether a -- whether and how a rival should -- whether preventing a rival from collecting data amounts to exclusionary conduct in any case?

MR. DR. BAYE: Great questions. Yeah, clearly, if consumers don’t value privacy or they’re
not willing to pay higher prices to preserve their --
their purchase behavior, for example, it’s going to be
hard. It’s going to be hard for a market to sustain
that wish of consumers, because, ultimately, if you
believe in markets, you know, markets are ultimately
going to attempt to provide those goods and services
that consumers want. And I think that’s one of the --
one of the tensions that we face as we contemplate
privacy is that, you know, we’re all very different.

I remember when I was at the FTC, Debbie
Majoris was Chairman, and I remember her telling me
that, you know, she’d give up her DNA to be able to
get at the front of the security line, right? That’s
her choice. But I bet there are people in the
audience that would not be willing to give up anything
to jump to the front of the security line, right?

So when you have heterogeneity among people,
it’s very, very difficult to design a privacy policy
that’s going to meet the needs of everybody and,
therefore, it’s going to be difficult -- difficult for
a market to generate the privacy policies that do
that. So the question, then, in my mind, becomes
exactly the exclusionary question, which, I mean, I
agree with, I agree with Jon’s theory. He proposed a
theory where there could be exclusionary practices
that raise prices.

And I also agree with Renata that it’s not unique to data issues and that it’s very difficult to disentangle kind of the targeted price cuts that Jon was referring to, to legitimate, trying to steal customers from a rival to increase your market share through legitimate business means. So they’re difficult to entangle those things.

But in terms of the foreclosure story, I think the foreclosure story in markets that involve big data and in particular big data on platforms is far more complex than the standard types of foreclosure stories that we -- that we all know can lead to a firm excluding rivals and, therefore, harming consumers.

And the difference is, it’s not like this great gold bullion that we’re going to call big data is something that the firm, you know, built a mine to get. It’s not a physical asset. It’s an asset that the firm somehow collected from individuals. The only way you create big data is somehow attract consumers or induce consumers to turn that stuff over. I’m assuming here we’re not engaging in, you know, fraud or deception, something like that. So, just bear with me for a moment.
So in an environment like that, if a competitive platform is at a disadvantage with respect to the data that it has, one hypothesis is it’s at a disadvantage because it’s not creating the value that consumers need to turn that data over in the first place. Right? So it’s easy to cry foul, but it’s not at all transparent that that foul is due to anticompetitive behavior. In fact, it could just simply be that the platform’s offering lots of value.

I don’t know how many of you folks in the audience use Google Maps, for example, but I’m very, very careful with what I turn over to platforms like Google, but I tell you, when I need to get somewhere quickly, I adjust my privacy settings so I get optimal information from Google about where I might stop along the way for gas and stuff. And that’s a conscious tradeoff this rational economist makes, right?

MS. LEVINE: Fair enough.

Renata, let me ask you your thoughts on whether we should be using -- we at the agencies, we at the courts -- should be using data as -- defining a relative antitrust market as data. Is that appropriate in a merger context, in a nonmerger context? Can you think of examples where a data market has been used either by the agencies or by the
MS. HESSE: So, before I get to that, I just -- commenting on this discussion, I do think there’s an element of the bigness of the data sets that, you know, that is relevant to how people feel about their impact on competition. So I tend to agree that, you know, data is different, but I also think that part of what people are worried about and, again, the question is whether antitrust is the right tool to address that concern, is that these data sets are so big that they make the machine learning dramatically easier or they make the artificial intelligence that much better or price discrimination that much better. So the bigness of the data sets isn’t just a fun word to use. It is actually relevant to what the concern is that people -- that -- that’s arising.

So I think you can’t answer this question in the abstract, I think, is the right answer. Right? Data might be a product market that one could define, but it might not be. And I think it depends on what the transaction is what the parties are, and what their products and services are. I don’t think, up to this point, people have focused on data itself as a relevant product market but rather have been thinking about it as an element of competition and an element...
of potentially the impacts, the competitive analysis.

So thinking about Microsoft-LinkedIn, you look at the EC’s 6(1)(c) decision and you can see they’re thinking about the data that LinkedIn has and whether or not that’s going to be a problem when Microsoft acquires it, but it’s not that that’s the product market that they’re focused on. And I think up to this point, that’s largely what we’ve seen.

So you would have to have a transaction where the asset that is being acquired or the product that is being acquired is actually the data, and I think we just haven’t quite seen that yet.

MS. LEVINE: I’ll ask an unfair question predicting the future. Do you reckon we’ll see a case like that in the future? Or can you hypothesize a theoretical case where that might be appropriate? And, Renata, I don’t mean to put you on the spot. If your colleagues want to jump in with an answer here, they should feel free.

MS. HESSE: It looks like Allen --

MR. GRUNES: Well, I think the FTC has defined data as a product market. So, Alex, maybe you can tell us more about the case or cases?

MR. OKULIAR: Sure, and maybe I’ll just qualify it. So I don’t know that there’s been any
definition of sort of a big data market. I'm not aware of that. But there have been cases where data’s being monetized as a product and the agencies have defined that as a market. One of the examples that I gave was Dun & Bradstreet and QED, which is a merger, it was about five years ago or so. You know, and in that matter, the parties were selling K-through-12 educational data, and so that was, I think, the market that they looked at. So there are some examples of that.

Thompson Reuters, it was sort of -- it was financial data, financial products that were being sold to analysts. And in that circumstance, the DOJ was particularly concerned because there -- it was because, in part, because of the size of the data sets that were required, how unique the data sets were, the companies had to gather historical data. They had to gather data across the world in all different jurisdictions. They had to interpret that data through different accounting standards to make it meaningful for financial analysts. And so all those factors went into the decision matrix, and, ultimately, they decided that these two companies were the only ones that provided those particular data products and, as a consequence, the deal would be a
problem.

MS. HESSE: Yeah. So I tend to think of those, and perhaps incorrectly, those cases as being about services that use a lot of data to provide information to consumers. So I don’t think about the -- but maybe that’s not the right -- maybe that’s not the right way to think about it.

Obviously, the data is important. And in a lot of financial services markets, you see that, that people are -- but when I think about Bloomberg, for example, I’m not thinking about the data that Bloomberg is collecting; I’m thinking about the service that Bloomberg is providing, the clearing trades and things like that. So --

MR. OKULIAR: It’s almost like a distinction between maybe like the raw data, right?

MS. HESSE: Right.

MR. OKULIAR: Versus data that has actually been turned into a product, right, so it’s been transformed in some way, I think maybe is one way to think about it.

MR. SOKOL: Jumping in for just -- a very quick intervention. So the other thing there is it was historic data on financials that went back literally roughly 100 years. That’s not what these
hearings are about. We’re talking about, if I understand correctly, like information that’s collected daily if not by the minute. And, so, the thing that made that a unique data set is not typically what we’re thinking about when we see any number of companies collecting our data based on our location as -- closest to whichever cell phone tower we’re at or what app we’re opening, et cetera.

MS. LEVINE: A question from the floor that is in this vein I want to interject with. Can greater data collection be considered tantamount to an extraction of higher prices? Does anyone want to jump in on that?

MR. GRUNES: So this -- it’s a really interesting question. You can think about data as currency, and I could give you an example of where that’s not metaphorical. That’s real. Your terms of service with some online platforms say in exchange for this service, you have an -- you will do something for us. It’s a financial exchange. You could think about data as currency. You could think about giving too much data as being equivalent to a price increase.

I don’t -- it might be hard to model it, especially in a free setting. But there’s no reason you couldn’t. The thing is, I think, in the U.S., we
don’t have this idea of exploitative monopoly or
dependent abuse of dominance. And if do you, as
Europe does and a lot of the rest of the world, I
think it’s a little easier to get at these issues than
under the U.S. framework which is exclusion,
collusion, predation.

MS. HESSE: But, I mean, I could think of --
I mean, for example, if you’re looking at competition
across -- you get two firms and they have different
policies about how they collect data and what they do
with it. You could envision thinking about a price
increase being possible if one of the firms has a
dramatically different policy about how they use or
extract data from -- right? I think you could fit it
into that.

I think you’re saying that, but it seems
like -- but, again, you’re sort of fitting it into the
framework that we already -- the existing framework
that we have and thinking about -- you know, I think
people think about qualitative features as competitive
effects, so increases in quality, decreases in
quality, innovation, all of those things. So the way
you extract data seems to me like it could just fit
neatly into that paradigm, I think.

DR. BAYE: Yeah, I mean, I concur. That was
kind of what I was trying to imply at the beginning, right? If you start out with a firm that already has big data and is using that to charge high prices, higher prices to extract additional rents, unless there’s foreclosure or something else going on, that’s not enough under competition law. But if two firms merge and you combine the two data sets and because of that you can enhance the prices that you’re charging, I mean, that’s anticompetitive.

The merger is leading to the combination of assets that allows the entity to raise prices. But if there’s some offsetting benefits to that raising of the prices, then you got to take that into account. That’s the two-sided market story that I was telling earlier, but that’s why you don’t focus on just one side of the market. You got to look at the entire benefit.

DR. BAKER: But I thought Renata’s point was that the merger could lead to worse privacy policies or something like that so that -- and that’s in effect an increase in the quality adjusted price. And, so, it’s not the price, per se, that you necessarily have to focus on. You can think of what -- competitive effects in terms of quality adjusted prices, for example.
MR. OKULIAR: I just want to note that one -- I mean, one practical difficulty that I think someone had mentioned is just how do you actually assess the change in price, assuming that the extraction of data can be analogized to a price or an increase in price, you know, how as a practical matter do you actually, you know, put that into an antitrust analysis and make sense of it?

MS. LEVINE: Let me ask a question about that antitrust analysis and ask you, Allen, about the -- about data as a barrier to entry, right? We’ve been talking about data using metaphors like currency. Viewing data as an input, does it matter -- can a firm’s data set constitute a barrier to entry for purposes of our antitrust analysis? And if it does, does it matter how you got it?

We talked about getting it through a merger. Does it matter if the firm spent a lot of money and resources building and developing the data? Does it matter if the data was developed internally versus, as we said, in a merger or an acquisition? Does it matter if the data is nonrivalrous, and as one of the questions from the floor has asked, you know, can be generated -- a question from the floor posited -- pretty easily by a new company?
Do those points matter when we’re thinking about data as a barrier to entry?

MR. GRUNES: So if I had -- if I had slides, if I had done my slides on time, I would show a slide that shows a castle with moats, and I kind of think of the moat -- the moat as potentially barriers to entry. I’m not an economist. Economists think differently. But in the slide, you know, there are a number of things like, okay, two-sided markets, getting at all these other sorts of things that could become barriers of entry.

But data is also one of them, even if -- even if data -- even if data tapers off at some point, data’s listed as one possible barrier to entry. But I think, you know, in answering your question, really, you got to -- I would -- I’d first say, you know, this also is case by case. You can’t -- I don’t think you can make any rules that one size fits all.

If data is a critical input, you’ve got examples of the FTC’s Nielsen-Arbitron case where the FTC has an entire section describing the barriers to entry there and why they’re high. Same thing if you go back a number of years to the European case of TomTom-Tele Atlas, which had to do with digital mapping. There’s a discussion of why those are high
barriers to entry.

But those are the cases where the data is -- you know, we’d call it a critical input, right? So the -- another -- and you know, more challenging question is, okay, what about things where you don’t think the barriers to entry are high? You know, where somebody else can get access to the same data and maybe they are. You know, geo location, for example, doesn’t just come from one source. Or, you know, where a user can simply click on or select a different app. Are those situations where barriers are high?

And the answer is, well, you know, they look like they’re low, but they could -- but it could -- they could be high. One easy example is search. Okay? So when Google started to do search, it didn’t have a lot of data. I mean, it was essentially developed in somebody’s garage. Okay? After a while, another competitor -- you know, if you wanted to develop a search tool, good luck competing with Google. Microsoft’s Bing, you know, as far as I know, is still losing money. Okay? And it’s the second largest search provider. So there’s something in the ability to scale up that makes barriers to entry higher. Okay? That’s point one.

Point two is when data’s involved, there may
be additional reasons to think barriers to entry are higher. Data-related barriers to entry could extend to things like algorithmic learning by doing, you know, the more data you have, the better your product is going to be. Now, that’s a product attribute, so I’m not saying it’s a bad thing, but it could turn into a barrier for somebody else to enter.

MS. LEVINE: Please.

MS. HESSE: Yeah, so I get a little bit uncomfortable in this area, in part because I feel like if you’re picking on Google, for example, you know, the reason why people use Google search generally is because they like it better. If -- now, one could argue potentially that -- and Google is not a client.

MR. GRUNES: Former client.

MS. HESSE: It’s a former client, but it’s not a current client, and I’m not saying this because of that. You know, the fact that they have all this data makes it easier for them to be better. But this goes to -- you know, right to the question that, I think Gail was asking in part, which is, does it matter whether the firm spent substantial resources developing and building. Right?

So this is when I start to worry about, you
know, are we going to punish someone because they did a great job? They got a lot of data, so they have a great product that people like. And if people didn’t like it, it is really easy to switch. Right? It’s not hard. So there -- so, I mean, I kind of take your point that the barriers to entry look low, but, for whatever reason, you’re not seeing people switch.

And the question is, does that have something to do with what -- again, we’re picking on Google here, but you could apply this in any other market. You know, is that because Google’s doing something that they shouldn’t be doing, or is it because, for whatever reason, the other product just isn’t as good?

MR. GRUNES: So let me just respond briefly, you know, and I don’t mean to pick on Google, but, you know, there is a record of looking at Google on these issues. And so if you look back at the Google-DoubleClick merger, one way to characterize it is Google had a lot of data about where users went when they searched on Google itself. And DoubleClick had a lot of data about where people went when they went elsewhere on the web.

You combine those two things, and it’s potentially game over, so -- for competition, okay?
So maybe this does come back to the question of did you do it yourself or did you develop it through mergers. Maybe it comes back to the question of, if you’re going to look at mergers, should you be focused on mergers in a product market, or is there something about data where you’ve got to look at adjacent markets or nearby markets kind of the way Europeans, I think, have done it a bit. Correct me if I’m wrong, Renata.

MS. HESSE: No, no, no. I think that’s a different panel discussion, which is, you know, are the agencies doing a great job looking at potential competition and are they getting at that well enough. And Google-DoubleClick is an example of a merger that people like to talk about along with Facebook-WhatsApp. You know, did the agencies miss something there?

And, again, I think that’s -- these are all conversations that it’s good to have, and I think it’s good to think about. But that doesn’t strike me as fitting neatly into the exclusionary conduct kind of paradigm but more by acquisition.

MR. GRUNES: So I guess my last response will be to say our old agency in Bazaarvoice, you know, took a merger between people where you’d think
the entry barriers were low, but the market
participants thought they were high and successfully
challenged it.

MS. HESSE: Bad documents.

MR. GRUNES: Well, bad documents or no
documents, it’s sort of the same theory. Right?

MS. HESSE: Okay.

MS. LEVINE: Danny, did you want to --

MR. SOKOL: Just two things. I want to just
bring it up to a more theoretical level. So we say
that data is the new currency. So let me actually
walk you through a thought experiment. Let’s call
this currency cash. Right? So if we had one company
acquiring another company that had a lot of cash,
would we block the merger merely because there was
more cash? Actually, I think what the agencies do
correctly is say, what are the competitive effects?
Cash itself is not what matters. It’s what you can do
with it.

And then actually to Allen’s point of do we
have, you know, a series of cases? We do have an
emerging series of cases, and, in fact, if we don’t
look at what competition authorities around the world
have done in terms of their discussion documents but
in terms of the actual cases, let’s just, again -- big
picture -- look at these. Have we seen any deal
blocked because of a data barrier to entry? The
answer is no.

And, in this, there’s no difference between
the EU and the U.S. if we look at the big, you know,
cases involving all your platforms, Apple, Microsoft,
Amazon, Facebook, Google, et cetera, these deals have
gone through. Right? So, then, there -- takes us
back to the next question. So is the framework wrong?
Because here it would have to be wrong both for us and
the Europeans on this issue. It could be that the
framework is working and we haven’t actually seen in
reality these kinds of data barrier to entries in
practice, acknowledging on a theoretical basis that
they may in some cases exist.

DR. BAKER: Danny, why isn’t Bazaarvoice an
example of a merger block where data is an entry
barrier?

MR. SOKOL: So I’m actually with Renata that
these were bad docs more than anything else.

DR. BAKER: But doesn’t the theory still --

MR. SOKOL: But this was --

DR. BAKER: -- include that it was difficult
for other firms to enter?

MR. SOKOL: So this was, I’d say, not a big
data type merger the way we’re thinking about big
data. The way that -- not you and I, but overall,
when the Wall Street Journal or Forbes or what have
you covers something called big data, Bazaarvoice is
two small companies in a nonreportable transaction. I
don’t think that that’s what they’re thinking about.

DR. BAYE: They’re getting people to give up
their ratings and reviews. That’s personal views
about products and that’s what was hard for someone
else to replicate. It’s not literally, you know,
personal demographics or something, but doesn’t it
have the same flavor?

MR. SOKOL: I think it’s a little bit
different, but I think the case also would have looked
different but for the fact that literally I can’t
imagine a single case in U.S. antitrust history that
had worse smoking gun documents.

MR. OKULIAR: Can I just -- I just want to
add very quickly. So I would be very concerned about
overenforcement in this space and chilling innovation.
I think that data gathering and data analytics are
certainly forms of innovation, and I would really be
framing this more as an analysis or a discussion of
innovation competition in thinking about, for example,
in the merger context whether you -- in the merger of
two parties whether there would still be sufficient
number of parties innovating in the space to maintain
competition. That’s how I would be framing this and
thinking about it.

MR. LEVINE: Okay. Oh, please, please, absolutely.

DR. BAYE: Can I please say one more thing?
Just not to take -- this is a very
interesting conversation. But I just want to remind
you as an economist that there’s some old literature
that grew out of the AT&T case when AT&T was
ultimately divested into the 13 Baby Bells. And that
literature is on -- there’s a great little book called
Theory of Natural Monopoly by Sharkey, and that
literature really builds out the whole notion for the
structural environments in which you’re going to end
up with one big player.

And in that world, it was the old landline
world that has now been supplanted by wireless towers
and so forth. But to the extent that you view data as
a barrier to entry, the -- one of the potential
reasons -- and I’ll just throw this out for it being a
barrier to entry is that there are economies of scale
and economies of scope in collecting data.

Economies of scale talks about the depth of
data, the more data that you get, the easier it is to
utilize that data, the more you can do with it. The
economy as a scope is about the breadth of the data.
Don’t only have detailed data about Mike Baye; you
have data from Jon and everyone else in this room.
That’s breadth. And as you collect that, you do
better.

I remember being in an economic conference
five years ago maybe, ten years ago, somewhere in that
ballpark, when Hal Varian and Susan Athey -- at the
time, Susan was chief economist for Microsoft and Hal
still is chief economist for Google -- were arguing
about economies of scale in search. And Hal was
arguing that, eh, you don’t need large numbers. You
know, and the law of large numbers come in, and he
talks about "t" statistics and stuff and tries to make
the argument that you don’t need a lot of searches to
get good results.

Susan comes back and says, well, it’s really
all about the long tail. You know? It’s true that
there’s a lot of searches that a lot of people do and
you don’t need a lot of information on that, but when
Mike Baye wants to find that bizarre book that only
Mike Baye wants called David’s Order Statistics, you
know, there’s just not a lot of searches for that.
And, so, if you got one player that kind of is a monopoly for those searches, it can do more than someone else, and that gives Microsoft Bing a disadvantage.

So I’m not coming up with Microsoft’s good, Microsoft’s bad or whatever, but that argument, it seems to me, is just the reality that, you know what, we’ll get better search results if we got some bloody monopolist to have all our information. Now, there may be consequences from that that we don’t like from a public policy standpoint, right?

But, you know, forcing Google -- and again I’m just throwing this out not because they’re paying me because they’re not, it’s just an example that we all get -- forcing, you know, Google to turn over its data to Microsoft so that each of them have half the data doesn’t necessarily make us better off as consumers. Yeah, you get more competition, but neither party can then operate on the long tail. Right?

So it’s a complex issue. If it’s structural, if that’s the reason that we have big data concentrated in the hands of only a handful of players, there may be a structural reason for that. And there may require other remedies to remedy social
problems that we perceive.

MS. LEVINE: So, Jon, let me ask you a question --

DR. BAKER: May I just --

MS. LEVINE: Go for it.

DR. BAKER: -- just something to what Michael said before we do it.

MS. LEVINE: Please.

DR. BAKER: Which is I’m not quite clear on why you -- what you see as the relevance of Bill Sharkey’s book about natural monopoly because if we’re talking about -- well, you can think of, you know, network effects, scale economies in demand and we have scale economies and supply, which is more in scope economies, which is more what he was worrying about, but you can have -- there are some settings where the scale economies are so powerful we had natural monopoly and then we regulate them.

And there are other settings where multiple firms can achieve sufficient scale economies to compete, and maybe it’s only a handful, and then we have kind of an oligopoly market, you know, relative to the size of the market. That is to say multiple firms can achieve the scale economies given the scope of industry demand.
And then we have an oligopoly market, and maybe there are only two. And then we have other settings where lots of firms can get sufficient scale economies and then we don’t worry so much. And I wasn’t sure that you were trying to argue that Google was a natural monopoly or simply just observing that you might have a market where only two firms could achieve sufficient scale economies to compete and that maybe Google still gets more than Bing but there’s diminishing returns and Bing has enough, and you get competition.

So how you come out on -- there’s like an empirical question about what actually the scale economies are and what the implications are for market structure and competition that you have to resolve before you can figure out what the antitrust response is.

DR. BAYE: I don’t disagree with anything you said. I’ve not conducted such an empirical analysis. What I was pointing out, though, is that Susan Athey was suggesting that Microsoft’s Bing wasn’t big enough to get the kind of economies of scale that they needed.

So, I mean, again, I’m not trying to put words in either of their mouths. I’m just trying to
point out, hypothetically, if it’s a structural issue, then it’s a structural issue. Let’s deal with that and figure out how best to deal with structural issues than try to, you know, prevent firms from becoming big because big data is a bad problem. You lose the benefits associated with that. That’s the dialogue between Susan and Hal was about that.

MS. LEVINE: So, Jon, let me ask you to help us switch gears slightly. You’ve got a question from the floor, Jon, about the selective discounting theory you put forward. So I want to talk about data as a competitive advantage.

So the question from the floor is, you know, understanding your hypothetical about selective discounting as something you could do if you have a critical and well-managed big data set, the question is, why would such selective discounting be bad for consumers? Or are you implying a look to other doctrines like predatory pricing or something like that to find a harm?

DR. BAKER: Oh, it could be bad for consumers if what it does -- if the consequence -- well, first of all, selective discounting can often be good for consumers. And I’m not arguing otherwise that -- because that could be a way in which
competition happens. But it could be bad for consumers if it operates to exclude rivals. And how could it operate to exclude rivals? Well, it could operate to exclude rivals by either raising their marginal cost of getting new customers or discouraging them from being aggressive competitors.

I mean, we have -- I mean, I’m thinking of there an analogy to the chain store paradox, let’s say, and, you know, in predatory pricing literature, but a firm can threaten a rival with -- or even just entry deterrence models generally. A firm can threaten a rival with aggressive competition and induce it to back off. And that’s what it could do with selective discounting.

So it’s -- there’s nothing unusual about the theory. It’s well within the four corners of what we think about with exclusionary conduct generally.

MS. HESSE: But does it have to fit into the predation? I mean, what’s the framework you use to analyze that? Because what you just described sounded like the American Airlines case which was a predation case that DOJ lost. I’m just curious. I’m not challenging the theory. I’m just wondering, how do you judge whether the selective discounting is anticompetitive or procompetitive?
DR. BAKER: Oh, well, you have to -- I mean, the issue is -- has to do with the rival reactions. If the -- you know, in some markets, everybody competes more aggressively and everybody selectively discounts to each other’s customers and you get very competitive outcomes. And other markets, you could get something like what I was describing as possible, which is the rivals back off.

And that’s -- I mean, what -- if you’re asking as an economic matter, we don’t necessarily have to call it predatory pricing or exclusionary conduct or anything. If you’re asking as a legal matter, then you get into what -- whether it’s -- what piece of the doctrine applies, and that’s kind of a different question that I wasn’t focusing on in what I was saying.

MS. LEVINE: Any thoughts or responses to that?

Okay. Let me change now slightly to a new subject, mergers. And, Danny, I’d like to ask you a couple of questions about this. We use the word "data" in the 2010 Horizontal Merger Guidelines but not in the way we’re using it today. Are the Horizontal Merger Guidelines from some eight years ago flexible enough to do the job now to handle database
theories of competitive harm?

MR. SOKOL: In short, the answer is yes.

But actually, let me just go back to what we’ve been talking about here to give you proof of that, which is, in every single case that we’ve been talking about, we’ve been analogizing back to other cases involving data, to other cases involving exclusionary conduct or predatory conduct, and we have specific cases in mind, and we say, does this look like this other case enough that it gives us a theory of harm that is potentially winnable in court? I think very effectively, by the way, I say humbly on the same panel as one of the authors of the leading antitrust law case book.

What I would say is, is there -- the basic question you have to ask is the following one: Is there something, some theory that we’re not seeing by the agencies and/or by the parties that’s not happening in the Merger Guidelines? That is to say, is there something in practice that is different than what the Merger Guidelines -- how the Merger Guidelines in practice are working? Is there some kind of dissonance?

Or, in the alternative, if we assume that the merger guidelines are actually not reflective of
practice but are aspirational of the practice that we want to see, is there something that seems to be missing from the merger guidelines in the way that we think about it? Well, every one of our theories, we seem to have been evaluating in mergers, I have yet to hear something incredibly new that the guidelines haven’t thought through as of yet. And I’ll just leave it at that.

DR. BAKER: Well, I mean, we always proceed by an analogy to past cases, and so there’s nothing new about that, but for what it’s worth, the Merger Guidelines are focused on horizontal mergers, and the harms are either coordination or these unilateral effects, but it’s basically in some broader sense collusive, you know, counting unilateral effects collusive, and it’s not really focusing on exclusionary issues, for example.

And, so, that’s why when we talk about -- we gravitate -- the closest we get is when we think about data as barrier to entry. That’s how we got there in this conversation, that, because in the merger analysis, that’s what sort of looks like exclusion. But you could also worry that acquisition of data would do just what I was describing, selected -- targeted discounting. It could allow -- or there are
other kinds of exclusionary conduct that -- involving
big data that you could worry about.

So it’s not so different from what I was
arguing about target discounting to say that the
merging firm can -- the merged firm can use its data
to better emulate the products -- characteristics of
rivals and to exclude them that way by -- you know,
through -- and it will have the same pros and cons.
That looks like competition. You’re giving consumers
better products, but it also could be a rapid, you
know, emulation of rival products could also be a way
of excluding rivals and forcing rivals to back off
competitively, invest less and that sort of thing,
too.

All of these things are exclusionary
theories that aren’t really well developed in the
merger guidelines and are potentially available as a
merger theory.

MS. LEVINE: We have fewer than five minutes
left. I want to throw out a very practical question
to this panel, because I know some of you have already
told me you have thoughts on the question. If we’re
going to take big data seriously, what questions
should staff at the agencies be asking to get evidence
on the big data questions you’ve been talking about
MR. GRUNES: So can I jump in on this one?
All right. So what sort of data are we talking about?
Is this industrial or personal? Is it user-generated?
Is it observed? Is it inferred? How does it
contribute to the rationale of a deal? What does the
acquirer intend to do with it? And in a lot of these
deals, I suspect the answer is, I don’t know, you
know, I’m going to figure out how to monetize it, but
that’s a legitimate question.

How replicable is it? It’s a question that
we’ve talked about today. What stops the acquiring
firm from getting it without the merger? Okay? And
what sort of data assets do competitors have? I think
those are some of the staff questions. And I’m sure
Renata’s old section asks those questions routinely.

One problem for agencies is if you have one
section asking those questions but you’ve got other
sections that also have data issues coming in their
mergers, how do you transfer that knowledge over to
the other sections?

DR. BAYE: Just real briefly, regardless
of whether it’s a consumer protection matter or an
antitrust matter, I would say make sure you’re looking
at the appropriate actual world and the appropriate
but-for world, because the tendency is, for example, to contemplate what the world might look like if it were perfectly competitive, how happy would consumers be, and that’s not generally the correct but-for world.

MR. OKULIAR: So thanks, Gail. All I would say -- or all I would add to what Allen and Mike said is that I would really focus on -- because those are questions that we would ask in Renata’s old section. And, you know, really focus on whether the data itself is unique -- truly unique -- like in a Thompson Reuters situation -- and whether that would enhance the ability -- the market power or the ability and incentive of the merged parties, for example, to exercise market power and raise prices somehow.

MR. SOKOL: Very quickly, because that’s all really helpful. We didn’t talk about efficiencies. We might also want to consider those. I guess that’s implicit in what we’re saying. But let’s make it explicit.

MS. LEVINE: Are there a different set of questions you’d be asking to elicit that information, or is it the same sort of suite of questions that’s been outlined already? Just that information about efficiencies.
MR. SOKOL: Oh, okay, right. So efficiencies are always difficult. They’re difficult conceptually for courts. Quality efficiencies -- you know, something that Allen talked about, particularly difficult for courts to understand. On the agency side, you all get it better than courts do. You have frameworks. You have a way of getting at these questions.

And I think, dare I say, the agencies typically do a really good job. To the extent that people complain at the spring meeting, it’s about one case oftentimes which they were involved in, you know, and -- but overall, I think we should recognize also when agencies do it right. The framework seems to overall work. The methodologies seem to work.

This is an area -- there are some areas I do have more concerns with others, but the ability of agencies to sift through information, including thinking through efficiencies, I think the agencies do this well.

MS. LEVINE: Danny, thank you for that closing and optimistic note. Let me ask everyone here to join me in thanking this extraordinary panel for their thoughts this morning.

(Appplause.)
MS. LEVINE: There’s a break. All right, now for the important information. I’ve just been told there’s a 15-minute break. Please enjoy.

(End of Panel 1.)
PANEL 2: REMEDIES FOR COMPETITION PROBLEMS
IN DATA MARKETS

MS. AMBROGI: We’re now live and back from our short break. Thanks to everyone who’s rejoined us. My name is Katie Ambrogi, and I’m an attorney adviser at the FTC’s Office of Policy Planning, and I’m really thrilled to be moderating this panel on remedies where we will explore the range of potential solutions, both in law and in policy, for competition challenges in markets involving big data. And this includes a wide range of potential remedies from licensing and divestiture of data sets in the merger context to other possible options such as data portability and interoperability.

So I’m thrilled to have these wonderful participants on this panel. And I direct you to their full bios for their list of accolades, but just by way of short introductions, we have Andrew Gavil who is a Law Professor at Howard University and past Director of FTC’s Office of Policy Planning; Courtney Dyer, who’s a partner at O’Melveny & Myers; Frank Pasquale, Law Professor at University of Maryland’s Francis King Carey School of Law; Kevin Bankston, Law Professor at University of -- sorry, I’m rereading Frank’s bio. Moving right along. Kevin is Director of New
America’s Open Technology Institute; and then Daniel Sokol, Law Professor at University of Florida Levin College of Law and Senior of Counsel in the D.C. office of Wilson Sonsini.

So we will follow the format of each participant will give five-minute opening remarks, and then we’ll have a moderated Q&A. And as with past panels, we’ll have someone from the FTC walking around taking your questions that we will incorporate into the Q&A. So without further ado, we’ll start with Professor Gavil.

MR. GAVIL: Thank you, Katie, and good morning, everyone. Just thanks to the Federal Trade Commission and to Bilal Sayed, the Director of the Office of Policy Planning, and Katie and to American University for hosting today. It’s a pleasure to be part of this discussion, and I’m glad to be here.

Just a quick disclaimer that anything I say today are my own views in terms of what we might be are talking about in remedies.

I guess the big point I would like to start with is that remedies are all too often thought of and discussed in a context of a litigation mindset. And even this morning, you could see that a lot of the discussion about big data-related theories and issues
have been focused on litigation. And what I’d like to suggest is that the FTC has a far broader set of tools available to it, and I’ll start by talking a little bit about the limitations of litigation remedies and the possibilities for far more flexible remedies using some of the other tools the FTC has, particularly competition advocacy, which the Office of Policy Planning has historically done a lot of.

Debates about privacy, big data, and competition are more likely to play out actually in the context of legislation, regulation, self-regulation, industry standards than they are through conduct-focused enforcement. Enforcement takes a long time. The agencies may, through investigation, be able to identify particular conduct that is worthy of an enforcement action.

But, if we look back historically -- and this was something the panel was talking about this morning as well -- it has become very difficult to bring Section 2-like cases, even for the Federal Trade Commission. It is a long process. It takes years in some cases. And if the notion is that we’re going to, at the end of the day, have structural remedies, well, go reread the decision of the D.C. Circuit in Microsoft and look what the standards are for trying
to impose structural remedies in the case of conduct
that is anticompetitive as opposed to conduct like
serial mergers.

So it’s very hard to win on liability. It
is very hard to achieve remedies. Remedies are
generally constrained in the context of litigation by
prior cases. And, so, all of that, plus the
likelihood that we’re going to see a variety of issues
dealing with big data and competition arising in the
context of, as I said, regulation, legislation, and
even self-regulation, leads me to think that the
agency ought to go forward with a fuller appreciation
of the range of tools available to it.

So why do I think some of those tools are
better? So let’s think about typical litigation is
going to be after the fact. And if we are thinking,
as was clear from this morning, about exclusion, we
have that problem of the rivals perhaps being
vanquished or gone and there is no remedy that can
bring rivals back from the dead, not for a court.

So what’s the benefit of the agency being
engaged sort of at an earlier stage following
industries, looking at guidelines, looking at the
possibility of comments on legislation regulation?
Well, it’s before the fact. So there’s an opportunity
there to influence the direction of industry. The other advantages are cost-effective. It is a whole lot less resource-intensive than bringing enforcement actions to think in terms of an advocacy program.

It is a lot quicker and more nimble, and there’s a broader range of possible solutions. And we’ll talk about, as the panel progresses, what are the concepts of things that might fix competition problems. And I think that’s the big point I’m trying to make is if you start thinking about remedies solely in terms of litigation, you think of enforcement and you think of remedies that are geared to the particular conduct in the enforcement action.

If you start thinking about competition advocacy more broadly, suddenly, you have a wider range of potential ways to influence the direction of the market to use the FTC’s voice through speeches, like I said, through comment letters, but also a whole range of things like these hearings, which are a form themselves of soft advocacy. And they are much more flexible, and you can use them in different ways to build agency expertise. And it might later translate into support for enforcement, but it should be part of the bigger package of remedies that we think about and talk about today, remedies for competition problems,
not necessarily remedies for anticompetitive conduct.

MS. AMBROGI:  Great, thanks.

And now Courtney.

MS. DYER:  Hi. Thank you, Katie. And good morning, everyone. Thank you for inviting me to be on this panel. I’m honored to be here.

As the practitioner on the panel, I want to talk about my experience in merger remedies that seek to address competition concerns where data is involved in the markets and the challenges that they may present that are a little bit different than what you see in a traditional context of divestitures.

Two things I wanted just to kind of touch briefly on this morning before we talk more amongst the panelists is how you define the assets to be divested when data is part of those assets. Data remedies have been or seem to be inappropriate in cases where you are trying to restore competition in markets where data itself is the relevant product market or a key component of the relevant product market.

But once you define the asset and the agencies identify what they think needs to be divested to restore competition, I think it’s really important to ensure that that data remedy doesn’t lessen the
incentives of either the merged party or the remedial party to innovate and to use that asset to create value and to use that data to compete more efficiently in the market.

In defining the assets to be divested in some cases like the CoreLogic case, the relevant product market was the data itself, and so the FTC alleged that CoreLogic’s acquisition of DataQuick would lessen competition in the license of publicly available real property data to third parties. And, so, it requires CoreLogic to license that big set of nationwide real property data to a remedial party so that it can relicense it to others in competition with CoreLogic. So the actual product was this nationwide set of house and property and tax characteristics.

In others, the data has been a critical component to what the agencies have defined as the relevant product market. In Nielsen-Arbitron, the FTC required the divestiture of assets related to Arbitron’s cross-platform audience measurement business, and it was then in development and Nielsen and Arbitron were the only two developing this business, but along with that divestiture required a royalty-free perpetual license to Arbitron’s individual-level demographic data that it collected
through its audience measurement panel.

And the FTC in this case found that Nielsen and Arbitron were the only ones who had these audience measurement panels, so the data that’s required to fuel a cross-platform audience measurement system was required to be licensed to a remedial party for them to be able to compete going forward with Nielsen.

Similarly in Google-ITA, the DOJ required Google to license ITA Technology in the underlying C class and fair accessibility data to online travel intermediaries. Google planned to compete with these -- against these OTIs with the assets it acquired, and the agency was concerned about foreclosing these OTIs from access to that same data to be able to compete in the market.

In each of these matters, the agencies concluded that a data remedy was appropriate when, again, the data itself was the relevant product market, and they found that that market had few competitive alternatives for that data or in a product market that relied on the data that only the combined company would have access to after the transaction.

But once these assets are defined and these remedies are crafted, I think it’s important to ensure that the remedy preserves the incentives of both of
the remedial party and the merged firm to use those
assets to innovate and to not impose conditions in
those agreements that get beyond what is necessary
that may have an impact of deterring companies from
applying kind of their own expertise and ingenuity and
innovative spark to really derive assets from that
data.

With regards to the remedial party, I think
the agencies should avoid overly prescriptive remedies
that may reduce their incentive to enhance the data.
It may be in cases less important for the remedial
party to step in the shoes of the acquired entity’s
current customer contracts, for example, by forcing
them to divest -- forcing the merged party to divest
ancillary products that may be outdated or
complementary data that the remedial party may be able
to obtain on its own more efficiently, and, more
important, to provide the technical resources and
knowledge for the remedial party to be able to use
that data and to incorporate it into an existing
business or sell products and market products to new
customers because data is -- data-driven markets are
innovative markets and ones which change rapidly.

With regards to the merged firms, I think
it’s important not to deter them from taking advantage
of the efficiencies and the transaction by forcing them to pass along any R&D and any enhancements that they want to make to their new data set to the remedial party and to their competitor. And, you know, behavioral remedies that go along with these structural divestitures do have, through the compelled licensing, the risk of losing the incentives for the merged firm to continue to make the products better.

Thanks.

MS. AMBROGI: Thanks, Courtney.

Professor Pasquale.

MR. PASQUALE: Yes. And for the slides, should I -- is there a controller or -- sorry. Should I stand up from there?

MS. AMBROGI: I can just pass it down.

MR. PASQUALE: Great. Excellent. Well, thanks so much. And I just wanted to begin my testimony today by thanking Katie and others -- oh, sorry for the mic. Thanks.

Just thanks so much, Katie, for terrific organization here and for the chance to speak about the potential for remedies and especially to think about platform power and a new age of competition policy, particularly as Allen Grunes discussed in the last panel when the U.S. might be falling behind if it
doesn’t think more creatively and expansively about
the nature of its competition policy.

So I want to be sure to emphasize that, as I
mention in my book, The Black Box Society, we’ve got
to think about new industrial combinations and new
ways of using data as being something as epically
different and important and in some ways unprecedented
as the utilities that emerged in the late 19th and
early 20th Century.

Now, of course, oftentimes, there is a
divide or a tension that is characterized between
antitrust policy and utility regulation. But I think
we also see the ways in which these can either
complement one another and can lead to synergies,
particularly in work by Spencer Waller talking about
the nature of merger conditions as effectively
involving agencies in ongoing regulation of certain
entities, particularly in the tech -- high-tech
context.

I start here just with respect to data
interoperability. I think that’s really critical and
that the example of the FCC making people’s cell phone
numbers portable should stand as a great example of
something that really increased the value of a certain
service to everyone that was using it and that was
ultimately something that we could bring that sort of model and that sort of ideal to many different areas if we wanted to have an industrial policy that actually promoted competition or federations of social networks as opposed to one that leads to monopolization.

I think also with respect to portability, again, data portability, should be something that should be considered part of individuals’ rights and in an effort to create a competitive market in many of these data-intensive fields.

With respect to licensing of intellectual property, I know there’s been some talk about the ways in which certain firms can gain certain advantages over different fields and can attain just massive amounts of intellectual property and that might be seen as an essential facility. And I think that a revival of that doctrine is necessary, or ways in which it could be implemented in -- through, say, merger conditions or other sorts of conditions.

Regulation, ongoing regulation, again, isn’t our focus but is something that I think needs to complement these other procompetitive elements. And I also just want to be sure to get into a few fines in thinking about how do U.S. fines for anticompetitive
behavior, how do they compare to fines in other parts
of the world?

Now, in terms of thinking about these types
of policies, in cabining platform power, I like to
draw a distinction between Jeffersonian tech policy
and Hamiltonian tech policy. And this was drawn in an
article I wrote for American Affairs a few months ago
that I was very grateful to the economists. They used
it as their frame for their special issue on digital
companies.

And the Jeffersonian tech policy would be
one that would encourage fragmentation of large firms.
I mean, the ideal there would be potentially requiring
a breakup of Facebook from Instagram from WhatsApp,
right? The idea there would be that you’d want to
have more opportunities for individuals to socially
network, to communicate, to do other forms of digital
sociality without having to worry about one company
gathering all of that data and sort of centripetally
bringing together data in ways that increased its
advantage over rival firms.

But we also have to keep in mind Hamiltonian
tech policy, particularly K. Sabeel Rahman’s article,
“The New Utilities.” And Rahman was a professor at
Brooklyn. He is now leading the Demos Institute, and
I think that his work in terms of firewallsing core necessities away and recognizing these infrastructural goods of imposing public obligations on infrastructural firms and creating public options all must be part of competition advocacy.

So I have plenty more to say, and I have other slides that will be entered into the record, but I just hope this is an opening to a conversation about thinking in larger terms and in a larger framework about the nature of competition policy and how we can add more dimensions to it. Thank you.

(Applause.)

MS. AMBROGI: Great. Thanks.

Kevin?

MR. BANKSTON: Thank you, Katie. And thanks to the FTC for having me here for this important forum where I’m going to talk a bit about the difficult but hopefully resolvable tensions between privacy and competition when it comes to portability and interoperability.

Hypothetically, imagine that after a huge privacy scandal involving a social network that you use you want to hashtag delete it. What about your data? What about your posts? What about your private messages? What about all those baby pictures? What
are you going to do?

There is, thankfully, I think, a growing consensus, post-Cambridge Analytica, that users should be able to take back copies of the data that they previously uploaded to a service, and this is indeed now a right for Europeans under GDPR. And I think there are three good reasons for this.

One, it respects the user’s right to control their own data, as does privacy -- as do privacy protections. Two, it hopefully lowers the switching costs for consumers that want to change services, similar to how number portability lowered the switching costs of changing cell providers. And, third, it hopefully makes it easier for competitors to grow more quickly so that the network effects of the incumbents aren’t insurmountable.

So, for example, it was thanks to portability of contact data that several of today’s social network incumbents were able to grow so quickly in the first place. And, now, several -- there are several tools -- several of the larger companies have offered data portability tools for many years now, but post-GDPR, they are working to improve them both in terms of comprehensiveness of the data and usability of the formats of the data.
But people have mostly just used these download-your-data tools to archive their stuff rather than move it, in part because they are download-your-data tools. Actually having to download your stuff and upload it somewhere else, especially if you’re a mobile user, is a pretty big barrier. And that’s also been a barrier to, like, the development of recipients of that data.

But there’s been a positive development in the formation of the data transfer project, which is an open source project that currently involves Google, Microsoft, Facebook, Twitter, where basically they are trying to develop standards for one button or a couple of buttons, couple drop-downs, ability to move your data between services. And this is, I think, over the next few years going to help us deal with the low-hanging fruit of portability, things like your photos, your address books, your stored files, things that are based on common standards and that are clearly yours.

But then we get to the edge cases. Let’s come back to the hypothetical. Getting my photos out is nice, but what about the photos I’m in that aren’t mine? What about the tags that people have added to my photos that I didn’t add? What about my comments to other people’s posts? What about other people’s
comments on my posts, things that aren’t clearly mine? And most especially what about my social graph? What about the network of friends that is really probably the most important thing I’d want to be able to move? Many commentaries, including my organization, want companies like Facebook to free the social graph and make it more portable. But, unfortunately, it’s not as easy as number portability because we’re actually talking about the data of other people and about other people. Essentially, the same kind of profile and contact information that was at the heart of the Cambridge Analytica scandal in the first place and sometimes contact information that my friends haven’t even chosen to expose to me on the platform in the first place.

Now, let’s be clear. Facebook has been finding ways to avoid letting users get this kind of information out of the platform for years based on privacy arguments that were also super conveniently and suspiciously aligned with their business interests. For example, the privacy setting that lets you decide whether or not friends can download your contact information is set to default private unlike almost every other privacy setting on Facebook. But especially now in the political and
legal environment that we have, I can’t blame them for
being very wary of sharing such data. And there is a
privacy issue there. And that’s not an easy --
there’s not an easy answer on how to square that
privacy issue and the desire for meaningful
portability, which takes us to the last important
theme here, which impacts both portability and
interoperability, that is, services talking to each
other in an ongoing way.

At this point, all the incentives for the
companies are to lean toward privacy over portability
and interoperability whenever they’re in tension, in a
way that I fear will ironically strengthen their
hegemony over our data and make it harder for us to
leverage our data on other services. We’re seeing
this especially in the context of interoperable third-
party apps that run on top of the Facebook platform or
lately on the Gmail platform.

Those types of open platforms have been a
huge source of innovative features and tens of
thousands or even hundreds of thousands of apps and
new businesses and economic growth, but at this point,
if I were one of the big guys, I’d be locking those
ecosystems down pretty completely and only letting
users interact with a much smaller population of
companies that are totally trusted and well
established and totally vetted -- Spotify and not the
little guy, Fortune 500 companies but not the smaller
companies, you know, Google Drive and Microsoft
OneDrive and iCloud but not the scrappy new drive
entrant. And that is the trend, the direction where
we’re going.

And, so, I think the big question on the
table is how can the FTC and Congress and other
policymakers ensure that we find the right balance to
both protect privacy and ensure continued competition
and innovation in a space which we can talk about in
questions.

MS. AMBROGI: Thanks, Kevin.

Professor Sokol?

MR. SOKOL: Thank you. I also have slides.

(Brief pause.)

MR. SOKOL: Before I get to the slides, so
pardon me for this, just two quick thoughts. Frank
gave a number of very compelling types of remedies.
Two things I want to just add to for the Q&A. Number
one, I’d say remedies look different as between
private parties versus when the Government is a
plaintiff. And I want us to think about that.

Number two, also missing from the list was
no remedy! Right? Every once in a while, it could be that the best remedy is to not to intervene because either it’s on the merger side and we think that these are complicated markets. Alex, in the last panel, brought that up. Others do as well. Sometimes no remedy simply because we don’t have a good remedy.

And to that -- there are two books roughly a decade apart that show really great case, Microsoft, mediocre remedies. We have the Page and Lopatka book, and then we have the Gavel first book. Both of them -- to the extent they agreed on anything, it would be that the remedies were not good.

So here we have some data-related mergers. We’re going to get through some of this. So I’m going to talk about refusals to deal and essential facilities. So we have a number of refusal-to-deal cases. And I want to cabin this as different than essential facilities because some of these cases in the lower courts actually made the essential facilities claims at the Supreme Court level that didn’t come up.

And some of these are great cases. I mean great in terms of doctrine. I loved Lorain Journal. I love Otter Tail. I love Aspen for what Aspen actually stood for. And, so, I think part of it is,
like, let’s read the cases carefully, particularly the
Supreme Court cases, for what they say and what they
don’t say.

Now, what does this do specifically for
essential facilities? The Supreme Court is deeply
suspicious, particularly for a particular type of
essential facility claim, which is involving a single
firm type essential facility claim. This also come --
you know, on this, they’re very clear. They haven’t
totally closed the door on it, but they’re pretty
close to it. And the treatise is equally troubled by
that.

And what I would suggest once we get to Q&A
is that there is good reason to be deeply suspicious
of essential facilities as a single firm type claim.
And so this is essentially what do we need to have?
Right? Bottleneck, and typically we see it, as Frank
alluded to earlier, in a regulated industry type
setting. And the real critical thing is here that
it’s really the only gateway available. And in this
tech setting, we have to ask ourselves is really this
the only possible way that we -- or like is --
especially is tech some kind of public utility?
Should it be regulated as such?

And I suspect most people who are antitrust
people would say no. And I think that that’s the right answer. And here’s the problem. The essential facilities doctrine, I think, creates a lot of uncertainty. I think that it’s just not the right tool in this particular setting, and some of that we teased out, why not, in the prior session. Some of it you heard a little bit about yesterday. And I’d say we’d be -- I’d be very -- very reluctant based on what we know in terms of the economics right now to impose this kind of framework.

Refusals to deal are limited. Where exactly they’re limited are going to be case to case, but particularly with regards to large firms, dominant firms, it’s one thing to say refusals to deal. It’s another thing to say essential facilities. I’m going to push back very hard against essential facilities. Refusals to deal are more limited under case law. And sometimes you get imposed -- I think Aspen as Aspen, where there was, you know -- the Supreme Court is even clear there. Right? Even if it’s at the periphery, it’s something that is still good law. That’s very different than what we’re talking about today.

Thanks.

MS. AMBROGI: Thanks. I think, as the opening statements reflect, there are a wide range of
potential solutions here, and each proposed solution has some upsides and some downsides to it.

Ginger’s presentation yesterday, I thought, laid out one way of thinking about a range of these solutions, and that might be that on the far side of no intervention to the other side where there’s total intervention, you have the free market, on the one hand, and then moving a bit towards industry self-regulation, then industry self-regulation plus consumer education, and moving further along, ex post enforcement of the laws, and then moving on from there, ex ante regulation of some of these conducts.

So there’s a wide variety of options and mechanisms to achieve these options. So we’ll try to touch on what folks have discussed in their openings. And we’ll begin by looking at some of the practical aspects that we in the antitrust community are maybe more familiar with through our agency work, and that is in the context of FTC and DOJ consent remedies, in the context of mergers, is data different than other assets like factories or retail stores? And does data present unique challenges when compared with some of these other assets? And if so, how can data remedies be tailored to effectively remedy competitive harm, and the point to remedy competitive harm as well as
what Courtney mentioned to preserve incentives that
the merged party has to keep innovating and keep
providing good products to the market. So we’ll start
with Courtney, if you want to respond to that.

MS. DYER: Sure. So, from a practical
matter, you know, the data, and I can speak personally
to the CoreLogic matter, which is ongoing, but in that
case, it was public data that anybody could go out and
get from county assessor and recorder offices. I
mean, the complexity of it involved going out and
collecting it from all of the counties and the offices
in all of the jurisdictions across the country,
processing the data, normalizing the data, and getting
it in a format in which you can license it to third
parties.

So there’s the aspect of the strict here’s
the assets to be defined, here’s the data that needs
to go to the remedial party. But with that said,
agreements -- remedies that impose some long-term
entanglements between the parties I don’t think are
necessarily always beneficial.

I think it’s important, and you’ll see in
these remedies that involve data, there’s specific
provisions on making sure that you give them the
technical knowledge and access to employees and
information that they’ll need to be able to use the
data and get it to consumers, access to business
records, customer contracts, et cetera, and then
unfettered ability to hire employees without the risk
of them getting counter-offered and hired back by the
merged party. And those come in a variety of contexts
and, obviously, are very case-specific.

I think those are important to promote that
the remedial party doesn’t just take the data and step
into the shoes and do exactly what a company did at a
specific point in time but has the knowledge and the
tools and the resources to be able to enhance that
data, incorporate it in the complementary businesses
that they might already have, and attract new
customers because this data is current data that is
being updated daily and delivered daily to the
remedial party and then to third parties.

I think what makes it a little more complex
in a data context, too, is unlike a retail or factory-
type divestiture and you’ve got goods and you got to
deliver to customers, here, you’ve got maybe the same
exact data, the number of bedrooms in a house, being
delivered to a customer that might want to incorporate
that into an MLS listing or otherwise, but you’ve got
them wanting you to call the field a different name or
wanting you to format it with a comma in this space versus this space. So you’ve got all of these customer interfaces that are different, so you’ve got to be able to pass along that knowledge, too, so they can actually replicate what each of the customers of the acquired party had at the time. So it adds some complexities into that.

In terms of tailoring the data remedies, again, I think the focus should be on how to get the remedial party to be able to use this data in a way that enhances competition in the market, and I think through that, you need to be able to pass on this technical knowledge and these resources, and I think it has to be less focused on making sure millions of records are delivered perfectly to the remedial party and more about being able to successfully interpret and adapt that to attract new customers in an industry that changes all the time.

MS. AMBROGI: Makes sense.

Anyone else want to weigh in on this topic? Frank?

MR. PASQUALE: I just wanted to -- just make a quick intervention to say that I really valued Senator Warner’s staff’s proposals for 20 different types of social media regulation, and part of the
foundations of those proposals was the idea that once
an entity has a certain very large amount of data and
a data advantage, that data advantage can become self-
reinforcing and almost insuperable.

I was making that type of argument back in
2008-2009 and was laughed out of some rooms where
people told me, you’re talking about Google now, but
Google won’t even exist in ten years. No one will
have heard of the company, right?

And, so, what I think what we’re seeing is
that very gradually establishment -- economists and
others -- are starting to catch up with the reality of
insuperable data advantages and self-reinforcing data
advantages, and that is something that makes data very
different than many of the other contexts in the
precedent that are now governing this field. Thanks.

MR. GAVIL: I think the last two comments
sort of highlight a point I was trying to make
earlier, that when we’re talking about remedies in the
context of litigation, it’s really quite different
from when we’re talking about it in the broader
context of some kind of regulatory setting where you
can really think much more broadly about what you want
to do.

But I want to say one thing about -- in
response to Katie’s question. Is it the same, is it different? I think the answer is it’s both, that data can have sort of similar characteristics to, you know, we’re going to look at competitive overlaps and we’re going to do some kind of slice-and-dice remedy.

Now, putting aside whether those kinds of remedies actually work in the typical horizontal merger, two points I would suggest. One is a point that was raised this morning. In cases where what we’re worried about is post-merger exclusionary conduct, that might not be the right solution.

It could be the kind of things that Frank and Kevin have talked about, might be better solutions if what we are worried about as a result of a merger that will result in higher entry barriers, instead of thinking about slicing and dicing data and, again, something that’s alike, we’d have to think about economies of scale, just like we would in breaking up factories, but assuming data could be sort of made into chunks of data or shared, it might be better to think about, well, what’s the problem with the portability of the data? What’s the problem with the interoperability of data?

So it could be that we could think of a remedy as more directed towards the competitive
problem. And that might be different for data than it might be in, you know, brick-and-mortar industries. So I think that, as was said this morning, it really depends on the particular case and the characteristics of the industry. Whether or not parties are willing to negotiate those decrees as opposed to litigate those sorts of remedies may make a big difference for the agencies.

So I think what you’re seeing is that there’s this range of options. When you’re in the litigation context, you really are limited by the facts of the case and the particulars and the willingness of the parties to either resolve it or litigate some data-related issues have been resolved through negotiation. Others have been more difficult. We’ve tried remedies involving technology industries that haven’t worked very well.

And that’s why I think it’s important for the agency to not put all of its big data eggs in the enforcement basket but to be mindful of the range of activities that are going on, some of which have been mentioned. Kevin mentioned some of the -- whether it’s industry self-regulation, whether it’s bills being introduced. I think there’s an important role for the agency to play in representing competition and
making sure that sort of competition issues and
competition values are at the table when we’re talking
about things like restricting data.

We’ll probably get into this a little later,
but there clearly is a potential for tension between
locking down data in the interest of privacy and what
might be best for competition. And that’s starting to
emerge in a number of industries where essentially
privacy could be used as a pretext for conduct that
might eliminate competition, make competition more
difficult.

MS. AMBROGI: And, Andy, you mentioned some
remedies where it hasn’t worked out so well in the
past with data. Did you have any in mind in
particular?

MR. GAVIL: So one of the more interesting
ones are at the time, the U.S. Government was not
really fond of it, but here’s an example. The Koreans
in looking in the Microsoft cases at what the U.S. had
done in terms of remedy and what Europe had done in
terms of remedy kind of concluded that neither of
those were very effective. The issue was the ability
to -- switching costs for browsers and the ability of
consumers to easily switch.

And, so, they came up with a novel solution,
which is to require that there be a browser option on
the desktop to try and get out the entry barrier and
switching cost problem. I don’t know that they ever
studied it to see whether it worked. It ran into that
problem, I think, that we talked about this morning,
where consumer preferences for particular browsers was
already fairly locked in. But that was an attempt to
do the kind of thing that we’re talking about is use a
remedy in a conduct case that might more directly
address barriers to entry and switching costs by
making it easier for consumers to do those things.

MR. SOKOL: Just some quick thoughts. Some
of this teases what we’ve already heard but just puts
a different spin on it. I think the most basic
question is one of institutional choice, and the first
one is, is this a -- what is it that we’re trying to
solve and what’s the appropriate institution? So this
builds on not just what we heard here but also earlier
today, Alex’s framework of competition versus privacy,
I’d actually say even across different institutions
going to what Andy’s talking about when we think about
it as enforcement cases, you know, in the litigation
context we’re thinking about judges. Maybe sometimes
we’re thinking about ex ante regulation. We have to
think really about what’s the appropriate
institutional choice. Frankly, when we say market, that, in itself, is its own institutional choice as well.

And, so, then the next question is, it’s so obvious but no one said it yet, so I want to take credit. Does the remedy actually fix the harm? Okay. Sometimes you get credit for saying the obvious. And I think that that’s another important overlay in this kind of situation, that -- and then it, therefore, goes back to something else Andy said, which is, ultimately, it depends on the situation. And, therefore, we’re going to see a wider variety of institutional choices and remedies based on the particular harm, but, ultimately, the remedy only works if it fixes the harm.

And then one final thought. The other agency has not taken kindly in the last two years to behavioral remedies. Also, just that sometimes behavioral remedies do work, but they actually have to remedy the behavior. To the extent that their critique is really, if the behavior’s been going on for 60 or 70 years, that doesn’t seem like an effective behavioral remedy, there’s probably some truth to that. But I don’t think that means that we should pooh-pooh behavioral remedies generally when
actual behavioral remedy is a good fix for the harm.

MR. GAVIL: One more thing I want to add. I think that there’s a temptation to think of data as some kind of commodity that, you know, our data exists -- my name, my phone number, my friends -- that it exists in that way. And I think that part of the challenges, and I’d be interested in Kevin and Frank’s response, because I think they know a lot more about the technology -- but part of the concern I have is whether data really exists in that way as a commodity or whether it is deeply integrated with analytics that a company may be using to sort of massage and create value out of that.

And going back to Courtney’s observation about mergers, there is an analogy here. So let’s say we’re going to spin off a factory but we’re not spinning off with it the real technical know-how, you know, the company’s magic sauce, that it knows how to operate that factory in an optimal way. So we spin off the factory, but it doesn’t really have all of the tools necessary.

Now, that’s something that traditionally agencies take into account in thinking about divestiture remedies, but if we’re talking about data, the first question is a technical one. Is it really
separable from the analytics that’s used to derive
value from it? Does it really exist in that way? And
even if it does, what is the use of separating out the
raw data in a way that doesn’t provide that same
analytical ability?

Now, maybe that’s something that competition
should be left to provide if somebody wants the raw
data, then they need to figure out what to do with it.
But I do think that’s something that potentially makes
data a little bit different. When we start talking
about interoperability and portability and you and I
think about our name and our phone number, I don’t
think in many instances it’s that simple.

MR. PASQUALE: So, oh, completely agree that
it’s not that simple, but I also think that it’s very
easy to overemphasize the tension between competition
promotion and privacy. I know that James Groman
(phonetic) and Randy Picker have done very interesting
work in that area. But as I’ve studied that work, I
have also simultaneously been working in the field of
health data. And think about health data and regional
health information exchanges as promoted by the health
information for the HITECH Act, the Health Information
Technology for Economic and Clinical Health of 2009.
If you think about the ways in which we promoted
interoperability and how the Office of the National Coordinator for Health Information Technology has released very sophisticated reports attacking information blocking by healthcare entities, we’re not writing on a blank slate.

We don’t have a tabula rasa here. We have a very well established history of health authorities using data, combining the data, and trying to gather that data in order to promote precision medicine and to promote cures. And if we had the same level of political will that we had about precision medicine and about promoting cures with respect to competition policy, we could think about ways in which to anonymize, we have the HIPAA de-identification standards that there were rules put out by HHS in 2012 on this matter. We have a whole infrastructure and apparatus of thinking about ways to share data safely. And I think that it’s time to bring that here.

I would also say that just with respect to Kevin’s points, and I do think that those are very important points and certainly there are attacks on the idea of anonymization, there’s always this whole pure science literature saying it’s very, very hard to anonymize properly. But I would say that at the very least one might say that a simple rule would be
anything I upload I can download back, right? If I can put up a photo, if I put a comment on, et cetera, that I think that would be at least some way in which we could try to ensure that there is a base level of this form of interoperability and portability.

And, finally, I’ll get to Andy’s other point about the nature of inferences and data versus inferences as in recent European and California developments have shed some light on that, but I’ll wait on that. So thanks.

MR. BANKSTON: If I could respond to a few of those points and answer some of the things I promised I would. First off, I tend to agree with Frank that the tension is not irresolvable and that finding venues to actually work through these hard problems, the FTC being one of them, is critically important. I’m not quite sure how the health example bears on the social graph example, but I can see its application in other areas.

In terms of what Congress and the FTC can or should do in this particular area, I think that Congress, as part of comprehensive privacy legislation, should include a basic portability right similar to the one in the GDPR. However, the one in the GDPR is really too simple in a way. It delivers
this basic right and then says this right is completely subsidiary to all the other privacy rights, such that it basically sidesteps all of the hard questions and says, no matter what happens, the privacy rule trumps.

I would hope and imagine that something in the U.S. law would give more flexibility, perhaps through rulemaking at the FTC, that would allow for more specific regulation or guidelines in the harder cases, where there’s a particular competition or other consumer benefit need that countervails the privacy need.

I also think it’s important for the FTC, looking at mergers and acquisitions in this space, to look at the portability and interoperability practices of the companies involved and consider remedies that require new portability that may require new interoperability. And there is some precedent for this, you know, in the AOL-Time Warner merger when AIM, may it rest in peace, was at the time the dominant chat client. And one of the conditions was they needed to become interoperable with, I believe -- it was sort of staggered over certain months, but one or two other competing messengers. And, so, I think considering those kinds of things as we look at future
mergers and acquisitions is going to be really important.

MS. AMBROGI: So a lot of good stuff here. I’m going to pose a question that came from the audience. It’s rather a combination of a few questions, which all seem to focus on the same issue. So for remedies that involve forced sharing or interoperability or portability or licensing or maybe just all remedies in this space, are folks, outside of Courtney, who already articulated this, concerned about the effect on innovation, or do you think it will increase innovation and/or should we be worried about intellectual property rights in that space? Are those a hurdle to interoperability and how do we think about those things and overcome some of those potential challenges?

MR. BANKSTON: I mean, I’ll take off a bite of that. I am not concerned about a threat to innovation from requiring portability. I think it’s worth considering maybe some sort of size threshold that you need to meet before that’s required, but then again, there’s also a value to forcing people to start with portability by design, just as we want them to start with privacy by design. Interoperability is very different, and this
will require a little -- I think there are two basic
big models of interoperability online. There’s the
decentralized interoperability of open standards,
where any of us can run an email server that can talk
to another email server, or a web server that can talk
to another web server. We used to have chat clients
that relied on an open standard. Now we have a bunch
of different ones with different standards.

Then there is the sort of centralized
interoperability of apps on a platform that are
basically relying on data from a platform that they’re
running on top of the Facebook platform is a good
example. Both of these raise very different
questions, and I think that, for example, mandating
that a product design itself to be interoperable over
open standards could entail a huge revamp of the
product and could also limit certain types of
innovation.

I think, for example, there is a debate in
the chat client world about -- it would be great if we
resolved the fact that there are all these competing
chat clients that don’t talk to each other with a
single standard, but even people like Moxie
Marlinspike, the coder of Signal, are like, yeah, but
if I tether myself to an open standard like that, I
will be much slower in adapting to consumer need around features.

And, so, there are definitely costs there that would need to be considered before you said something like, yeah, let’s just make Facebook and Twitter be able to talk to each other. Making sure that companies that offer platforms are offering interoperability in a way that doesn’t stifle competition, I think, could be good for innovation.

And I know I keep picking on Facebook, but they have a provision right now in their platform terms of service that says you can’t have an app on the platform that replicates a core functionality of Facebook. So if you wanted to live on that platform, while offering a newsfeed-like product or a direct messaging product, you can’t do that right now. And, so, I think requiring that kind of interoperability would actually foster innovation rather than threatening it.

MS. AMBROGI: So thinking about requiring, what is the mechanism that would achieve some of these portability and interoperability goals? You mentioned that if there was comprehensive privacy legislation that some of these could be baked into that legislation. So in the view of the panel, is that a
role for Congress? Is it a role for the states,
assuming this is a goal?

We’ll leave the question of whether it is or
isn’t a state that we want out and talk about the
mechanism, or should it be industry self-regulation?

Kevin, you mentioned the data transfer project
earlier. What’s the best mechanism to achieve some of
these goals?

MR. BANKSTON: Since I’ve been talking a
lot, I’ll just say very briefly, I think mandating
portability is straightforward and we should do it,
but we should make sure we do it in a flexible way. I
think interoperability is a much more case-specific,
technology-specific, fact-specific inquiry, and just
saying things should be interoperable as a mandate
doesn’t make any sense.

MR. GAVIL: I’d also add, Katie, going back
to your last question, that forced sharing is not the
same as trying to come up with a system that allows
things to be portable and interoperable. Forced
sharing is like a dirty word in antitrust, and we
associate it with, you know, undermining incentives
for innovation, forcing, you know, forced licensing,
compulsory licensing. There’s a whole bunch of
imagery that goes along with that, but that’s not
necessarily what’s being discussed.

And the one thing I would add is, you know, in terms of targets for enforcement, when you see conduct that is impeding interoperability, impeding portability, and doesn’t really have a business justification, and this is what I said earlier, I think the health IT may be an example, Frank, where one of the arguments made is, oh, but we are really worried about privacy. And, so, we’ve erected these barriers to information flow in order to protect privacy.

That’s exactly the kind of situation where the FTC can play a role, saying, all right, well, you’ve adopted this pro-privacy policy; it has this anticompetitive consequence; and asking the traditional question that the agency has always asked, are there less restrictive available means to achieve that? Is it a genuine concern to begin with? Those are sort of the bread and butter of advocacies that have come out of the agency for years. And that might be an appropriate sort of use of that advocacy to identify things that are greater than necessary to protect some genuine issue.

The last thing I will say about Trinko, because Trinko, I do want to pick on Trinko, one of
the great, colorful phrases that influences our thinking about forced sharing is Justice Scalia’s “We must not reach into the bowels of Verizon,” because, like, judicial proctology, ooh, who wants to do that.

So a great phrase from Justice Scalia. That was the motion-to-dismiss case. Never got to any factual inquiry as to what really was required to facilitate the interaction of Verizon and AT&T, was the company seeking access. You can look at that case and think of it as a refusal to deal case, forced dealing. You can also understand it as a dirty dealing case. It wasn’t really about refusing to deal. It was about refusing to deal in a way that was required by regulation.

So our imagery of these sorts of forced-dealing cases has been influenced by a line of cases, and we ought to understand that, you know, the essential facilities, Areeda wrote an article called “An Epithet in Search of a Rationale.” The Supreme Court cites it in Trinko. Obviously never read it because in that article he says he thinks MCI versus AT&T was rightly decided. What is that case? Is it essential facilities? Is it a refusal to deal? It’s exclusionary conduct, and the labels don’t really add much to it. So I’d be cautious about viewing these
things as forced sharing.

MR. PASQUALE: And I think also one of the things that I think is really interesting, and, you know, I’ve been following the debate about structural versus behavioral remedies, and, you know, I was just reviewing this article by Kwoka and Moss, John Kwoka and Diana Moss from 2012, sort of critiquing the regulatory capacity and the capacity of agencies to sort of really monitor and follow up on behavioral remedies that are sort of part of the thing -- cases like Google-ITA, Comcast-NBC Universal, et cetera, and I think that there’s a role that we should definitely have a sense of the limits there, but two caveats, one being sometimes this is just a resource problem, right?

It’s just do you have the resources to do what you need to do and with, like, the FDA when they didn’t have enough resources, you have PDUFA, you know, in terms of the Prescription Drug User Fee Act. You have other ways of funding these types of activities. And, so, I think that having those resources, that should be something agencies should be unafraid to ask for.

The other thing that I would note is that we’ve got to be really careful in terms of thinking
about the context when we see a critique of any particular approach. So, of course, originally when these big firms came up, there was a utility regulation, but then that gets critiqued and people in antitrust say, you know, that is just so inefficient, really antitrust can solve the problem. But then when antitrust authorities try to impose structural remedies, historically then there was all this resistance. You know, we heard some of that in Andy’s testimony earlier in terms of that, and so then they sort of backed down the behavioral remedies.

Now, we’re hearing that behavioral remedies are really very problematic and that they exhaust the capacity of the agencies and we can’t pursue that. And, so, is the idea that we’re eventually going to shrink it to nothing? You know, I mean, I don’t know. And I think that if we don’t complement those sorts of ideas with the idea that, hey, maybe the ultimate remedy is fines like what the European Commission can levy, 2 to 4 percent of global turnover, if we don’t try to expand that, then we essentially have promoted a evolution in policy that just continually gets more and more shrunk, as opposed to dealing with the liberalities of the new economy.

MR. SOKOL: Just some thoughts. One, I’ll
push back against Frank in one area. So I think that agencies do best the things that are their core competencies. And, so, sometimes when you see an agency sort of shrink in terms of what it’s willing to do, it’s not because we think that there should be no solution; it’s that there are other processes, other institutional choices that are simply better suited.

So we see across a number of different areas, agencies have overlapping or even let’s say parallel powers, but not exactly the same powers. And they have different pluses and minuses, so we should always think, you know, which agency is best suited, and by agency I shouldn’t say agency, right, because it could be sometimes the remedy is statutory, it could be the remedy is market, whatever it is. There is an institutional choice that seems to be better than the others in terms of ability to get at the problem. And, again, all this assumes that there’s a problem. It gets at the problem and does it more effectively.

And part of, I think, what we have to do is to figure out, you know, which institutional choice is better at that. And I think largely that goes to core competencies.

The second thing is to take what Andy was
saying and just extend it further with regard to
Trinko, right? If the real concern was forced
sharing, and Andy says, but maybe it wasn’t forced
sharing, maybe it was just a certain type of behavior,
I think that the push at the time of the Supreme Court
was send this to regulatory agencies because maybe
that was the better institutional choice at that time,
whereas I’d say back to the MCI case and to AT&T, the
problem is the FCC wasn’t doing anything. And that’s
the reason why we -- in terms of antitrust -- really
made the big difference in antitrust because we saw a
gap and a real competitive gap.

But that’s a very different question than I
think the basic one today, is if we’re looking at data
markets and competition problems, A, what are the
specific competition problems case by case, what Kevin
was saying and Andy was saying, then which particular
remedies can we map onto those specific competition
problems and the kind of day-to-day work that the FTC
does. And I think that’s a little bit different than
what we’ve just been talking about.

MR. GAVIL: So I would just add one thing
quickly to that, and it’s the limitations of case by
case. Case by case takes a long time, and it is, by
its nature, case by case. And if there are broader
issues in the industry, maybe as a result of these hearings, the agency will better understand them. And if there is active regulatory efforts going on, the agency needs to be at that table, and the agency needs to be thinking about what are the tradeoffs that are being made to be a voice for competition, because, again, that's where advocacy can actually affect the direction of an entire industry, where case by case tends not to have that broad an impact.

MS. AMBROGI: So we've touched on this a little bit. How likely is it that a plaintiff could succeed in arguing that data is an essential facility or whatever you want to call it, unilateral refusal to deal or that it's involved -- implicated in exclusionary conduct under the current antitrust jurisprudence? What would a plaintiff have to show?

Does anyone want to take that on?

MR. SOKOL: I had a slide on that, you know, from the 7th Circuit.

MS. AMBROGI: Yeah.

MR. SOKOL: It turns out it's not easy. Now, to be sure, that was a Section 1 case, not a Section 2 case. But it turns out -- it begs the question, is the data essential, right? So even just to get to your question, there are a number of things
we have to bake in -- or we -- or there are certain
ingredients that we need to have to even bake whatever
it is that we’re baking, to figure out if there is
some kind of remedy.

So, thus far, it seems not easy, but then it
begs the question of, well, why is that? Is it not
easy because it’s just difficult to bring a case? Or
is it there’s something very interesting about this
kind of case that perhaps doesn’t lend itself to an
essential facility.

And that’s where I would push you to say
it’s not clear to me that these are essential
facilities because of issues like multihoming --
because, in fact, data sets can be assembled and
disassembled, you know, with ease -- this is what I
talked to earlier, in the last panel, about the entire
data ecosystem, can you more or less replicate the
data, can you buy the data from a third party, et
cetera. And there’s just -- there’s a lot of
complexity here, and when we reduce it to everything
being essential, I just don’t think that’s right.

MR. GAVIL: So I agree with Danny that
regardless of the theory of the case, these cases are
hard to bring. There’s a reason that DOJ and FTC have
not brought very many Section 2 unilateral conduct
cases, and there’s a reason you don’t see a lot of private cases, and there’s a reason that it’s a challenge to find plaintiffs that prevail in any of these cases. There just aren’t a lot of them because the law is very demanding.

But I think the theory of the case makes a big difference, and this goes back to something we were just saying. If the challenge is simply refusal to deal, I want data, I want something that this dominate firm has, and the conduct is the refusal to share it. That’s quite different from a situation where you have conduct that is impeding sharability or is in some sort of artificial way that’s hard to justify for business reasons. And that’s potentially a difference between looking at something like Aspen Skiing and Trinko. So I think that that makes a lot of difference, and the theory of the case would affect the theory of the remedy, but there’s no doubt that these cases have become very difficult to bring.

MS. AMBROGI: Frank, I know you mentioned in your opening statement interest in potentially reviving some of these theories in the data context, and I wondered if you could speak to, you know, your current understanding of the jurisprudence and what would it take to stake a claim in this space.
MR. PASQUALE: Sure. I mean, I think that one of the issues here is -- and here just to engage in like maybe a friendly colloquy with Danny, you know, I mean, in his thinking about this sort of area is let’s say that we had a situation with the acquisition of content in Google Books, you know, and that was a long-term investment, you know, that I give Google a lot of credit for doing that, and very highly fraught with respect to would they win the fair use case against publishers, could they coordinate libraries, et cetera, et cetera, to acquire this massive collection of books.

And you have also the possibility -- and let’s say imagine that an upstart comes in and, I don’t know, some foundation maybe gives someone millions of dollars -- tens of millions, whatever it might take, and then the library will say to them, look, you know, we’ve already had our books scanned once, and to do it again, it’s just -- it’s going to break the book spines or something, and we just don’t want to have this all done again, right?

That’s a situation where I think we have to think deeply about, you know, just as we thought with respect to do we want to have the sidewalks dug up 15 times so 15 different phone companies can bring wires
to your home, we might think very deeply about to what extent do we want to force every book to be scanned over and over again, et cetera.

Now, of course, the idea that would come back is who will, you know, going back all the way to the 1995 Guidelines and innovation markets, et cetera, the idea might be, well, who’s going to invest all the resources necessary to put together a corpus this large if they know that it could essentially be licensed in the future, right?

But I think that we’ve got to be able to respond to that in some cases and say that, look, you know, we could create different types of fair and reasonable, nondiscriminatory licensing patterns in many different situations in commercial life. This might be one that we should open up some sort of possibility to. So that’s one example, and I know that the IP, the interaction of IP in that makes it a little bit complex, but I still think it’s interesting because, you know, data is those scans.

I’d also say that with respect to gathering that data in alternative ways, I mean, I wrote a whole book, The Black Box Society, about how secretive these companies are, right? I’ve talked about, and this has been followed by a big follow-on literature of a
triple layer of legal secrecy, actual technical complexity and purposeful obfuscation with respect to critical aspects of the functioning of many large tech platforms.

So -- and this was something that was, of course, part of the difficulty in ongoing regulation and enforcement of antitrust litigation with respect to Microsoft, say the trade secrets and different aspects of their platform or their software. And, so, what I want to just bring up there is that I don’t think we can just very easily say, eh, go get it yourself or go get that data yourself. It may be that for the past -- for quite a long period of years the only place that data exists is within this triply protected moat, you know, it’s like a moat, is what Warren Buffett calls it, entities. And we have to start to taking more seriously the possibility that these are truly unique and essential resources.

MR. GAVIL: The only thing I’d add to that is there certainly has been a lot of literature generated about this tension between the innovation incentives of the incumbent dominant firm versus the innovation incentives of the challenger. And it’s not easy to resolve that. This was discussed at this morning’s panel as well.
And we do have to be concerned about adopting standards that will inhibit firms from seeking to become a monopolist. You know, one of the great lines from Judge Hand’s Alcoa decision is having encouraged the firm to compete, we don’t turn on them when they succeed. There’s an important antitrust sort of cornerstone to a lot of what we’ve done based on that.

Having said that, I think sometimes some of the commentary focuses too much on fears about impeding the incentive of a firm that has achieved dominance and doesn’t consider the impact of the potential innovation being offered by the entrant. And that’s what brings me back to going beyond the simple refusal to deal and looking for conduct that is in some way affirmatively impeding that new entrant because that new entrant is also an important source of innovation for the economy.

Striking that balance is difficult. The agencies have had to think about it; the courts have had to think about it. There are two sides to that debate, and we shouldn’t dismiss either side of it, particularly when we’ve got exclusionary conduct.

MR. PASQUALE: And I would just add to that, you know, that I think that, you know, looking at some
of Lina Khan’s work on Amazon, it’s very interesting to sort of think about some of those potential for intervention, and also how Singer’s work with respect to pointing out what net neutrality can’t do and what antitrust could do with respect to platform nondiscrimination. So I think both of those are just very -- just to add on to Danny’s points.

MS. AMBROGI: So how do we, at the end of the day, assess relative --

MR. GAVIL: It’s not even lunchtime.

MS. AMBROGI: -- the proverbial day, how do we assess the relative success of data remedies, and can we draw any conclusions today about past remedies involving data and any lessons learned?

MS. DYER: I can start from a practical perspective with that one. I think, you know, if you feel like you’ve got a remedy that’s crafted appropriately in terms of getting what the remedial party needs to compete and restore competition in the market, I think data does present a little bit unique issues in determining the success of that remedy. You know, it’s one thing to say, okay, did you transfer, you know, everything that manufacturing facility had into the hands of the remedial party.

Here, you’re giving them big reams of data
that they need to be able to use and incorporate into
their business. But is the success that, you know,
every one of those millions and millions of records
gets into the hand of the remedial party, or is it are
they then understanding the data, are they then
acquiring data from other sources to enhance that
data, are they gaining new customers and attracting
new potential customer segments to the market because
of the innovative ways that they’re using the data?

Are they lowering prices in the market? And
not lose sight of the competitive dynamics that are
happening as a result of the remedy and focusing more
on the technical divestiture to make sure they’ve got
everything that they need because what they need may
evolve as the industry evolves and technology evolves.

I think the other risk, too, in measuring
success is, you know, was the remedy too broad. And
you’ve got some cases where these parties are forced
to enter into remedial agreements with the remedial
party that now gives them access to data that they can
almost use unfettered, or at least unfettered in the
context of the remedy itself, and that happened in
Neilsen-Arbitron where the data was supposed to be
limited to being able to use the data for the cross-
platform measurement services versus the television

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only, and the remedial party started using it for television only, and so Nielsen had to go and sue them privately because they couldn’t resort to the agencies because they weren’t a party to the agreement.

You know, similar things have happened in other cases where, you know, once the data is in their hands, how do you not give them an unfair advantage because they now have access to things that they can use to compete more effectively but in markets that didn’t need to have any sort of competitive impact restored.

MS. AMBROGI: Andy, not to put you on the spot, but you’ve articulated that competition advocacy may be one way to work to advance some of these goals. It’s always a perennial question how would we know -- how would we know if competition advocacy is effective in this space and how would you suggest that that particular tool be implemented in a way that’s effective?

MR. GAVIL: It’s always been a challenge for the advocacy program, is taking -- undertaking efforts and using resources to look back at prior advocacies to see if they’ve been successful and how to measure success. You know, the agency takes a position in favor of or against a regulation or a statute, and you
could mark it as a success if the regulatory body or legislative body adopts the position that was advocated. But that doesn’t tell you whether it was successful from the point of view of competition.

So I think that that’s an important question. It’s why we do retrospective studies. It’s why we do this sort of, you know, hearings to try and understand the state of the industry, and I think that to the degree we are still -- I embarrassed myself yesterday in my complex litigation class by revealing to my class that when I was an associate, document review meant, like, really document review, sitting in a warehouse with documents. I think it’s -- and how much things have changed in such a short period of time.

I think that we are still very early in the information age. We are early in dealing with these issues. I don’t know that we have any data ourselves on big data remedies that is enough to answer that question, but I think it’s important to the degree the agency undertakes either enforcement or advocacy that it think about how to answer that question going forward, how to track the results of their efforts so they do have a good sense of what is a measure of success and whether their efforts have succeeded.
MS. AMBROGI: Great, and with that, we’re out of time. And join me in thanking our panelists for this discussion today.

(Applause.)

MS. AMBROGI: And now it’s lunch. We’ll be on a 45-minute lunch break, a little bit shorter today, but hopefully you guys can get the job done.

(End of panel 2.)

(Lunch recess.)
PRESENTATION: ECONOMICS OF ONLINE ADVERTISING

DR. COOPER: All right, welcome back.

Welcome back from lunch, everyone. I’m James Cooper with the Bureau of Consumer Protection at the Federal Trade Commission, and I’ll be moderating this panel that’s going to look at the competition and consumer protection issues surrounding online advertising.

And to kick this panel off, we are going to have a presentation from Garrett Johnson on the economics of online advertising, which is the area he’s quite expert in. Garrett is an Assistant Professor at Boston University Questrom School of Business. And, so, without any further ado, I will turn it over to Garrett for our introductory talk.

DR. JOHNSON: Well, thank you very much.

It’s a great honor to be able speak to you today. My job is to set the table. So to get us started, I just want to give you a sense of where digital advertising fits in the wider picture of advertising. As of last year, digital advertising overtook television to be the top advertising spending medium. And it had always been the case that search advertising was the largest part within digital advertising until a year ago when display advertising overtook search.

Now, in modern advertising, three-quarters
of the dollars spent are in mobile rather than desktop. And part of what’s contributed to mobile being so successful is that video is very big on mobile and also in display.

So just at a high level, some economic benefits of online advertising are that it subsidizes publisher content and the online services that we enjoy in our daily lives. This is not merely a theory. We have some work -- or there’s some suggesting that ad blocking has actually reduced publisher’s content and the quality of their content. Advertising certainly has a role to play in both informing consumers and in reducing search costs. And on the advertiser side, it furthers goals, whether that be increasing sales, increasing donations, or increasing the number of votes.

Now, ad tech is a particularly dynamic and high-growth sector within the American economy. And American firms dominate in the ad tech sector worldwide.

So in my talk today I want to talk about three distinguishing features of digital advertising. The first is the lower cost of targeting, and this is something that Avi Goldfarb has talked about in his review paper. Certainly, if you look at search
advertising you are advertising to consumers that are arriving at the search engine with some intent, and whether it be through paid or organic search, this medium is going to facilitate a match between consumers and firms.

Now, display advertising has seen a massive increase in the ability of targeting as well, from contextual advertising to now following what consumers are doing in the past through their browsing history to target consumers behaviorally. The most famous, or infamous, of this -- example of this is retargeting. And, increasingly, we see the use of offline data in the online world through firms engaging in database matches. One distinguishing feature of mobile advertising is there is an additional form of targeting, which is location targeting, which can be extremely fine-grained.

So what does the economics theory literature have to say about this increase in the ability to target? Well, several papers make the point that this should soften competition because it’s easier for advertisers to find the consumers that are loyal to them in the marketplace. From the perspective of publishers, we may think that this could either increase or decrease revenue, and the basic tradeoff
is that increasing targeting increases the valuation
advertisers would have for the ads but could thin
marketplaces, though empirically we’ve seen that this
generally creates revenue on net.

One other phenomenon in this industry is the
increased use of ad blocking. And we have some theory
papers talking about the externality that causes for
the rest of us that are still not blocking ads and how
this can create some inefficiencies in the market.

Finally, some theory papers have examined
the tradeoffs between offline and online advertising.
And the basic difference there is it’s much easier to
target consumers online.

Now, the second distinguishing feature of
modern digital advertising is an increase in the
ability to measure the effects of advertising. Now,
some of this starts by just having simple data that
connects the ads that people are seeing to the actions
that they take at the consumer level, something that’s
certainly not possible with billboards or, in most
cases, television.

With this has come new ways of measuring the
effects of advertising such as clicks and conversions
that can be specific to individual ads, and that has
allowed the industry to optimize campaigns mid-flight
using this feedback that they get from these outcomes,
albeit with the tradeoff that these are maximizing a
proxy metric rather than ROI so that you can get --
create some inefficiencies.

Now, also as a result of advertising going
digital, it’s much easier to run large-scale
experiments to measure the effects of advertising.

Now, there is a burgeoning academic literature on
this, but for the purposes of today, I want to talk
about three important lessons that we’ve learned from
this literature. The first is that it’s really
important to run experiments to measure the effects of
advertising because when you don’t, you typically come
out with the wrong answer.

The second thing we’ve learned is that it’s
now possible to do scalable experimentation for low or
no cost, and that has caused a large influx of
advertisers that are now using this technique to
measure their return on investment.

And the third thing we’ve learned is that
it’s extremely hard to get precise measurement on the
effect of an ad campaign in that it requires something
like millions of user observations to be able to learn
something.

So the net effect of this is that because
it’s going to be very hard to measure the effects
of advertising, that’s going to create some
accountability challenges that will hinder the
effectiveness of the functioning of these ad markets.

Now, the third distinguishing feature of
modern display — or digital advertising is the wide
use of auctions. Now, auctions are very helpful
because they facilitate the process of price
discovery. There’s no one at Google whose job it is
to find out, you know, what is the price of Civil War
reenactment costumes and how does that price vary
around the anniversary of the Gettysburg battle.

This is something that is done by the
marketplace that can be done at very large scale. So
economists have looked at many features of these
auctions and how to run them optimally. One feature
that distinguishes this form of auctions is that we
don’t just include the bids of users and search
advertising. We also weight those bids by the quality
of the advertising in order to have a good match
between what advertisers are offering and what
consumers are looking for in the marketplace. So this
is one way that these platforms balance their
interests with those of their consumers and those of
their advertisers.
Now, the final consequence of this is that by automating advertising sales and moving away from the sort of Mad Men, you know, sharing a bottle of scotch back and forth way of selling ads to computers selling ads back and forth is, well, first of all, there’s less scotch being sold, but it certainly reduces the transaction costs in this marketplace, allowing for improved targeting.

So I wanted to talk at a high level about how the display advertising marketplace works. Obviously, on the advertiser’s side is we’ve got the demand side of the marketplace; and on the supply side, we have publishers like the New York Times that are trying to sell advertising. But there’s a third agent here, which is consumers like you and I that are creating the opportunity for ads to be shown.

Now, ad impression is a single ad on a single webpage by a single consumer for a single load of that page. So it’s a very fine-grained level of analysis that’s very different from television where you’re buying, you know, Modern Family on a Saturday night for all of the United States.

This is also going to mean that the supply of these impressions is random and not something that publishers are going to exactly know. So these two
are going to meet in a marketplace, and for most publishers, that marketplace takes one of two forms. The first is guaranteed contracts. Guaranteed contracts are bulk buys of advertising specifying the price and quantity and targeting attributes and time of the campaign.

And ad exchanges are platforms running realtime auctions. It’s kind of a miracle of technology that happens in less than .1 seconds and allows advertisers to find these individual users and individual impressions that they’re interested in.

Now, this is important to recognize because in the search ad space, 100 percent of ad sales are programmatic; and in the display side, 82.5 percent of these transactions are done programmatically. Now, most of this happens in mobile, but one sort of thing on the horizon here is that currently less than 10 percent of TV advertising is transacted programmatically. And that’s something we see expanding in the future quite a bit, which is probably why we see firms like AT&T buying AppNexus.

All right, so in today’s session, we’re going to be talking about market power and about privacy issues, so I wanted to give a high-level introduction to both. The challenge with market power
in this setting is first in defining the market. So when we think of concentration on the online advertising side, we need to remember that there’s also substitutability with the offline advertising as well. And Avi and Catharine have a nice paper showing that empirically.

The other challenge that has been brought up, I think, in the previous hearings as well, is the challenge of understanding multisided platforms. So, in particular, this is not a case where, you know, a monopolist is making the price very high. In fact, this is usually the case that platforms are providing free content and services, whether it be search or email or maps, that provide a lot of benefit to us in our daily lives at no cost.

Now, there is actually some work showing some countervailing power on the demand side. And the way this arises is that advertisers are typically working with intermediaries like ad agencies to purchase advertising, which creates some countervailing power on their side.

Now, another challenge in this industry is the prevalence of lack of transparency and the prevalence of fraud, which has been the subject of a major report by the National Advertising Association,
as well as, I gather, a FBI investigation currently,
but when we talk about market power, one kind of
important thing to have in the back of our minds is
just the market concentration of the top two firms.
So Google and Facebook collectively make up
57 percent of online ad spending. Google’s dominance,
of course, arrives from its dominance in the search
space, whereas Facebook’s dominance arises from its
dominance of the display ad space. Two of every five
dollars spent in the display ad space is spent with
Facebook. And this is a consequence of basically
having the audience, as well as the targeting and
measurement capabilities that draw advertisers to
spend money there.

Now, pretty recently, there’s been two big
companies -- Amazon and AT&T -- through their
acquisition of AppNexus that are entering this
marketplace, and we could anticipate some changes
there. But in the shadow of those two great big
companies, there’s a very vibrant industry. Here’s an
illustration from a company called Luma that shows you
all the different companies that are involved in this
space. And you get a sense of how rich this is.

In the top center, you see ad exchanges,
which we’ve talked about before, but I haven’t
mentioned the plethora of intermediaries that
advertisers and publishers use to provide services
that allow them to buy and sell advertising in this
marketplace. So there’s a vibrant marketplace with a
lot of acquisitions that’s going on in the background.

Turning now our attention to the other topic
of this hearing, which is consumer protection issues,
I’m going to focus on the issue of privacy, but
certainly we have literature that deals with other
issues like ad disclosure in native advertising as
well as equity in ad targeting that Anja could speak
to very knowledgeably.

So I’ve been very interested for a long time
in the privacy consequences of the online display
advertising marketplace. Here, what I’ve done is I’ve
visited a newspaper in Pennsylvania called The Morning
Call, and I’m using an extension to my browser called
Disconnect, which allows me to visualize all the third
parties that are notified of me visiting there. And
you can see that dozens of advertisers are -- and
intermediaries have been notified of my visit without
my explicit consent. And this is something that’s
pretty widespread across the web.

So what’s the regulatory environment for
this like in the United States? Well, currently,
there is no regulation except for honest business practices. U.S. regulators have favored for the past decade an opt-out policy, whereby consumers that are concerned by tracking and that are concerned by online behavioral advertising can opt out and avoid these practices.

And around 2010, the industry banded together with a self-regulatory program to provide an opt-out for consumers. So this regulatory program is called the AdChoices Program, and the way it works is that it has a notification function where there’s small icons basically on all display ads that consumers can click on to arrive at a consumer choice page. And on the consumer choice page, consumers can click to opt out of online behavioral advertising and tracking.

Now, this page functions a lot like the FTC’s Do Not Call List with the caveat that the Do Not Call List refers to phone numbers, which are stable over time, whereas our computers don’t have identifiers for these devices that are stable over time, which creates some challenges in the persistence of this choice mechanism.

So I was very interested in studying this because this issue hadn’t been studied or at least the
A self-regulatory approach hadn’t been studied by economists and marketing people. And to set the stage, kind of what is the number of people we should expect are opting out? Well, if you survey people, reliably two-thirds of people say that they dislike online behavioral advertising.

So we might expect that a lot of consumers are taking action here, but when we looked at the data, what we found is that only, in fact, 0.23 percent of U.S. impressions arose from consumers that had opted out of tracking. So what we observe is a privacy paradox where there’s a huge gulf between people’s stated preferences and the actions that they take.

Now, this is not unique to our setting. Certainly a lot of other privacy research has found sort of similar gaps, like a gap between the willingness to pay and the willingness to accept when it comes to privacy, but still this gulf is particularly wide in this setting. And we can talk more about that in the panel.

The challenge, though, is that this form of advertising provides a tremendous amount of value. So, basically, the consensus in the literature is that the value of a cookie to this marketplace is either a
lot or even more than a lot. So estimates range from
50 percent to 65 percent in terms of the reduced value
that you have when you remove online behavioral
advertising. And, so, this creates a very difficult
challenge for policymakers in examining this issue.

Lastly, I wanted to speak very briefly to
some issues with privacy policy because they can
overlap with competition policy. Now, one way that
this can be anticompetitive is that it’s -- when you
impose costs on firms, like the cost of getting
consumer consent, it can be easier for large firms to
get this consent than small firms, which can create an
anticompetitive effect. Also, large firms have lots
of resources to throw at the problem, and so they may
be able to succeed more so than small firms in the
marketplace.

Now, on the other side, there may be some
procompetitive effects of privacy policy. The first
is that large companies endure a lot more consumer and
regulator scrutiny when it comes to their privacy
practices. So there’s no regulators in Europe that
are currently targeting the number 551st website in
Lithuania, but it’s really only a matter of when that
they go after Facebook or Google.

So this is not to my -- this has not been,
to my knowledge, emphasized in the literature, but this creates a bit of a safety in the herd effect where as long as you’re not sticking out as too large of a firm or sticking out as a firm that’s engaging in particularly egregious privacy practices, the chances that you’re going to be singled out with regulatory actions is smaller.

So the task of summarizing, you know, 20 years of literature is a very challenging one. So for those of you that are interested in further reading, I would recommend these three review articles by Catherine Tucker and Avi Goldfarb, who is in the audience today.

Also, this is such a dynamic industry, that I actually probably spend about 20 minutes every day just keeping up with the trade press, and all of the goings-on in the industry. So those of you that are interested in doing that, I would encourage you to check out the AdExchanger newsletter.

So with the table set, I will now turn things over to the panel.

(End of Presentation.)
PANEL 3: COMPETITION AND CONSUMER PROTECTION ISSUES IN ONLINE ADVERTISING

DR. COOPER: Thank you, Garrett, that was great, and it is a perfect stage-setter for the panel. Like the other panels, people will be walking around, taking -- with cards from the audience, if you want to answer -- or want to ask questions. And before I get started, on the off chance that I say anything remotely substantive, anything I say today are my opinions only and don’t represent the Federal Trade Commission or any individual Commissioner.

So each one of the panelists will have about five minutes to talk before we get into a discussion. Let me just briefly introduce them. Their full bios are in the book, but just in the interest of time, I’ll be quick with this.

So Anja Lambrecht, right next to me, she’s an Associate Professor of Marketing at the London Business School.

Next to her is Leigh Freund. She’s the President and CEO of the Network Advertising Initiative.

Next to Leigh is Allie. Allie Bohm is Policy Counsel at Public Knowledge, where she focuses on government affairs, including broadband and privacy...
Next to Allie is Howard. Howard Beales is a Professor of Strategic Management and Public Policy at George Washington University. And he’s also a former Director of the Bureau of Consumer Protection at the FTC.

And, finally, Katie McInnis is a Policy Counsel at Consumers Union in their Washington, D.C. office.

So to start off with our presentations here for the panel, let me turn it over to Anja.

DR. LAMBRECHT: Thank you. Do you have a clicker?

DR. COOPER: It’s here. Do you want to come up here?

DR. LAMBRECHT: Can you hear me? Yes. Okay. Well, thank you so much, James, for the introduction. Thank you, Garrett, for the first introduction into online advertising. I want to very briefly build on what Garrett said and go in a little bit more depth of what is one important trait of when we speak about competition and consumer protection in online advertising.

So this is what advertising used to be, right? Advertising used to be an information message
targeted -- untargeted almost -- to massive consumers out there, which could be on a billboard and other advertising. It could be in TV advertising or it could be in magazines perhaps. In each of those cases, the advertiser speaks to a mass of largely anonymous consumers.

Well, what advertising is today when we speak about data-driven online advertising, it is about an individual consumer who visits, for example, this fashion website, and after having visited that fashion website, based on all the tracking mechanisms that Garrett briefly mentioned, is shown an ad that precisely placed the product the consumer looked at before and potentially other related products. Now, this form of advertising is typically referred to as retargeting.

Now, why do firms use this type of advertising to reach out to highly specific consumers? Well, the underlying idea is that while they're targeting a large mass where some people might or might not be interested in the specific product being offered, we focus on those who are most likely to be in the market, and the key measurement criteria here that the industry uses is what is typically referred to as the lift, which is the change in the probability...
of purchasing if a consumer does not see an ad relative to a consumer actually seeing the ad, right? And, so, you can probably imagine that if you focus on consumers who are more likely to buy, the average lift is going to be larger. So I studied this type of advertising, retargeted advertising, and part of the question being, well, if an advertiser actually implements that, what type of messages should they be sending to the consumer?

And it turns out rather than showing the specific product, in many circumstances while targeting the specific consumer, the advertiser might benefit from showing a more generic ad. Now, what does this mean without going into detail here? It actually means it’s incredibly hard for advertisers to find the best ways, even in a data-driven environment, to evaluate the data and target consumers, right? So while there is a value to targeting, it is not always easy to implement.

Now, the second point I would like to make is getting on the other side of the tradeoff. So, here, first, we looked at the view of the advertiser and the benefits of targeting to an advertiser. Well, the other side is that advertising today -- data-driven, online advertising supports a large number of
free content and services. And you might think about online content providers, which range from ESPN to CNN to New York Times or LA Times that essentially are able to provide information services to consumers for little price or no price at all. And these revenues come from advertising, as you’re well aware of.

Now the question is, what is the situation for these type of firms when we take away or reduce targeting? As I said before, what targeting means, it allows advertisers to have a higher probability, a higher lift, a higher increase in the probability of converting a consumer. And when we have -- in a world of less granular targeting, this may potentially go down, meaning that any individual advertising impression creates less value for an advertiser and, by consequence, this might -- may potentially press advertising prices.

And you can see what this is leading to, potentially reduced revenue opportunity for these type of platforms. In one of these papers, we studied a specific setting of ESPN and find that they benefit particularly from online advertising in periods of high demand, when it’s actually more beneficial to give content away for free because of the particular structure of the consumers coming into the market.
And you can see that especially in periods of high demand to depressed prices this may have a potentially significant effect for the platforms.

Now, let me summarize what are the key policy issues that we’re facing when we’re considering a particular tradeoff. It is that on the one hand, data-driven, online advertising can make ads more relevant to consumers. It can allow firms to enter the market or to continue existing in a market by offering free services or content. And on the other hand, we obviously have data-driven advertising that may raise privacy concerns in terms of tracking, storage, and sharing of data, which is potentially opaque for consumers and not controlled.

However, I think what we see with GDPR in Europe now is that control can be potentially very, very effortful. And, so, to wrap this up, I think the key question here is how to get the balance right. This can be very hard, especially since consumers, and many consumers, benefit substantially from getting access to services or content in a free or free(mium) economy. Thank you.

DR. COOPER: Thank you.

Leigh, you’re up next.

MS. FREUND: Okay. Can everybody hear me?
Good. By the way, I just wanted to make one comment
before I get started that online advertising firms do
drink scotch. So maybe scotch in the market is not
completely dead.

So thank you so much, James, and to the FTC
for including me. For those who don’t know me or the
organization I represent, my name is Leigh Freund, and
I head the NAI, or the Network Advertising Institute.
It is a nonprofit, self-regulatory organization that
was set up in 2000. So even though the entire
industry -- sorry, the entire industry began its self-
regulatory efforts in 2010, the NAI is composed of
basically the third parties or those folks in the
middle of that Lumascape that you just saw, the pipes
that connect the consumers to the advertisers and the
publishers.

We bound together in 2000, 1999–2000. At
this stage in time, we have over 100 member companies,
each of which are required to adhere to the privacy
protections that are set out in the NAI code of
conduct. So our members include, as I said, all of
the folks that make up the middle of that Lumascape,
ad networks, exchanges, platforms, other technology
providers. And our member companies basically form
the backbone of that industry that you’ve been hearing
about, helping advertisers reach consumers that are most likely to be interested in their products and services and allowing those consumers to receive the ads that are personalized to their interest.

So the NAI code and our guidance continually evolves to adapt to changes in technology and changes in consumer expectations. So, for example, I think Garrett spoke a little bit about the programmatic TV space. Earlier this year, we issued guidance to address how our members may and may not collect and use information about video content that consumers see on television and helping to ensure that those consumers receive notice and choice with respect to that medium of advertising.

We’re currently also undertaking a pretty major update to our code of conduct that will include some robust new privacy protections. And, so, in essence, we’re constantly adapting, as self-regulatory organizations do, to adapt to kind of rapid changes in technology, and the requirement that our members provide consumers with choice regarding those technologies and how they collect and use information about consumers is a vital component of what we do every day. We have published three updates to the code, four guidance documents since 2012. And, so, it
is always our mission to keep up with and stay ahead of the technologies that our industry puts forth. So, today, a broad -- I’m going to leave most of the economics to the economists, but today a broad array of rich content is available on the internet: news content, information, video and music streaming services, interactive software services, email, social networks. They’ve all experienced robust growth over the last several years. And they provide those services and information to consumers for free or little cost because they are supported by digital advertising, so digital advertising including personalized advertising, which is the way we refer to it at the NAI, has basically been the lifeblood for the internet. It’s the reason, I think, that the U.S. firms dominate globally in this space, providing benefits to consumers while also providing the opportunity for those businesses.

So as the internet-based media ecosystem has become richer and far more diverse, one thing has remained constant, and that is by far the most popular model for consumers is free or low-cost, ad-supported content. We’ve done pretty significant research. We’ve got data from Nielsen that suggests while the
media landscape expands, the type of content consumers are spending time with, which is the free content, has remained fairly consistent, and it remains the medium that consumers gravitate toward the majority of time when you look at their viewing habits online.

So the share of time spent with ad-supported content on platforms such as TV, radio, smartphones, video games, and tablets for adults in 2017 was 86 percent. That seems to have remained flat over the last decade. And research also demonstrates the considerable economic contribution provided by this industry. So our ad-supported internet has created a little over 10 million jobs by 2016, and the interactive marketing industry has contributed over $1 trillion to the U.S. economy, which has doubled in the last four years and accounts for 6 percent of gross domestic product. So when we put privacy and consumer protection into -- we must remember the robust effects on our U.S. economy.

So when thinking about data collection and use in connection with digital advertising, I think it’s important to recognize -- and I think there’s a little bit of a misperception out there -- data in this context has an extremely short shelf life. Companies are interested in data only to the extent
that it’s relevant to the personalized advertising
they want to show, and data used, for example, to show
me an ad when I’m interested in going to Cancun, which
I often am, is not relevant once I’ve taken that
vacation or purchased my plane tickets.

So there’s a definite point of diminished
return that disincentivizes companies to keep a
massive vault of consumer data. Typical data use for
personalized advertising by many of our companies is
relevant for 30 days or less, unless I think you’re
buying a car, in which case it’s a little longer.

So I think it’s important that self-
regulation -- and any future legislation -- I know
that’s probably a topic at these hearings -- any
future legislation or regulation encourages companies
to embrace privacy protective practices that are
tailored to the sensitivity of the data that those
companies are processing rather than kind of lumping
all kinds of data together with broad definitions,
which would remove incentives that we have, for
example, in our code for data deidentification,
pseudonymization, data minimization practices, et
cetera.

So I think full names, email addresses,
phone numbers can be collected, but our business goals
can also be met by using pseudonymous identifiers. So under our code, pseudonymous identifiers allow companies to recognize an internet-connected device without directly identifying the user of that device, and they’re particularly important for privacy protection because they allow companies to recognize a browser or a device without collecting any additional information that reveals the identity of the individual.

So I think when we talk about privacy, we think about the types of data that are collected, and I’m sure we’ll talk more about that. And our companies really strive to do privacy-protective practices and data minimization practices within their businesses.

DR. COOPER: Allie?

MS. BOHM: Hi, everyone. So in 2002, Target wanted to identify which of its customers might be pregnant. It recognized that the arrival of a new child often led to changes in consumers’ buying habits. And if they could identify when people were expecting children, they could potentially win them over as customers for years to come.

So they crunched the data in their pregnancy -- I’m sorry, their baby registries -- that’s what
those things are called -- and they identified 25 products that pregnant women were buying. And using that, they were able to create a pregnancy prediction score that they applied to customers who didn’t have baby registries with Target. And they used that to figure out, you know, what coupons to send them to lure them into the store as customers.

Data-driven advertising has only mushroomed since 2002. Data-driven advertising has some distinct advantages. It allows for customized online experiences for users. It can reduce irrelevant ads, help consumers discover new relevant products, reduce search times and costs that make online shopping easier, and as Leigh pointed out, it can help folks access content without having to pay money for it.

It can also help businesses, particularly small and local businesses, reach very niche audiences, but that’s not the full story. Data-driven advertising can facilitate higher prices and reduce competition. So algorithms can monitor prices and other terms of sale in near real time, allowing companies to adjust their practices based on a more detailed view of the market.

Notably -- and often that means that they don’t have to cut prices to remain competitive.
Notably, this practice is probably not redressable under existing antitrust law because there’s no express agreement to fix prices. Moreover, pervasive data collection allows companies to develop detailed user profiles about their customers and their customers’ willingness to pay, which allows them to -- that enables personalized pricing strategies and precise manipulations of consumer choice.

And, you know, I should step back, particularly following Leigh, to say, you know, often the information that is used here is not the sensitive data points. It’s not your name. It’s not your Social Security number. It’s not even your health status. Think back to my Target example. The information that was used was these women’s buying histories. They are buying lotion. They were buying unscented lotion. They were buying zinc, they were buying magnesium. None of this is sensitive, right, but it revealed very sensitive information. It revealed their health status, their pregnancies. So when we talk about privacy, we do need to talk about the panoply of data and not just sensitive information.

Data-driven online advertising also forecloses opportunities for consumers. When we show
relevant ads to folks, we’re excluding them from seeing things that the algorithm has determined are not relevant to them, right? But that may mean that they’re unaware of particular opportunities that they don’t see. And, so, maybe that doesn’t matter if you’re advertising unscented lotion, but if you’re advertising housing or job opportunities, that matters tremendously. And that’s not conjecture.

So employers have used algorithms to prevent women and older folks from seeing high-level management positions. Landlords have used algorithms to prevent minorities -- racial minorities -- from seeing certain housing postings. Data-driven advertising also incentivizes the collection of more data, which jeopardizes privacy.

And the data demonstrate that although some really like targeted advertising, the most -- many consumers find the most privacy-intrusive ads, quote, unquote, unnerving. So, interestingly, and I’m going to sort of throw this out as a new idea, maybe, online advertising may actually be a space where more privacy-enhancing approaches may actually be competition-enhancing as well. So long as we rely primarily on targeted advertising, we’re going to entrench the duopoly of companies that have access to
vast troves of data.

But if we were to limit the ability to --
and I realize Congress might have to do this. This
might not be something the FTC can do. But if we were
to limit the amount of data that can be used in
advertising, we might see a return to contextual
advertising, so, you know, trying to reach sports fans
on ESPN or music fans on Rolling Stone. That’s a
practice that more companies can participate in. It’s
also more privacy-protective because you don’t
actually have to know much about the consumer other
than that she’s gone to ESPN or to Rolling Stone or,
you know, searched for music.

And interestingly, that may have some
benefits for companies. So we heard yesterday from
one of the researchers who said that targeted
advertising has raised revenues by 0.00008 percent,
but can be 500 times more expensive than contextual
advertising. Now, I went to law school, so you know
I’m not good at math -- or at least that’s the joke --
but that doesn’t sound like a great return on
investment to me.

In addition, from a brand safety concern,
question, you know, if you’re doing contextual
advertising, your brand is like -- you’re likely to
know the closed universe of what your brand is going
to show up next to a lot better than you would in a	targeted advertising environment.

So, in sum, data-driven online advertising
has transformed the market. It poses opportunities.
It also poses threats to privacy, to competition, and
to consumers’ well-being, but it doesn’t have to be
this way. So the FTC should encourage Congress to
enact privacy protections. And we can talk in the Q&A
about what my organization would like that to look
like.

But the FTC can also take some actions on
its own. For example, it could use its UDAP authority
to determine on a case-by-case basis whether it is
deceptive for websites and services to place third-
party trackers all over the internet and track
consumers when they’re on other websites without their
knowledge or consent.

So I appreciate the opportunity to be here
and to testify, and I look forward to addressing your
questions in the Q&A.

DR. COOPER: Thanks, Allie.

Howard, you’re up.

DR. BEALES: James, could you pass the
clicker, please?
MR. DR. COOPER: I could throw it, but...

DR. BEALES: Thank you. The big green arrow. There we go.

Thanks for the opportunity to be here today. I want to make just a few points, some of which have been made already. Most of what we enjoy on the internet is, from an economic perspective, a public good. Content isn’t used up, and it’s essentially free to add another viewer to most kinds of internet content. Now, there are some things that are different like email services and things like that, but most of the content that we enjoy is a public good.

Throughout the history of publishing, the way we’ve gotten public goods in all sorts of media markets has depended heavily on advertiser support. There are models that are pure subscription models, but they’re very small markets and very small parts of the market. Typically, media markets are heavily dependent on revenue that comes from advertising, and that’s the way markets provide the public good.

Advertising converts the public good of content into a private good of advertising exposures that can be sold to somebody. And that’s how this market works. There’s no reason to think financing of
internet content is going to be any different from any of those other media markets or from the couple of hundred years of history we have of the economics of those markets that says advertiser support is likely to be a crucial element of providing that content.

Second key point is information really adds value to online advertising. There’s two studies that I did. One is a survey of major advertising networks at a time when advertising networks were the main way that third-party advertising was sold. We looked at behaviorally targeted advertising versus run-of-network advertising, and the price was just short of three times higher for the targeted advertising compared to the nontargeted run-of-network advertising that could be anywhere.

We did a more recent study in 2013 of auction prices on two different ad exchanges. And what we found was if there was no cookie, there’s one price for the advertising. If there’s a new cookie that was just placed there, the price of the advertising roughly triples. Okay, and the longer the cookie’s been there, the more the advertising sells for. The more information that you have, the more valuable the advertising is to publishers.

Now, losing somewhere in the neighborhood of
two-thirds of your revenue, if you can’t target based
on information value, is something that’s likely got
serious implications for the kinds of content that
publishers can provide.

The other thing that’s important about this
is the sales that happen through third parties are
much more important to smaller websites. This is data
from Adomic that tracks where the -- and it’s a count
of the ads, where does each ad come from that is
served on a particular webpage. And I don’t know that
you can read it, but the website rank is the
horizontal axis, and the percentage of the ad
impressions that are sold that way is the vertical
axis.

Even the largest websites sell a majority of
their advertising through networks or programmatic
advertising. And for the smaller websites, number
4,000 there -- and obviously websites get a lot
smaller than that -- two-thirds of their -- some two-
thirds of their advertising revenue is sold through --
comes through -- it comes through sales through third
parties. All right, it’s not sold direct; it’s sold
through either a network or an ad exchange as the way
they make money to finance the content that they’re
providing.
If you think about that Lumascape that you saw, which is a great graphic, most of those companies nobody ever heard of. I was looking for examples because I never heard of these companies. And so I looked at the list of NAI members, and here’s the first four members. Thirty-three across, Acuen, Acuity, Adara. How many of you have ever heard of any of them? Not very many.

Certainly, most consumers have not, but those kinds of intermediaries are an important source of competition in an online advertising market that’s mostly Google and Facebook. If you can’t use information that you obtain through cooperation with publishers and the placement of cookies to find out about how consumers are using the internet, then you can’t sell that advertising in a way that is competitive.

If consent requirements get more elaborate for these behind-the-scenes companies, if you have to agree to them, that’s going to selectively disadvantage these companies compared to the Googles and Facebooks of the world that consumers have actually heard of. And that’s something that’s much more likely to entrench a duopoly than to undermine it just because consent is difficult.
Finally, it’s important to remember advertising is actually a good thing. The FTC actually for a long time has been a leader in recognizing the benefits of advertising for competitive markets. Advertising tends to lead to lower prices. It leads to product improvements. It narrows the differences between demographic groups. And it’s FTC studies that have established a lot of those propositions.

There’s no reason to think online advertising is any different. It’s a cheaper way to do what is a good thing for consumers and likely to enhance market performance across the board. Thanks, and I look forward to our discussions.

DR. COOPER: Thanks, Howard.

Katie?

MS. MCINNIS: Thank you, James. Thank you for organizing this panel. And thank you to the FTC for hosting these hearings and for the opportunity to talk to you today.

As James mentioned, my name is Katie McInnis, and I serve as policy counsel for Consumers Union, which is the advocacy division of Consumer Reports. So my comments here today will be focused on the consumers’ perspective of a lot of these
So consumers currently don’t really understand the advertising ecosystem as it currently affects them. They have some sort that they’re being tracked across the web and that their online and offline activities are being correlated in order to serve them with ads, but they’re not really sure how to take control of their digital footprint or how to push back on companies who are tracking them across the web entirely.

Although they have some tools at their disposals such as like ad blockers and the use of a virtual private network, these tools don’t have a lot of market depth, in part because it’s hard, it takes the consumer doing a couple of really positive steps in order to put these into action. But we’re seeing the ad blockers this year will have about a 30 percent use across the web, which is fantastic. And then we’ve an increased use of virtual private network use among consumers, due in part to the reversal of the broadband privacy protections at the FCC by the Congress last year.

So we see this disconnect between consumer knowledge of tracking and how much consumers are actually tracked, but there’s also some competition
issues at work here as well. As companies amass more and more knowledge about individuals and how they use the web, they’re able to manipulate the kind of services that consumers are presented with and the kind of economic opportunities that they are presented with as well.

So we’ve seen online retailers such as Amazon artificially preference some products over others on the virtual shelf on Amazon in order to favor the companies that they have business practices with. We’ve also seen that consumers are not being served with the same sort of ads as other consumers based on decisions that are based on their online activities. For instance, we’ve seen this effect especially in the Equal Employment Opportunity and Fair Housing Acts. And these opportunities are a huge -- these ads that are serving opportunities are a huge disservice to many consumers because if some people, especially women, are being shown ads or the some ads -- are being shown the same ads as men, they’re not going to have the same access to opportunities for employment and advancement as other people.

But we’re going to deal with those comments next week more on the panels on algorithmic bias and algorithmic transparency. But we’ve also seen
companies take advantage of their dominant place in the online advertising ecosystem in order to push out other competitors. For instance, we saw the use of Facebook buying Onavo, a really poor VPN, please don’t use this VPN, in order to kind of sniff out what their possible users and their users were doing on their phones in other applications.

This led to Facebook realizing that Snapchat was going to be a huge competitor for them, and so they developed some practices that would -- some offerings on their platform that were similar to Snapchat in order to kind of regain dominance and influence in this spectrum.

In addition, consumers are also being shown prices that are based on their online activities, what are decisions that are being made about them based on their online activities. This is especially apparent in the travel ecosystem where consumers are shown different prices than others based on their searching techniques and also how often they’ve been looking at prices. In all these previously mentioned instances, two things come out. Consumers don’t have knowledge or transparency about the kind of ways that their privacy is being invaded upon and how companies are using their information.
Unfortunately, the self-regulatory response to this has completely failed. We saw an abandonment of do not track years ago. The resources that are offered by industry now are not comprehensive. They’re only followed by a few companies. And these markers are easy to override.

And consumers deserve the right to protect their privacy and to push back on companies’ tracking practices across the web. In light of this, we strongly support a federal data privacy law that would give consumers the right to control access and know what companies are doing with their information.

One of the most important things that have been introduced recently that may serve to help -- give consumers these controls is the Senator Wyden’s discussion draft of the Consumer Data Protection Act, which allows for consumers to have controls in order to cover their digital footprint and to make sure their privacy preferences are acknowledged and followed by the companies that wish to track them across the web. Thank you.

DR. COOPER: Thanks, Katie. All right. So let’s dive in. There was a lot put on the table. One thing, and this was in -- we heard this in Garrett’s opening talk and people who have looked at
the market, I think, recognize this, is we don’t see a lot of consumer uptake on privacy-enhancing technologies when it comes to online advertising. I think -- and I forgot the exact, I think it was 0.23 percent was what Garrett cited.

At the same time, you know, we see surveys that suggest that consumers are concerned about privacy. I’d just like to throw it out there and see what explains this disconnect. And we haven’t heard from Garrett in a while, so let me let Garrett start that off.

DR. JOHNSON: Well, thank you. I’ve thought a lot about this specific issue because there is this huge gulf between the people that take action and the people that say that they’re very concerned about these practices. So I think part of the challenge is that when people are asked about their privacy preferences, it makes it very salient, but they have fairly ill-defined preferences over privacy. It’s hard for people to think about. That’s why you see -- basically people will sell their information and their mother down the road if you give them a slice of pizza. And it’s very easy to move people’s privacy preferences and actions with small costs and small incentives. So that’s the challenge that we face.
Certainly when it comes to online display advertising and the AdChoices program, one issue is a lack of awareness. So awareness numbers range from 6 percent to 37 percent on the specific mechanism, but there, too, awareness is a choice. This is something that people could find out about if they wanted to.

I think one underlying challenge here is the technological sophistication of the average consumer. That’s one reason why we see AdChoices have a higher adoption rate for nondefault browsers like Chrome and Facebook. One usability study by Laurie Kramer and coauthors examined many different options available to consumers, and what they found is that all of them were failing usability tests, even the ones that were developed by private corporations for the specific purpose of helping consumers with their privacy.

Just to give you some sense of the numbers when it comes to online privacy protection demand, we looked at use of various privacy-preserving extensions on Chrome and we found that there is 68,000 users of the AdChoices extension, but the two top extensions, which are Ghostery and Privacy Badger, only have 2.7 million and 0.5 million users worldwide respectively.

Not only do we see low adoption of these privacy-preserving technologies, but we also see very
low consumer search. So we went on Google Trends and we found that there’s about the same amount of search volume for AdChoices as there is for internet privacy topics as there is for Do Not Track. And to benchmark this, I went and looked at some pretty niche search terms like the candy Swedish Fish, the Star Wars character Jar Jar Binks, the 2003 film Tommy Wiseau film The Room, and those all had two to five times more search volume than these topics. You know, Ghostery received three times more search volume than AdChoices, but still, at some point, we have to confront the fact that this is not top of mind in terms of many observables for many consumers.

DR. COOPER: Thanks.

Anyone else like to weigh in on this? Let me do Allie and then Howard, if that’s okay, and then Anja.

MS. BOHM: Sure. So I think that first of all, there’s certainly a sentiment of resignation among consumers and sort of I can’t control it, I will be tracked; I don’t like this, but what can I do, that it’s something that has to be pushed back against. I also think the question is which privacy-enhancing technologies are not being used. So 92 percent of Facebook users change their privacy settings from the
default. That, to me, says consumers, in fact, want
to control what audiences are seeing their
information. It’s not that they don’t care about
privacy, but that may be a tool that folks have sort
of figured out how to use.

I think AdChoices in a way is a really bad
elementary because the ad industry actually did some
marketing research with Future of Privacy Forum to
figure out what phrases and what symbols were going to
be most salient and helpful to consumers. And the
results came back with something like there was a
symbol called the asterisk man, and that was the one
that the most people clicked on. And there was a
phrase like “why did I get this ad.” And people
understood that.

So instead of going with those things that
performed really well with consumer understanding, the
ad industry decided to go with the little, you know,
triangle with the tiny little eye and with AdChoices,
which was not something that polled particularly well
with consumers. So if the tool is designed to be -- I
don’t want to say deceptive but maybe a little bit
deceptive, not exactly user-friendly to consumers,
it’s not exactly surprising to me that consumers
haven’t had a huge uptick in using it.
DR. COOPER: Howard, would you like to weigh in?

DR. BEALES: Yeah. I think it’s important to keep in mind that this kind of a disconnect between surveys and behavior is really quite commonplace. I actually -- I went searching for what people think about organic foods. And half of people have a preference for organic foods. Market share is about 5 percent. All right, behavior and preferences don’t connect. The problem with preferences and surveys is they have no price.

So at best, what you’re looking at is demand if the price is zero. And that’s going to be different than price and demand in the real world where there is a price, where there is a cost of using privacy-enhancing technologies, but the cost is not particularly high. And what revealed preference says is consumers don’t care enough about the tracking kinds of privacy concerns to be willing to do anything about it. And that says this is not from consumers’ perspective an important problem for them, even if they do change their Facebook settings. That’s a whole different kind of privacy concern.

DR. COOPER: Anja, do you want to jump in?

DR. LAMBERT: Yeah, so Garrett made this
point, it’s just simply not top of mind for many consumers. And along with what Howard just said, I would agree that if you ask consumers a fairly generic question without offering a tradeoff, you’re likely to get a very different response than if you actually asked consumers to trade off, right, and to invest.

So coming from Europe, the land of GDPR, while I haven’t seen any broad data summarizing this, you know, let me just offer some case-based evidence, so to speak. When you browse in Europe, you’re asked on every individual website for permissions, right, and the way this is implemented varies across websites, but it’s basically about the right for websites to collect your data and use it for different purposes, including how information is being displayed but also for advertising.

Well, it turns out if you do that 20 times a day, it gets pretty time-consuming and hassle-intense. And, so, I think -- I wouldn’t be surprised if data were to show that many consumers are actually not willing to invest this time, amount of effort. And, so, Allie talked about consumer resignation. You know, this is not very hard. You do a couple of clicks and change your settings. And, so, I wouldn’t say consumers have resigned here if this is what data
were to show. I would rather argue that the cost for a consumer is perceived as not outweighing the potential benefits.

DR. COOPER: Let me get Katie and then Leigh.

MS. MCINNIS: So, first of all, I wanted to respond to Howard’s positioning here that this is similar to an organic food situation where people might preference having organic food but they’re not actually buying it. And in that instance, I think, well, the problem is I don’t know really that much about the market, but I imagine that part of the problem is access and money. And just organic foods cost much more, it’s harder to find. So it’s not really a one-to-one comparison.

And I think in this situation, consumers are trading an extreme amount of time in order to have their privacy preferences acknowledged. And it’s not just a couple of clicks. Most of these opt-outs are really buried quite far down. They’re hard to navigate. They change month to month, day to day. Even me, my job day to day is to look at these privacy policies, I still have a hard time finding where I’m supposed to opt out, where I’m supposed to delete my data, and where I’m supposed to file some sort of
redress.

So I think the thing is the main problem here is that we framed this whole situation incorrectly. The onus shouldn’t be on the consumer at all. And that’s one reason why Consumer Reports has introduced our digital standard in order to test products for privacy and security because consumers just can’t evaluate these things on an even playing field, especially when they are required to read these long and extensive privacy policies, where really it’s a choice of yes to the privacy policy or no, I can’t use the service, which is not really a choice at all for many consumers.

So the framing should be on -- the onus should be on manufacturers to make it easier for consumers to have their ad choices and tracking preferences easily and universally enforced across platforms. We shouldn’t require consumers to do this many times for every service they use. Thank you.

DR. COOPER: Thanks, Katie.

Leigh, you wanted to weigh in?

MR. FREUND: Yeah. I mean, I think -- you know, look, consumers clearly care about privacy. Although I think as Howard mentioned, the way you devise your survey is really important because words
matter and definitions matter. So I think almost
everybody in this room would answer a survey
affirmatively if the question were do you care about
privacy, but I also think folks really like the
internet the way it is. And I think the choices that
consumers seem to be making are indicative of that
fact. And I think it’s a little bit of a fallacy to
say because that consumers aren’t choosing to opt out
that means they either don’t understand it or are not
exercising a privacy right. Perhaps they are.

DR. COOPER: Howard, I didn’t know if you
wanted to -- give you a rebuttal, since you were
mentioned by name.

DR. BEALES: Oh, I mean, I agree with what I
think is the fundamental point here. We framed this
issue wrong because if you say this issue is about
control, I think this is a hopeless proposition. Any
more than you can control the people that are in the
transaction chain between you swiping your credit card
and any retailer and it actually appearing on your
statement, this is not a control problem. There is a
consumer protection problem here if things are being
done with the information that are harmful to
consumers, but online advertising is not one of those
things. This is a thing that by and large is
beneficial to consumers, both in terms of the content it makes available to all of us and to markets because of the competitive effects of advertising.

DR. COOPER: Thanks, Howard.

Kind of related to that, I mean, a couple of the policy prescriptions we’ve heard today would -- and I think it was Allie who had suggested that maybe we should get away from behavioral targeting and go to contextual -- back to a land of only contextual ads, but we’ve also seen from Howard’s presentation and from some of the work that Garrett presented is that behavioral targeted ads bring more revenue.

So if we were -- what would be the tradeoff there? I mean, you know, what would the world look like without behavioral targeting where you have less revenue? Would that send more things behind a paywall? Would we have less rich content? Would there be exit? How would that shake out for consumers?

So that’s to anyone who wants to jump in and talk about that.

DR. BEALES: You know, I guess -- I mean, we don’t really know. It’s an experiment that I think we’re better off not running. But it is -- what seems to me to be the most likely outcome is less content.
Some stuff will retreat behind a paywall and survive, but even stuff behind a paywall often comes out and has spillover benefit in advertising markets.

If you think about movies, okay, you got to pay to go to a movie, but the advertising revenue from when the broadcast television rights to that movie are sold is an important part of the economics of the movie business. If you can’t have the advertising revenue or as much advertising revenue, it’s likely to have adverse effects on content, and especially on content from small publishers.

DR. COOPER: Anja?

DR. LAMBRECHT: In addition to the points Howard made, you can imagine a world where there is just more ads on websites, right? So each individual ad impression earns less money and you want to keep the revenue inflow constant, you can just put more ads out there. Now, what is the effect on consumers then is the question. Are consumers going to visit less often because they don’t want to see lots of ads in front of them? Do they have, when they visit, perhaps a lower utility because they get less access to information? That’s another question.

What happens to the quality, right? So we might still be providing information, but if on
average the inflow is going to be less, perhaps the quality, let’s say the generalistic quality, is going down because there is less investment. So I think these are all possible outcomes. How precisely the world would look like is hard to predict.

DR. COOPER: Allie?

MS. BOHM: So I was in the room yesterday, and I think my major takeaway yesterday was that it’s -- the jury is out on the benefits. And, you know, maybe today we have different scientists in the room so they feel differently, but the scientists we heard yesterday really had questions about the return on investment for targeted advertising.

They also really had questions about how we measure who sees the targeted ad and whether advertisers are effectively measuring their impressions. For example, I’m a huge Indigo Girls fan. I see targeted ads for Indigo Girls when they release a new album all the time. I’ve also already bought the album by the time I see those targeted ads. So that impression is wasted on me. I was going to buy the album whether I saw the ad or not, and in fact, bought the album before I saw the targeted ad.

So I think until we have really good data on the return on investment, I don’t think it’s really
appropriate to entertain sort of these doomsday scenarios. I think also, you know, we lived in a world of contextual advertising for a very long time, very, very long time. That’s what we saw in magazines; that’s what we saw in broadcast media. And I’m not saying magazines and broadcast media are the same thing as the internet. They’re not, but marketers still figured out how to reach their audiences. In fact, my understanding is the percentage of GDP spent on advertising actually hasn’t increased since the 1950s. It’s just sort of shifted where it’s being spent, so I think we need more data before we can jump to conclusions here.

DR. COOPER: Anja, and then Leigh. I think Anja had just a really quick point on --

DR. LAMBRECHT: Yeah, just two quick points actually. I think -- so I think what -- you’re probably referring to the need to measure precisely advertising effectiveness, and I think that’s definitely a very important part. You know, and some advertisers -- I work a lot with advertisers, and some advertisers, I’ve seen how some are good and some are less good in terms of mirroring effectiveness. I would say that we’ve come a long way the last even five years, and there’s a lot more knowledge
in terms of measuring precisely advertising
effectiveness, implementing some type of AB testing,
field experiments, and using that information to infer
advertising effectiveness. So I completely agree that
this data is important and should be the fundament of
any such analysis and decision. I think we know a lot
about advertising, know a lot now about advertisers,
know a lot about how to measure and assign a
particular value. And indeed these are those values
that then inform the bidding decisions.

So I’ve done some research that Garrett
previously referred to very briefly where we look at
potential -- or apparent algorithmic bias and look at
economic actions between different economic actor,
which indicate that ultimately in a particular field
experiment women are less likely to see employment ads
for careers in the science/technology/engineering/math
field, but not because of any evilness on the side of
the advertiser, but simply because they have higher
value to other advertisers because women do more
shopping, right?

And I think what this indicates indirectly
is that advertisers do have a pretty good idea who is
buying, roughly how much they would spend, how much
they would earn from a particular impression, and that
informs the bidding decisions, right? So I think there is actually -- we are in a world now where there is a pretty high level of sophistication in terms of understanding advertising effectiveness. That was my very short point.

My other very short point, and then I’ll hand over to Leigh, when we talk about who would actually suffer in terms of content providers, right, who actually benefits -- and I think Howard had this data and this graph before -- who actually benefits? Well, if I’m the New York Times, right, I sell front-page ads. I don’t have any insight about New York Times sales mechanism, but front-page ads I could probably sell bulk to a buyer, right? I sell them all a certain share of front-page advertising impressions because I know I get a lot of high-quality consumers in there.

If I’m a small website, small content provider, then I’m more likely to be in the behavioral advertising business. I’m selling to particular consumers because I can’t make the point that, you know, my content is so great because nobody actually knows my website very well. And, so, you start thinking about moving away from behavioral advertising and retargeting, for example, we need to consider what
are the effects for small sites and small firms relative to large firms, and it’s possible that small firms might be more effective.

DR. COOPER: Next go to Leigh.

MS. FREUND: Yeah, thanks. Just a couple of points here. One, I think, you know, when it comes to ad effectiveness, I’m going to leave the discussion to the economists, but I do think that the perception in this case is reality, that targeted ads are perceived as being much more valuable in the economic industry that we live in, and so, therefore, it’s relevant to talk about it.

I also think in the conversation about contextual ads versus targeted ads, it’s important to note for those that are really worried about the privacy piece of that that contextual ads have data associated with them, too. You know, we do things -- it’s a little different than selling a magazine where you know that they’ve printed this number of magazines and you’re paying per magazine. You have to have some data associated with the ad to show where it was and if somebody viewed it, and so I think, you know, if we’re talking about contextual advertising as a solution for privacy, we have other conversations to have.
But I’d like to bring up the competition issue with respect to the concept of paywalls. Anja just mentioned the New York Times and how strong an advertising market it is. It’s clearly also a strong market for those that would think about paywalls. A lot of consumers -- first of all, there’s the digital divide issue of who can pay and can’t pay to get access to content. And I think access to content is vital, especially in this day and age.

We just finished an election, and access to content was certainly important to many of us who voted, but I also think consumers, to the extent that they’re spending their limited dollars, would probably pay for the New York Times or for CNN or for Fox News or whatever, but they might not -- they might no longer pay for the small single-mom blog or the cooking site for, you know, down-home, southern cooking. And, so, that really chills what makes the internet great.

And, also, if paywalls or micro transactions or whatever other alternative we’re thinking about comes into play, it’s much harder for those smaller publishers to implement that. It’s very time and resource-intensive, so I think there’s a real competitive effect to that as well. Thanks.
DR. COOPER: Garrett and then Howard.

Yeah, Garrett, go ahead.

DR. JOHNSON: So in my other life, my focus is measuring the effectiveness of advertising using large-scale experiments. And I can definitely tell you that there’s a lot to be learned by industry there, but it shouldn’t be completely far off. I mean, the point was raised, you know, we need more data on does behavioral advertising create more value than contextual advertising alone. I would push back on that. Howard presented research looking at price differences.

I’ve done my own version of that accounting for as much as possible differences between opt-out users and the sort of websites that they’re spending time on and the sort of browsing history that they can be associated with. And, still, you know, we’re coming up with very similar numbers, in our case minus 50 percent; in his case, minus 50 percent. On one ad exchange, minus 72 percent; on another -- Avi Goldfarb also has a nice paper with Catherine Tucker comparing before and after in Europe the European e-privacy directive, which is a temporary clampdown on behavioral targeting. And there, they saw that in terms of survey measures about effectiveness, this
went down by two-thirds.

So I think, you know, we’ve seen time and time again that there’s somewhere between a twofold to fourfold increase in value created by online behavioral advertising, so certainly some privacy tradeoffs that we need to think very hard about, but in terms of monetary value, I don’t think that there’s too much debate there.

DR. COOPER: Howard, did you want to --

DR. BEALES: I had two quick points. One is we have a market test here of the value of this kind of advertising, and it’s reflected in advertiser behavior every day. There is an academic literature that goes back at least 80 years, trying to think of the earliest paper I can remember, on the returns to advertising. In 80 years, it has come to no conclusion. If we wait for a conclusion about the academic assessment of the value of advertising, we won’t have any advertising or any internet content.

Second, I don’t think any advertising has ever been purely contextually targeted. Media sellers and advertisers do a tremendous amount of research on the average characteristics of members of the audience in order to figure out where they want to reach the kind of people that they think will buy their product.
I mean, you’ve all heard of soap operas, I’m sure. What many of you may not know is they were created by soap companies to attract a particular audience that they thought would be interested in their product. Even when it looks contextual, there’s a lot more behind it than that.

What’s different now is the information is person-specific rather than the average characteristics of the audience.

DR. COOPER: Thanks, Howard.

I want to shift gears now and talk about southern cooking websites. That just got me thinking. That sounded good. For at least the next 30 minutes, we’ll talk about the consumer protection and competition issues surrounding online advertising, southern cooking websites.

Anyway, I wanted to shift gears a little bit actually to behavioral targeting. I mean, it’s about making predictions of who is likely to buy your product using consumer data to figure that out. Both Allie and Katie touched on this a little bit. More generally, it’s about using -- we can think about using data to make all sorts of predictions, predictions about who -- you know, and target who may be pregnant, who may not be pregnant, predictions that
can lead us to give some people different prices. We heard -- I think Allie talked a little bit about personalized pricing. We’ve seen a little -- we haven’t seen much of this in a while. We heard about Amazon tried it -- allegedly tried 10, 15, maybe longer than that ago and got a lot of pushback on that. There was a little bit in the news about Expedia maybe listing higher-priced hotels -- putting the higher priced hotels higher for Mac users than PC users. That was a few years ago, but we haven’t seen a lot of that.

So I kind of had a two-part question here. One, why don’t -- we seem to have the data to target ads and it happens, but we don’t see a lot of -- we don’t really seem to see personalized pricing but we hear a lot talked about that. So that’s kind of question one, is maybe why don’t we see it.

And then number two, just more generally from a policy standpoint, should we -- when we think about accurate predictions where, you know, some may win and some may lose but nonetheless they’re accurate, should we think about those as a privacy harm more generally? So let me throw that out. Allie, I don’t know if you want to talk.

Well, I’ll go Allie and then Katie. I know both of
you have expressed an interest.

MS. BOHM: Sure. So I’m going to talk first
about one area where we do see personalized pricing.
And the Wall Street Journal did an interesting study
on personalized pricing. For any of you with
computers, you can Google it. But one of the things
they found was they were looking at Staples and, you
know, pricing of various products at Staples. I think
there are a few other examples in the article, but if
you lived closer to a rival store, you would get a
cheaper price. Understandably, right, they wanted you
to buy online from them, not, you know, go down the
street to the store.

It turned out that the people who were
getting lower prices also tended to be wealthier
because those are the folks who have stores near them.
So, you know, sort of query as to who this
differential pricing is benefitting and whether it’s
actually entrenching some of the economic divide that
we currently experience.

I think as to, you know, when predictions
are accurate is there harm, so I think the question is
accurate about what. You know, so if you are
advertising senior management positions in STEM fields
and you only advertise to men because, you know, most
people who are in STEM fields are men or because somebody bid higher in the instant ad auction, you know, to show women something for nail polish -- that was really condescending, I’m sorry, or really flippant, I’m sorry.

Maybe you get a great job candidate, right? Like maybe that happens, but two people lose. First of all, you lose because you probably missed out on a really awesome woman who might have transformed your business; and second of all that woman who might have had a really awesome transformative experience in her own career missed out.

So I think for me, the who loses is really what are you advertising. You know, if you’re advertising an Indigo Girls album and I don’t see the ad, I’m still going to buy the album, I don’t lose out, right? Maybe Indigo Girls lose out, however, if I see the ad because they’ve spent the money on the ad to show it to me and I was going to buy it anyways. But when it gets to job postings or housing postings, you can see loss on both sides, losing qualified candidates and then also qualified candidates losing access to what could be real cool opportunities for them.

DR. COOPER: Thank you for the ‘90s
reference, Indigo Girls. I did not know they were
still around or someone your age would even know they
existed.

MS. BOHM: They put out a really awesome
symphony album. You should check it out. That was
your promotion for this panel.

DR. COOPER: Katie, I’ll let you jump in
next.

MS. MCINNIS: So we don’t really know about
the prevalence of first-degree price discrimination --
also known as dynamic pricing -- because it depends on
outside researchers to uncover these practices. And,
so, that’s one reason why we don’t know about them.
But Consumer Reports has been since the early -- since
2000 -- has been looking into dynamic pricing schemes
in the online travel and airline industry. And we’ve
found some instances of price discrimination, first-
degree price discrimination, for different users
across a couple different websites.

So it’s definitely going on at least in the
airline industry, especially since the Air Transport
Association, which is a global airline industry trade
association, unveiled recently their new distribution
capacity, which was to enhance product differentiation
and to have a dynamic availability of fair products,
that means prices, for consumers.

And, so, this is based on your information as you travel the web. And, so, they’re giving you a different price than your neighbor, which I don’t think seems fair. And, also, there’s no transparency around how these fair prices are reached or what kind of information they’re using in order to serve you with that price.

We’ve also seen first-degree price discrimination in ride-share apps such as Uber and Lyft, which uses a lot of personal information on your phone, including your battery, in order to give you a different kind of fare increase than another individual might have.

In addition, Uber in different countries has identified who might be regulators who might regulate their activities and has served them with a completely different ad interface in order to skew how they felt and how they might regulate this industry. So first-degree price discrimination and first-degree discrimination on what kind of ads you’re served with, what kind of app experiences you have are definitely happening. We just don’t have a lot of transparency around it, which is one reason why we endorsed Senator Chuck Schumer’s call for the Federal Trade Commission
to investigate the airline industry and get some real answers about the use of dynamic pricing because we can’t just depend on consumer groups like Consumer Reports to unveil these practices. We have to ask for more policies from our regulators to protect us in the first instance.

DR. COOPER: Let’s see, Anja, I know you wanted to jump in.

DR. LAMBRECHT: Quickly because you asked is it that the accuracy of prediction can lead to privacy harm. I think that’s a very interesting question. And I think on the one point, I would say as a marketer, fairness is a very fickle concept. You know, it’s very hard to define what consumers regard and disregard as fair. And, you know, I can also say it’s the accuracy of the prediction that somebody is or maybe self-identifies as a student or a senior citizen of privacy harm because everybody else in the population will pay a higher fare for buses or entries to the zoo.

So I think to some extent, you know, the predictions are being made by somebody else, so people self-identify, but it’s really such a different type of question.

DR. COOPER: Thank you, Anja.
Howard, I know you wanted to jump in.

DR. BEALES: Yeah, I’m going to make two points, I guess. One is in a lot of contexts, price discrimination is a good thing, not a bad thing, when it happens in markets. And the airline industry is actually a good example because it probably couldn’t survive if it could only charge one price to everybody. They need to fill the plane. That’s an important constraint on costs and the availability of air transportation to people who can’t afford as much, who can’t pay first class.

And it happens because they give lower prices to people who value the transportation less that are willing to stay over a weekend as an example that’s been with us in the airline industry for decades. And why using information gathered online changes that fundamental economics or the fundamental benefits of that practice escapes me.

Second, about accurate predictions, I don’t think -- I mean, accurate predictions are generally a good thing. And predictions based on more information are generally a good thing. If you don’t have information, you fall back on stereotypes. And those suppress information and they use -- misinformation in a lot of cases.
When I was at the FTC in the late '70s, we brought a lot of equal credit opportunity enforcement actions. And every time we looked at a judgmental creditor, which is somebody who looks at you and assesses your worth and willingness to repay and says, okay, I’ll give you a loan and, no, I won’t give one to you, there was discrimination. Every one of them.

If you looked at the people who used models and risk predictions and credit scoring, there wasn’t. All right, more information reduces discriminatory problems in general -- not in every instance -- but in general rather than making people rely on the stereotypes they carry around with them and don’t even know they have.

MS. BOHM: Sure. So I think that, you know, that may generally be true, but sort of an important caveat to what Howard just says is it really depends on what the data set is made from. So there was recently -- Amazon revealed that they had to stop their -- and I realize I’m getting outside of online advertising here for a second, but bear with me.

Amazon had to stop their algorithmic resume screen because the data was built on who -- the training data set was built on who has worked at Amazon.

And the algorithm was systematically pulling
out lacrosse players and people with male names and
systematically dropping out of consideration people
who went to all women’s colleges and other folks who
had, you know, sort of clear indicators that they were
female because Amazon, like many tech companies, has a
predominantly male workforce.

And, so, yes, it is certainly true that data
can be used to undermine -- to eat away at insidious
biases. It can be used to entrench those biases and
to hide those biases and sort of make them look
natural because, you know, the machine is not biased,
right? The machine just came up with it. We don’t
know how it ended up with all of these male lacrosse
players as, like, the people we should hire next, so
it can cut both ways. That’s what I want to say.

DR. BEALES: There are discrimination
problems out there in the world. There’s no doubt
about that, but they are discrimination problems.
They are not privacy problems.

MS. MCINNIS: So I just wanted to make the
point that having accuracy in the kind of behavioral
ad delivery, whether or not there’s a privacy issue in
that, is not necessarily the framing that I would
suggest. I would say that the privacy issue occurred
in the outset where you collected my data without
permission, online and offline, to create a kind of personalized dossier about me with conclusions that may or may not be correct in order to serve me with behavioral ads and also different prices. And so that is, I think -- the privacy infringement occurred at the beginning. Also, when you didn’t follow my do-not-track signals, which many companies do not follow, even though most browsers allow you to signal that.

In addition, I just wanted to point out that most consumers -- some consumers might feel like they’re benefitting from targeted ads, but a lot of consumers do not and, in fact, many consumers feel freaked out or concerned about the kind of advertisements they’ve been served with. The kind of conversations around whether or not Facebook or Instagram is listening to you is the kind of example here where consumers have no idea how they’re getting such targeted advertisements based on things that they only said out loud.

And, so, that kind of disconnect between consumer knowledge and the kind of tracking that’s happening is a huge problem that should be addressed before we talk about the efficiency or the worth of these advertisements.

DR. COOPER: Let me -- Allie, maybe you can
answer this or react -- but while we’re on the subject of price discrimination or personalization and predictions, we have a question from the audience that I think is a good one, sort of clarifying perhaps. You know, you mentioned dynamic pricing, but is dynamic pricing really price discrimination because dynamic pricing is really just adjusting the price to supply and demand conditions? So should we think about that as price discrimination or just kind of changing the market equilibrium based on shifts in supply and demand?

MS. MCINNIS: So I don’t really think it is about supply and demand, right? It’s about my possible willingness to pay. And by having these kinds of tailored prices and tailored advertisements to me, you’re also diminishing my share of the consumer surplus, which is a harm.

MS. BOHM: So I want to address two definitional things. I think there’s sort of dynamic pricing, sort of lowercase D, which is, hey, most of the tickets on this train are sold out, therefore, for everyone, all of the tickets are more expensive. And then there’s the kind of dynamic pricing Katie is talking about, which is, hey, they’ve realized that I live in a wealthier area and, you know, I’m a lawyer...
and whatever and they realize I really desperately want to go to New York this weekend, and so they’re charging me a higher price. There are two different things there, and at least to me, one of them raises more concern than the other.

I also want to really quickly address Howard’s point that that’s not a privacy concern, that’s a discrimination concern. I think there’s a definitional thing there, too. So there are certainly folks who are concerned about privacy as a “I want to be left alone, I am the king of my castle, leave me alone.” And there’s nothing wrong with that. That’s really important. You know, privacy does extend from sort of the Brandeisian property rights idea, but there’s also privacy is a way that we make sure to protect -- or I should say lack of privacy undermines some of the other values that are really important to us. And that includes things like civil rights, access to opportunities, having fair access to information online, sort of what does lack of privacy lead to? Informational disparities, discriminatory access to opportunities.

And, so, when I talk about privacy harms, I do think about some of the discrimination and more civil-rightsy harms because I think that, you know, as
Katie sort of more artfully explained than I did, these are sort of when you take the privacy violations and the personalization as far as they can go or maybe not as far as they can go but, you know, sort of to their conclusions, that’s where you end up.

DR. COOPER: Thanks. So I think both, Katie and Allie, in your presentations you had talked -- said that, you know, self-regulation doesn’t appear to be working in this market, so I wanted to put that on the table that, you know, has self-regulation failed to protect consumer privacy here? And if that’s the case, what’s the alternative?

So I’ll let Garrett kind of take the first cut at this. And then Leigh may have something to say. I’m not sure.

DR. JOHNSON: Great. Well, I’ll start by saying that I think an opt-out option is highly desirable in that we have the kind of two facts here. Online behavioral advertising generates a tremendous amount of revenue for publishers, and also we have people that are very concerned about their privacy. So an opt-out allows these things to coexist.

Other policy options have to go down the ways of hard tradeoffs of ignoring one or the other considerations. So I think the AdChoices program has
some advantages. Because it was rolled out by industry, it was done relatively rapidly. It had good coverage. It’s kept up with a fast-moving technology frontier, but there’s certainly, you know, lots of complaints about it. You would hope that the industry would apply some of the same determination it does to putting identifiers on consumers’ computers as it does to making sure that the opt-out choice remains preserved and isn’t just deleted by a cookie.

They have done some work on this by creating a ad extension -- an app -- sorry, a browser extension that preserves these preferences, but that’s not very easy to find on the website. You’d also expect that if consumers care so much about online behavioral advertising, you would also expect that they would have strong preferences against things like database matches. And, so, this would be something that the industry might want to consider extending there as well.

Now, the other question was about alternatives. So this is a really tricky thing, right, because one alternative is to go down the way of a browser do-not-track route. And that would have the advantage of preserving people’s privacy preferences, but it does have the challenge that
browsers could set the defaults in ways that don’t
fully internalize the externality that that would have
on the advertising industry and on the web.

The GDPR, which we’ll be talking about
later, is kind of an interesting case because the
language of the GDPR says that you need explicit opt-
in, where consumers need to present to every single
company in every single use of their data. That’s
sort of the de jure expectation, but the de facto
thing we’ve seen so far is an opt-out. And as Anja
says, the experience of being a European consumer on
the web is not super fun. You get to see all sorts of
consent pages every time you visit a webpage, and
about 90 percent of these people are sort of going on
without opting out according to a data release from
Quantcast.

A couple of people have brought up this new
bill presented by Senator Ron Wyden, where he
essentially is arguing for a federal do-not-track
page, somewhat like the Do Not Call List. As I read
the legislation, it’s wanted to make the Federal
Government a clearinghouse for some of these consent
mechanisms. You know, there may be some arguments
that suggest that the federal Do Not Call List did a
much better job of protecting consumers than the
industry version, but I think if you’re the FTC, you should think very, very long and hard about whether you want to be doing this job, given just how technologically sophisticated these things are.

So I think I’ll leave it there. Thanks.

DR. COOPER: Leigh, I’ll let you --

MS. FREUND: Thanks. Yeah, I mean, when I think about content -- or the question which I’m asked a lot, which is, is self-regulation failing, has it failed to protect, especially now that we’re talking about a new privacy legislation or regulation, my answer is always as compared to what. You know, what is the alternative? The industry came together in as early as 2000 and tried to address the issues that were concerns at the time.

It’s kind of similar to -- one of my members gave me this example, so I’ll give them credit, but I’m going to use it. Seatbelts are not failing because we still have car accident deaths. Seatbelts are saving lives. A code of conduct that has strong privacy protections is helping. If there is more we should be doing, we’re happy to engage in conversations to do it, but I think you can’t measure the way the industry may have developed without a code of conduct that has strong privacy regulation or self-
regulation within it.

So many of our members have declined business model opportunities, declined to do certain things, declined partnerships with companies because those things would not comply with our code. So I do think we have prevented harm from happening in the marketplace.

And, so, I think the opt-out, as Garrett mentioned, the opt-out regime certainly is something that we strongly advocate for, but I will note that our code does contain a requirement for opt-in consent when the information that we’re using is sensitive enough. So, for example, precise location data or sensitive health data. Those things cannot be used without a user’s explicit opt-in consent. And, so, if there are more of those things that we should be considering, then that is something we are always talking about and always trying to do, but I resist strongly the argument that self-regulation has failed.

DR. COOPER: Katie, I know you had your hand up earlier.

MS. MCINNIS: Yes, thanks. With all respect to Leigh and the NAI, the privacy principles they came out with in the early 2000s, which, by the way, was in response to avoiding legislation around this issue,
were not strong even back then. And then we’ve seen a
complete abandonment of these principles over the
course of a few years, right? These principles were
only supposed to be followed by coalition members,
then NAI allowed for other associate coalition members
to join, but they don’t have to follow it. They just
have to pay dues. And a few years after --

MS. FREUND: That is completely 100 percent
untrue, by the way. You must be mixing up trade
associations or self-regulatory organizations.

MS. MCINNIS: Okay. But only a few
companies are following the regulations, even just a
few years after they were introduced. And the fact
that consumers don’t know a lot about these tools, I
think, would be another example of the failure of
self-regulation and the call for a data policy here at
the federal level, and the number of committee
meetings we’ve been having around it is another sign
that consumers are not satisfied with the self-
regulatory tools that have been provided to them.

MS. BOHM: Well, so to pile on, so first,
let me just say that, you know, self-regulation is an
important tool as far as it goes, and public knowledge
has been willing and interested in working with folks
in the industry to come up with the best self-
regulatory tools they can. They only go so far. And there are a few reasons for this.

First of all, I talked about AdChoices, right? So that was their self-regulatory tool was this tool that like, eehh, we know what we would be useful to consumers, so let’s do this other thing. Or I should say, we know what would be more useful to consumers, let’s do this other thing.

I think the other piece is even taking Leigh, you know, at her word, and she’s been quite lovely to sit next to, is not the one Katie is talking about. Even if all of her companies are really, really good actors and they’re turning down business opportunities with really bad actors, there are still the really bad actors out there who aren’t going to voluntarily play in a self-regulatory regime because they feel that they can get ahead if they don’t.

Now, you may be saying, but, Allie, those bad actors aren’t going to follow the law anyways, but if there was a law and, you know, it gave enforcement authority to an agency or gave folks -- or to state AGs, or gave folks a private right of action, there might actually be redress for the folks who don’t follow the law.

So I do think that there is an important
role for legislation here, and I think we’re seeing
that in the conversations that are happening in
Congress now. And I do want to say that, you know, I
don’t see that legislation as legislation as pertains
to the advertising industry, right? I see that as
comprehensive privacy legislation that applies to all
of the actors in this space. Some of them are
advertisers. Some of them are ISPs. Some of them are
completely other entities. So it’s not a “let’s gang
up on the ad industry.” It’s a “there’s a lot of data
out there, there are a lot of risks associated with
that, let’s have some rules of the road, let’s create
expectations for businesses, and let’s create some
protections for consumers.”

And I think there’s an appetite for that,
and I think it will also benefit groups like Leigh’s
that want to be doing the right thing because they
won’t have that competitor over there doing the wrong
thing.

MS. FREUND: Yeah, and just if I could just
add to that, I think, you know, absolutely. I think
federal legislation and comprehensive privacy
legislation is something we are absolutely thrilled to
talk about. We’ve been trying to advocate, you know,
for the right privacy protective practices for 20
years. And, so, I think -- I do think, however, that self-regulation has a strong role to play in that. And I think, you know, the FTC is already resource-constrained, and we can certainly help keep those good actors in line.

And I agree with you about the bad actors. I tend to not like them either. So, you know, definitely, but I do think that privacy legislation has to balance all of the stuff that we've been talking about today. So it has to balance privacy concerns with the innovative, open and free internet that we have today, and it has to find that right balance.

And so, you know, we are happy to engage in those discussions and looking forward to it.

DR. COOPER: I think we have about a minute left by that clock, but we're right up at 2:30 by that clock because I think we started a little late. So rather than getting into my next question, which was what would privacy legislation look like, and solving that in a minute and 15 seconds, well, I think we actually did, I think Leigh and Allie agreed on what that's going to look like, and they're working on it right now, up with Capitol Hill.

So, anyway, please join me in thanking our...
panelists for such a vibrant discussion today.

(Applause.)

(End of Panel 3.)
PANEL 4: THE IMPACT OF PRIVACY REGULATIONS ON COMPETITION AND INNOVATION

MR. DR. GILMAN: Good afternoon. I am a man bereft of name tag, Dan Gilman. I work at the FTC’s Office of Policy Planning, and I’m really glad to be hosting a terrific panel here this afternoon. Glad to have you all here.

A couple quick things. First, as before, we have staff who can collect question cards if you have questions. Just raise the cards up or ask for a card, we’ll get them on in. Some of them we might be able to read to the panel; others we’ll take back to FTC with us.

Second, in competition with my colleague James Cooper over disclosures, I want to point out that should I happen to say something of substance here today, it does not necessarily reflect the views of the Federal Trade Commission or any individual Commissioners or the Office of Policy Planning at the FTC.

That was an unanticipated effect of the disclosure. Any questions I ask here today do not necessarily reflect the curiosity of the Federal Trade Commission or any of its individual Commissioners or any other human person.
We have a very fine panel here. I’m not going to read everyone’s bios. We have them available in print outside; we have them available on our website. I do want to just introduce people by name and affiliation and then leave time for them to do a brief presentation, six, seven minutes, and then we’ll jump into our discussion.

So moving from my left, Jane Bambauer who teaches at the University of Arizona James E. Rogers College of Law; then Avi Goldfarb, the University of Toronto’s Rotman School of Management; Anja Lambrecht of the London Business School; to her left, Amalia Miller, the University of Virginia, where she’s a Professor in the Department of Economics; one down, I can’t even see over people. Oh, Lior Strahilevitz from the University of Chicago Law School; and, finally, Rahul Telang from Carnegie Mellon University.

So let me just turn the floor over to Professor Bambauer.

MS. BAMB AUER: Thank you. Thanks so much for including me. So I’m glad I’m speaking first because it’s some of the gaps in our knowledge of how privacy and potential privacy regulation is going to affect innovation that I’m most interested in, or at the sort of highest level of conceptualizing what it
is that we’re trying to protect when we protect privacy. And this is -- I think it’s important to get definitions of privacy harms right so that we can then compare them to potential tradeoffs with innovation. And I thought for today’s comments I would actually use the Cambridge Analytica example to illustrate that it’s actually quite hard to get concrete and to get agreement about what types of privacy harms we ought to have the Government intervening to manage. And the reason that I like using Cambridge Analytica is that almost everyone thinks something went wrong, and we all kind of use it as -- well, we all say Cambridge Analytica and we all nod and we all agree -- you know, we all use it as sort of a placeholder for “ick,” but if we actually -- if we each individually define what we think the problem is that the Government needs to solve, I think we’d start rapidly splintering into different groups and could not agree on what direction to go in.

So the first thing that might have gone wrong is that Facebook users didn’t realize that when they were taking this little personality survey that they were exposing even their own full Facebook profile, including every “like” that they had ever done on Facebook to this researcher at Cambridge, let
alone the Facebook profiles of all of their friends, right. So I think descriptively that’s accurate, that Facebook users did not realize how much they were waiving away when they clicked -- you know, when they saw the screen warning them about the privacy implications and it’s like yes, yes, yes, just get me to the survey, I need the survey.

So I’m going to treat the transmission of their data as a decision that Facebook made, and I’ll come back to the consent idea. But even if we think of this as being ascribable to Facebook, I still think it’s hard to define precisely what should be done. So is it that the problem is that we’re letting anybody, either Facebook or third parties, study people without doing IRB-style informed consent?

So, you know, inference winds up being at the heart of much of what we love about internet and smart devices and smart services. AB testing actually involves interventions. I mean, they’re randomized controlled experiments that for some reason the industry call AB testing. And, so, even, you know, traditional interventions are a normal part of innovation, and I don’t think that we want to prevent that from happening or put very cumbersome processes in the way.
So then maybe what we should do is allow Facebook to study its users in that way but not permit third parties to have access to that sort of -- either the raw data itself or to the sort of hypercustomization that that raw data would allow third parties to do. Well, that gets to the heart of Facebook’s and Google’s, for that matter, business model, right? So there’s a reason that Mark Zuckerberg, in his Congressional hearing testimony, rejected the idea that Facebook should shift to a pay service. I think he knows that people -- he knows what many of the presenters at this conference have already said, that people won’t actually pay for the services that they get in money, even though they will pay in data.

I don’t think that Congress is ready to kill Facebook. I don’t think we should be ready to kill that sort of business model. And, actually this relates to the opt-out idea. On the last panel, there seemed to be at least a little bit of consensus for, well, when a consumer opts out, that at least should be honored. And I’m not so sure about that. As long as opting out continues to happen at a rate of 0.24 percent, sure, let people opt out. It’s a small cost that content providers like Facebook can easily
handle.

But if John Oliver convinces a bunch of young people, millions of people to opt out one day, then that business model is severely compromised, and so I don’t think -- you know, consent itself could, at least if it’s legally enforced, could wind up wiping out the payment model that we’re used to.

Okay, so, finally maybe then the problem is that Facebook can allow traditional advertisers to have access to this data and to use hypercustomized content, but there’s something wrong with letting, you know, untraditional content providers like political actors have access to the same data or have access to targeting in the same way.

And this really gets to the heart of the externality that I think many people think occurred with the Cambridge Analytica story. The line differentiating, though, like sort of standard advertising and the kind of content that we think is suspect because it might distort elections, that’s awfully hard to define and, you know, we’re essentially -- what we would be doing is asking either Facebook or regulators to identify what counts as a bias or a manipulation versus just content -- persuasive or maybe nonpersuasive content -- that
people seem to want to view based on their clicks. So this kind of raises questions that have been studied for decades now in the advertising context of created demand, like is there some -- is there something about firm -- you know, content providers like InfoWars that’s actually creating biases and demand for certain types of content that it’s bad for people. Or is it that we’ve kind of all galvanized around blaming Facebook and Cambridge Analytica for a problem that really just kind of is at the heart of American democracy, that basically that the only problem with democracy is its own voters, right.

So, I’m raising a bunch of questions without offering answers right now, so I want to share that the way I’m starting to think about this, and I’m sort of in the early phase, but that there is some, you know, evidence-based work with, is I’m starting to look for early signs of times that people may be engaged in a short-term techno-panic and may be sort of psychologically and naturally geared toward resistance and hesitancy to a technology that they will in a short or medium amount of time wind up adopting and even liking versus persistent forms of privacy preferences that seem to be nearly universal,
and that seem to flow and be persistent even when
technologies are changing. So I can say more about
that during the Q&A, but I don’t want to take more
time.

DR. GOLDFARB: Hi, I’m Avi Goldfarb. So a
lot of these ideas that I’m going to talk about over
the next six minutes were touched on by various people
over the course of the day, but I want to dig into a
few of them -- to the extent that’s possible in six
minutes -- to give a high-level introduction to these
ideas.

So we think about privacy. What privacy
used to be was either the paparazzi, it was either
there were a handful of people who were declared
public figures and they had essentially different
rights than the rest of us in terms of the
communication of their private life, or we emphasized
security services and the police, and there were
restrictions on how they could surveil the public.

Privacy’s now a business issue. That’s why
we’re here, that’s why it’s at the FTC, privacy’s a
business issue. It used to be almost purely a legal
issue or a media issue. Now it’s more than that. Why
is it a business issue? It’s a business issue because
of all the data that digitization of media and of all
sorts of other aspects of life have enabled. And, so, what we need to recognize when we think about this as a business issue is, we do know already that privacy regulation can restrict innovation, okay. There is -- the empirical work so far is that there is a tradeoff. That doesn’t mean we can’t theoretically construct a situation where privacy would enhance innovation, but the dominant empirical work so far, and you’ll hear more of this later, but this is, at least my work with Catherine Tucker has been that privacy in the online advertising space, when you restrict information flows, well, there’s a reason that those companies wanted that information. They could innovate with that information; they don’t do as well without it. And that’s a theme you’ve heard. You heard it from Garrett, and you heard a fair bit in the last panel.

Another thing to recognize, and this is a thing about competition, privacy regulation can help large incumbents. Okay, so what do we mean by that? To the extent that there is a -- it happens in two different ways. So one way is you might be much more likely to trust Google than some new startup that you’ve never heard of. And so you might be more likely to give an old, established, large company,
large brand, data about yourself than a startup.

In addition to that, what this particular paper is about is another idea, which is that if you touch a company in lots of different places or, in particular, a company touches you in a lot of different places, that means that one opt-out can help that company in lots of different ways. And, so, if you’re a startup or a smaller company that really is only doing one particular product, they have to pay effectively the same regulatory cost to get you to consent as a very large company. And that can create an opportunity, and essentially benefit incumbents relative to entrants, benefit large companies at the expense of small.

So if privacy, if the empirical, theoretical structures that we have suggest privacy is going to hurt innovation and it might hurt competition, well, why are we talking about this at all? And the reason is that consumers actually do care about privacy. So this was a debate we’ve heard. Yes, consumers aren’t opting out of these things, but when we fix a particular context, we see more privacy-protective behavior today than we used to. So it’s much harder to get people to fill out surveys than it used to be.

The Census has to work harder to get people
to fill out the Census or information. Given a context for communicating data or, when we fix that, we’re even more privacy-sensitive than we used to be.

What’s changed, and the reason why we had the discussion or at least I think the reason why we had that discussion in the previous panel on, yeah, but consumers don’t seem to be doing anything about it, is because along with more privacy concern has come with huge benefits to data sharing. And so even if the costs are increasing or the perceived costs of sharing data are increasing, the perceived benefits, the ability to have Facebook and Google, et cetera, has grown as well.

And so the point is there’s a tradeoff between privacy and innovation. In lots of cases there’s a tradeoff between privacy and competition. But that doesn’t mean that privacy is bad, it just means that we need to recognize these as distinct values, and we need to think about weighing them against each other.

So the policy issue -- the theoretical policy issue is essentially privacy regulation can’t be too strict because if it’s strict it will stifle data-driven innovation and competition, right? If you don’t allow firms to use data, they can’t use data.
And if data enables competition, as we heard earlier today, or as I just described, or if data enables innovation, it’s maybe the core input into a lot of the most exciting technologies today, artificial intelligence, ad exchanges, et cetera, then data -- you know, then privacy regulation will be too strict. Or strict privacy regulation would hurt innovation, hurt competition.

That said, we got to remember, privacy regulation can’t be too lax either. If it’s so lax that consumers don’t trust companies, then the companies won’t get the data either. In Europe and the United States, at least the empirical evidence so far is we’re a long way away from that. It’s not clear if we are worldwide.

So getting the balance right is the key challenge here, and given the importance of data to innovation, and AI in particular, privacy policy is one important way the regulatory environment is going to affect the rate and direction of innovation and the degree to which competition plays out.

With that, Anja.

DR. LAMBRECHT: Thank you. So I’m going to build directly on what Avi just said and start with a particular setting which is financial services. And,
so, you can well imagine that in financial services, personal finance, consumers, we all worry a lot about privacy and security and our data in particular settings. I studied together with my coauthor at the introduction of a, at the time, quite new technological service, which in early 2000s, was online banking. And the question is how do you actually want to start sharing information with consumers for the consumer’s privacy and security?

Now, nowadays, online banking is something we’re used to on an everyday basis. In the early 2000s, it was not very much prevalent. I think there are lessons that we can learn for the use of new technologies in today and in the future.

What is the underlying tradeoff? Well, of course, especially in this type of setting, consumers care about privacy and security verification hurdles to prevent others, third parties, to access their financial information and potentially execute transactions, such as money transfers, in these consumers’ names.

But the other point is that consumers, and Avi briefly alluded to that, also care very much about ease of use or else they may not adopt the new technological service, right? And, so, this is
ultimately the tradeoff we worry about a lot, when we speak about privacy and technology adoption, and the question is what are actually the implications?

Now, in that particular study, in that particular empirical setting, what we observed is that because of privacy and security concerns, the bank implemented multiple hurdles for a consumer to use the service, starting with requiring a paper-based signup, then sending to the consumer login information that allows the consumer to use the service, in terms of gathering information but not actually executing transaction to the latter, an additional piece of information, transaction numbers were required.

And, so, if what we have ultimately in this type of setting and more generally it’s a multistage adoption process where the consumer goes through the hurdles of signing up, logging in, doing a transaction and potentially substantive over a time repeat usage, given these hurdles that were implemented in order to protect consumer privacy and security, what we have here is that actually since the consumer had to go through all these steps, it introduced substantial delays in the process.

And what we find is that delays that come here through this process were exogenous shifters. It
actually reduces at any point in time the probability a consumer would go to the next stage, say from logging in, to actually doing first transactions. And these effects are significant. So for example, more than a third of consumers would not log in in the month of sign-up; about a third of consumers would not actually do -- initiate a transaction in the month of their first log-in. And so you can see what the knock-on effect of those are, both for consumers who now do not use a service that is intended to make their life easier perhaps or be more efficient in actually handling and transferring their money, keeping a certain balance in their banking account, and, on the other hand, for firms who still needed to deal a lot more with paper-based transactions.

And, so, to wrap this short summary up, the key insight here is that, well, complex security protocols that you might want to set up to ensure privacy and security are very personal, important pieces of information that might, on the other hand, actually reduce adoption. And to the extent that we think adoption of new technologies and innovations are good for consumers, and maybe for the economy more broadly, that raises a question about where the balance would be, and what could be done to eliminate
these frustrations by consumers while at the same point in time encouraging adoptions.

And, so, the key point, therefore, is whether efforts that we have to ensure online data security and the privacy can, therefore, have, and how they can have, unintended consequences for the diffusion of new anonymitive services. And I think any discussion of these questions will need to consider such unintended consequences. Thank you.

DR. MILLER: So what I’d like to do with these remarks is to talk a little bit about some empirical research that I’ve done focusing on the area of health privacy and looking at the effects of different privacy, regulations related to healthcare data. And I focus on health in my research, health privacy in particular, because health is an area where we have sensitive information, the privacy issues can be really important, the data can be persistent. And also it’s an area where in the United States there’s been the most regulatory activity on the part of states.

So the first paper I want to talk about looked at the effect of regulation that was targeting one aspect of data privacy which is data security. It’s about controlling information and making sure
it’s not being used in ways that are not intended.
And specifically what we did was we looked at what
happens when states passed laws that were encouraging
data security practices, and they were trying to
courage firms to use, to adopt encryption technology
and encrypt their data.

What we found is that when states had these
encryption exemptions in their data privacy rules that
basically promoted encryption, we find that more
hospitals adopted encryption and data loss went up.
Why is that? Human error. So what happened was the
technology, the policy was pushing a technology;
people -- firms responded by adopting the technology,
but it didn’t achieve the policy goal.

And I think that the theme there that I want
to kind of draw out from this research that I’ll come
to again is that when we think about designing our
policies, we want to think about the goal, and we want
to think about the details of how we get there. And,
so, focusing on a particular technology, especially in
a sphere where technology is evolving, can often lead
to weaker effects than we expect or even reverse or
pervasive effects.

That theme is going to come up on the second
paper I want to tell you about, which was a paper that
looked at the efforts -- some policy efforts -- that
were made to encourage the adoption of health IT as
part of the HITECH Act. And specifically the goal,
one of the goals, was to try to encourage hospitals to
exchange health information about patients. The
policy lever that was applied in trying to achieve
this goal was promoting a technological capacity on
the part of the hospitals. So they had to show that
they had the technology to be able to share data and
to exchange data, and that it could be interoperable
with other systems.

What we find -- so what we find in our
research is that the focus on technology again was not
sufficient. We find in our research that hospitals
that were part of big hospital systems, with lots of
hospitals in them, were actually more likely to
exchange data with other hospitals. They were more
likely to have the capacity to exchange data, but they
exchanged data internally with other hospitals in
their system.

What they didn’t do, or what they were much
less likely to do, was to share data outside of their
system, okay. And, so, the reason for that is that
they didn’t necessarily have a business incentive to
want to share the data, right? The hospital is
producing this information. They are creating medical records, they’re collecting information, they’re storing it and they are not necessarily going to want to give it away freely to their competitors, to other hospitals in their local area, even if there is a policy benefit or a public benefit for that.

And, so, what we have is this creation of information silos; by focusing on technology we didn’t prevent that. So this Echoes, again, the first theme about thinking about how we design our specific interventions and how that’s important. The second theme I think is even broader, which is, it relates to this question of how do we think about data, health data about individuals, but actually consumer data or individual data more broadly, okay.

And this question about ownership, I think, is a little bit new and special here. The fact is that companies or businesses or organizations are creating data. They are collecting data. It’s their data. They might think they own it, but it’s data about people. And, so, people might think that they have some ownership, and it’s actually ambiguous who should own the data, and even who does own the data.

And I think this ambiguity about property rights, and about even what there should be, is an
area of concern and an area that leads, I think, to some potential inefficiencies. It also means that when we think about privacy policy there’s not a clear binary on/off of do we protect privacy or not, but there’s -- or how much do we protect along a single linear dimension, but there’s questions about what aspect of privacy are we targeting? Are we talking about the ability to collect it, to store it, to exchange it, or to use it? Are we talking about users’ rights to access their own information?

So the third paper that I want to tell you about, this third research paper also in healthcare, looks at variation in policies, in privacy policies that actually took different approaches, all to address the same common issue of genetic privacy. So different states took different approaches to protecting genetic information, and what we look at in our research is how these different approaches affect the rates at which individuals were willing to get genetic tests to predict their cancer risks. So this can be very sensitive information; you think privacy protection could be important.

What we find here is that the type of the protection actually makes a big difference, and that the different forms of protection had completely
different effects. So a policy approach that focused on informed consent and letting individuals know about exactly who had the property rights, and how that information was going to be used, and about their privacy concerns actually had a significant effect of lowering rates of testing. When the privacy laws instead emphasized or required a, required permission from consumers for their own data to be redisclosed or sent to a third party, so it gave the individual more ownership, that actually promoted adoption.

A third approach that’s actually the most common approach used in privacy protection for genetic information is a focus on how the data can be used. And, so, rules like that that limit the ability of employers or insurers to use genetic information, in terms of pricing or market interactions, actually had no effect on adoption. So these antidiscrimination laws that focus on the use of data were not effective.

There are various reasons for these effects, and maybe we’ll have time to talk about it more in the Q&A, but I’m running out of time, so I want to say that, right, so that this, again, I think, highlights this theme earlier about the details of the policy making a big difference. And even policies that almost sound like they’re the same thing, a genetic
privacy law can actually have opposite effects depending on the particulars of how it’s specified.

Okay, so to summarize, I want to just relate this to the two topics of the panel. First of all, as we relate to competition policy, I think the research we found with the creation of data silos in big hospital systems emphasizes the important concerns that we should have about big data and the potential to lock in consumers, and how this does create potentially a competitive advantage for bigger firms and make it harder for incumbents -- sorry, make it harder for entrants and small firms to compete. And it relates to the exchange of information.

Second point is that when we think about innovation policy, all of these papers that I’ve talked about and some that I haven’t had a chance to talk about but that Avi and Anja have talked about, I think all show that there is a real connection between privacy, regulation, and future innovation, and in many ways, privacy policy is innovation policy in healthcare and elsewhere.

DR. GILMAN Thank you.

MR. STRAHILEVITZ: Great. Hi, thanks. So I’ve titled this “Confessions of a Convert,” and I’ll explain that, which is that I’ve been writing about
privacy for 16 years, and often find myself at
conferences of privacy law scholars, all of who favor
a much more aggressive privacy regulation, and I’ve
been one of the few people to say, oh, let’s apply the
brakes, let’s think about the tradeoffs involved. So
I’ll talk you through about a decade’s worth of
research and how I got to where I am now. So exactly
a decade ago, I started thinking about ways in which
the proliferation of reputation information about
individuals was providing all kinds of opportunities
for law and legal systems.

Yelp, and regulation of the medical
profession by the AMA, are substitutes for one
another, and in a lot of respects, the kinds of
information that’s generated by services like Yelp or
TripAdvisor provides a really nice substitute for
government inspectors and those sorts of mechanisms in
making sure that consumers are getting their money’s
worth and that firms are behaving appropriately.

About half a decade ago, I started thinking
about the political economy of privacy, why
differences arise, especially between the United
States and Europe, which have only become more
pronounced since then, and tried to emphasize that
privacy regulations create winners and losers, and
that we can predict who they will be, and that
sometimes the impacts of privacy regulations are often
regressive.

And then just a couple years ago, I started
to think empirically about research. This is actually
a 2016 paper rather than a 2014 one. But in any
event, what we tried to do was make some progress on
one of the chief topics for this panel today, which is
to figure out, well, why aren’t markets developing?
We spent a lot of time looking at the use of automated
content analysis with consumers’ emails for the
purposes of serving them with personalized
advertisements.

We asked consumers -- a nationally
representative sample of them -- how invasive do you
regard these sorts of practices where gmail is looking
at the contents of your emails and giving you
personalized ads, and they said quite invasive -- 7.63
was the mean response on a scale of 1 to 10. And at
the same time, we said, well, would you be willing to
pay any amount of money to avoid it? No was the
response of about two-thirds of the sample. And
that’s another example of the privacy paradox that’s
been mentioned in some of the other research.

Among those who were willing to pay the
median willingness to pay stated in surveys, so not a revealed preference, which was $15 per year, and looking at how much consumers said this data was worth to them versus how much we know it’s worth to Google or Facebook or Yahoo. We think that probably those platforms value it more than the individual consumers do, at least with respect to personalized ads based on email contact.

So that’s sort of what I’ve been working on and how I arrived here today, and I do want to stick by some earlier views that I’ve articulated, which is that there’s still lots of reasons to think that the U.S. has done quite well by having a relatively permissive environment, that we’ve seen a lot of innovation, that there are technologies that have developed in the United States that couldn’t have developed in Europe because people would have needed permission to do -- to develop the kinds of applications that have proved to be so successful, both here and there.

But at the same time, there seemed to be real breakdowns in the self-regulatory model in laissez-faire approach. One of these breakdowns is that consumers often don’t know about all the problems that can arise, whether it’s on a data security side
or on a privacy side, with robust journalistic efforts, with robust enforcement by the FTC. Consumers can find out and make informed decisions. It’s not clear that adequate resources are being developed to identify privacy snafues or data security snafues by either of those institutions.

And the proof is in the pudding, to some extent, which is to say that if you ask Americans, as Reuters did a few months ago, whether they trust Facebook to obey the laws that protect their personal view -- protect their personal info, the majority will say, no, we don’t trust Facebook, even though Facebook has a very, very strong financial incentive in getting people to yes on that question. And some of the other technology companies with probably better records generate majority saying that we trust you, but not anywhere near supermajorities.

Okay. So as we think about privacy from where we are in 2018, I think we can talk about some of the fundamental ways in which the world’s looking worse for privacy and the laissez-faire approach than it was ten years ago. Jane talked about Cambridge Analytica. Hopefully we’ll be able to talk about that during the Q&A.

I probably think there are things we can all
agree about that Cambridge Analytica did wrong. Most prominently, I should have the right to reveal or not reveal personal information about myself. And I didn’t choose to delegate that to the 800 friends I have on Facebook. And when Facebook organized their API, such that any of 800 people could choose to reveal a lot of information about me that was potentially sensitive, that strikes me as a technological breakdown, one that potentially lends itself to regulation.

We’re seeing, especially in the last election cycle, in the last couple of years, doxing, instances of online harassment, online trolling that’s really off the charts. And I think it’s scaring off the sensible center from a lot of political discourse, scaring off women, scaring off people of color, really compromising fundamental values that are bedrocks of American and democratic societies.

More generally, think about how often you answer your cell phone now versus how often if it’s an unrecognized number you just let it ring and go to voicemail. Lots and lots of people, as a result of breakdowns in do not call, and flagrant violations of do not call, lots of people have stopped answering phones. Think about the cost of that. Those costs
are real, and they’re felt by consumers, they’re felt by people trying to make phone calls.

And we can look overseas and see some of the things that’s happening with social credit scoring in China, and be really worried about some of the potential for abuses with these kinds of technologies.

So just in the minute I’ve got left, let me identify a couple of issues. The first, which I think we’ll talk about on the next panel, is there’s lots of inconsistencies between GDPR and the American approach. The world is going with the European approach, not with the American approach. That makes -- that causes real problems for American companies, and for the free flow data across the Atlantic or across the Pacific, between North America and Latin America.

So one idea that harkens back to work by Victor Mayer-Schonberger in his 2009 book Delete, which formed the basis for the European right to be forgotten, turns out, I think, to have some modern adaptations, which is here’s a proposal for deletion by default, okay. The main problem with the right to be forgotten, as currently implemented by the European Union, is that it’s unconstitutional under their First Amendment law.
There are ways to accomplish the same kinds of objectives without running aground of any constitutional problems, and deletion by default, which is certain data should automatically be deleted by, let’s say, ten years after it’s collected, purchase history information, Facebook posts, et cetera, and people could always choose to opt out of that, which is, I think, both constitutionally permissible under the U.S. regime, and also probably better.

So Google puts out really useful data about how often people are actually exercising the right to be forgotten, and it turns out that the rate of utilization is about 0.15 percent of European residents have exercised their rights under the right to be forgotten, under a generous interpretation of data from the Google transparency report.

So as we think about, well, what are the kinds of purposes that are vindicated by the right to be forgotten, the right to be forgotten, as employed, which puts the onus on the consumer to delete information, isn’t working. Something like deletion by default would work much better and it’s an approach worth considering. Thanks.

DR. GILMAN: Mr. Telang.
DR. TELANG: I’ll try to be quick so that we have opportunities for others to chime in as well. My name is Rahul Telang. I’m a Professor at Carnegie Mellon University. I’ll pick up from where Lior left. I’m not as pessimistic, I think, as maybe he is about the power of markets and competition in solving some other problems, but let me just highlight and maybe we all agree with this. But, in an ideal world, really, what we want to know is where exactly is the friction. Rather than thinking about what regulations will work, we want to probably sit back and ask, well, what exactly is the friction that people face when they’re dealing with the customer data, or our own data, and firms that are utilizing that information. You know, think of that as essentially an externality problem, that firm has my data, they are somehow misusing it, or extracting too much rent out of it than I would like them to do it, and that’s the externality they’re imposing on me. And the question is that how can we push that externality back onto the firms.

Maybe I’m misquoting, but, you know, generally the FTC has looked at this as a problem of can we make information available to consumers so that they can make better informed decisions, more or less
without imposing too much regulation, and I think that’s what Lior also sort of mentioned. And I’ll come back and talk a little bit about where we stand, but then the idea is that, well, this should lead to across-the-board innovation, both on the demand side and actually at the supply side, right? I mean, if you want a whole lot of privacy, then there should be some firms available who are willing to provide that privacy, maybe not at the firm level but maybe at the intermediate level.

Maybe you will use a certain browser with certain features in it that’ll make sure that Facebook might or might not be able to collect your data. Maybe you’re not able to do it, but at some level, the idea is that -- both that there is going to be a demand for privacy, security, whatever you want to name it, but then also there is a potential possibility of supply for privacy security.

And, you know, I guess the question maybe some of us believe that this model can never work, maybe some of us might believe that at least partially this model can work. I mean, fundamentally, this problem maybe just comes down to whether security and privacy can be a feature that the firm can advertise, and it doesn’t have to be that whether we are willing
to pay for it monetarily. There are some other ways
people are willing to pay, including market share,
transactions, how long we want to have a relationship
with the firm, so on and so forth, or whether it is
just a bug that we are worried about, and then
everybody’s trying to figure out a way to undermine
that.

In some aspect, the evidence is not
completely negative. And, in fact, if you think about
it, you know, maybe the data breach notification law
would be a good example where, you know, it forced a
fair amount of disclosure, at least on the parts of
the firm. And if you look at it, we are holding a lot
of firms actually accountable, even if not the firms
directly, we do punish the executives.

I mean, Equifax CEO had to resign because
there was a data breach. Mark Zuckerberg did have to
come in front of the Congress and actually provide
some details and, you know, at least some
embarrassment, Wall Street Journal reporting and the
New York Times press, which probably none of them they
would like. So there is a little bit of externality
that we are pushing back on the firm without any, you
know, serious regulation on what you can do with my
data or what you cannot do with the data. But at
least in terms of making it clear to people that,
look, these people might or might not be abusing of
our data.

And there is really no impact, no way for us
to empirically measure whether things have gotten
worse or better, but there is at least some evidence
that maybe firms are being elastic to some of those
changes in terms of how they are storing of our data,
how they are sharing of our data, so on and so forth.

I think, you know, one other point is that
sometimes we talk about, you know, when we’re
designing policy, can you share the data, should we
stop the data, sharing between firms or data abuse. I
think at some level you will also think of, maybe
there is certain part of the data that is off limits,
and maybe there is some other part of the data that it
perfectly might satisfy the firm.

So, I mean, think about online
advertisement. Sure, some targeting is very
effective. We need some data for the targeting to be
very effective, but maybe there is a whole lot of
information that the firm uses that’s really not that
effective, or they can find proxy for that and be able
to be reasonably effective without knowing my Social
Security number or name or what have you, and some
other proxies might work, too. So it doesn’t have to be always a zero sum game.

One more point. One more point I want to highlight is that it’s also we have to remember sometimes that sometimes it’s the uncertainty in regulation that actually can hurt innovation more than the regulation itself sometimes. Again, if you go back, when the data breach notification laws came, everybody complained about it, so much compliance is happening, so much compliance costs are happening. I don’t think anybody complains about it. In fact, a firm says, you know, instead of 50 different states, I would rather have one national law so that, you know, I can kind of get over with some of the -- or lower my compliance cost. Nobody is saying that we shouldn’t be having those laws.

And, in fact, if you think about it, there are second-order and third-order benefits to sometimes these regulations. For example, if you talk to cyber insurance policymakers, they will -- everybody would agree that actually the data breach notification laws led to so much cyber policy being written to provide insurance against data breaches, because some of those regulations actually provided some certainty about what the cost would be, what the floor would be, what
the ceiling would be. And that led to, you know, some
of the significant growth in cyber insurance, which
also then creates good practices and what have you.
So there are these secondary and tertiary benefits
sometimes with regulations, you know, lack of
uncertainty can help, but it is a lot of work, not
just in the privacy space, but automobile space,
health space, environment protection space, which
seems to argue that if you reduce the uncertainty and
stop sending unclear signals to the industry actually
it can be very helpful.
Again go back, the automobile industry
bitterly opposed the seatbelt and the air bag. And
once those regulations actually came in, they figured
out a way to actually live with it, not only live with
that, actually innovate where all of us benefitted,
the consumers and the safety, but they also were able
to sell it as a feature where they were able to
actually price them out.
Something to think about where we think
about regulation that sometimes having some certainty
can be actually much more useful than sometimes just
arguing about what the regulation and the content of
the regulation should be. So I’ll stop here.
DR. GILMAN: Okay, terrific. I guess I’d
like to start really with a question for the entire panel. We’ve had -- I’m sort of reminded, we’ve had some really excellent research-based panels. We are a research-based agency. We do research-based law enforcement on both the competition and the consumer protection side. We do research-based policy work, but I’m thinking of various threads that have come up over the two days that have reminded me of an outdated and terribly unfair label for economics as the dismal science.

So what do I have in mind here? There’s quite a bit of research on, certainly, market imperfections, whether or not they’re durable market failures, people might debate, so very high information costs, very high maybe information asymmetries when it comes to privacy issues, both between firms and consumers, folks like we’re sitting up here, and indeed between firms as vendors and firms as consumers.

Certainly, there’s evidence of people suffering these kinds of information privacy-related harms, ranging from identity theft to any manner of other things. We’ve had some very interesting and I think useful and important research on some of the limits of intervention in this space, right.
So first competition issues surrounding privacy interventions, which may not always but may tend to favor large firms and incumbent firms at the expense of smaller firms or entrants. Certainly, unanticipated effects from privacy regulations, which sometimes, I’m thinking of some of Professor Miller’s research, say with Catherine Tucker, just health effects that weren’t anticipated with IT regulations. One thing, or even, you know, you get -- you flip the sign of your anticipated effect as with some of the data security regulations. It doesn’t mean that all data security regulations will have these effects, but it’s certainly not a positive result.

And, so, I guess one thing is sort of just a question going down the line. It seems that there is maybe some pertinent research, but quite a bit less that answers the policy question, what do consumers win with one or another privacy or data regulation intervention?

Plainly, consumers have concerns in this space. I don’t think anybody would deny that, but one question is, do we have an adequate research basis for saying, first of all, that these interventions will actually be effective, whether in one silo or another or across large sectors of the economy; and, second,
1 you know, an adequate way of assessing consumer
2 benefits, right?
3 So we have costs when we fail to intervene;
4 we have costs when we intervene. Have we developed a
5 good science of assessing and then actually achieving
6 concrete benefits? Anyone? We’ll go down this way
7 unless someone wants to pass.
8 MS. BAMBAUER: So I agree that we have very
9 good research on some narrow questions. I continue,
10 though, to -- and I’m basically restating what my
11 opening comments were -- that I continue to be
12 concerned that we haven’t even really defined the
13 harms well enough to then know how to measure them.
14 And that’s really sort of more of a philosophical
15 question than even an empirical one.
16 And so without it, though, the foundation
17 for doing the empirical research that we would need to
18 do is lacking. So, yes, I’m concerned that we don’t
19 have enough of an evidence base quite yet.
20 DR. GOLDFARB: So if we weren’t the
21 dismal -- we’re looking for some kind of Pareto-
22 optimal solution where everyone -- there’s a market
23 failure where everyone would be better off because we
24 have a regulation. And that -- it doesn’t happen
25 enough. Maybe credit scoring and the Fair Credit
Reporting Act was a privacy regulation that was Pareto-improving but -- and in some sense we’ve been looking for that in the privacy space for 20 years. It’s not obvious that such a thing happens. It seems pretty clear that the empirical work says there’s a tradeoff. There’s a tradeoff between, you know, more privacy might mean less innovation; it might mean less competition. I have some other work that suggests it might mean more inequality but that doesn’t mean that it’s a bad thing. We’ve also heard a whole bunch of reasons why privacy is good.

And, so -- you know, and you said, you know, this regulation’s not effective. In some sense, a lot of the regulations have been extraordinary effective. If the goal was to restrict data flows, the regulations restrict data flows. They do exactly what they were supposed to do. That just means that ads become less effective or healthcare doesn’t work as well. But they are effective in terms of their explicit goals on restricting data flows.

So I just think it’s important to realize there’s tradeoffs here. These are hard decisions. And in some sense the empirical work -- like, as an economist, I don’t -- certainly I don’t feel like I have the skills to tell you about those tradeoffs.
What I can say is what those -- you know, I can really lay out well is what those tradeoffs are.

DR. LAMBRECHT: Okay, so two points on that. I think one interesting point is that the perception of privacy changes. You know, what we regard today as privacy-relevant, or what was regarded 20 or 50 years ago as privacy-relevant, or sensitive information, may not be regarded as such anymore today, at least not all of it. And if I look at my younger students, they might still have a different perception of which data are, you know, privacy-sensitive than I have.

So I think one aspect is that these sensitivities, and therefore, the tradeoffs, also change over time. And I think this is just one point to keep in the back of our mind as we are trying to think about policies.

The second point is that I do believe that these tradeoffs are highly context-dependent, and the harms and the benefits are very context-dependent. And I know similar to what Avi said, I think it’s very hard to lay out the overall, overarching framework for how these tradeoffs should be sold.

So think, for example, a retailer that holds information about your browsing behavior. We had the example of Target earlier, but think about this
happening online, and using it in a way that one consumer feels as privacy-invading. On the other hand, the retailer might also use that information to structure information displayed on -- in response to product searches on their website, which may have -- for consequences of the consumer gets better selection of product, a better choice, makes a better choice, and may spend less time on making those choices.

And, so, this is what I mean with context-dependent. There are settings where the harms may more obviously -- or that the benefits may more obviously outweigh the harms, and maybe other settings where the harms may play out in very different ways, way outside the specific context, for example, in online advertising.

DR. MILLER: So I think these are the tough questions. A few thoughts. One thing in thinking about the costs and benefits of privacy protection, I think it’s always helpful for me to step back and think about the costs and benefits of privacy itself and then think about the privacy regulation.

I think that, you know, some of the results that we find of privacy regulation leading to less adoption of technology could actually reflect an underlying latent benefit or need for that regulation.
So to the extent that informing consumers about privacy risks makes them less likely to do something that entails a privacy risk, it’s not obvious that that’s inefficient. It could be that they were inefficiently unaware of privacy risks, or that it wasn’t salient to them.

And so I think that there’s sort of a question of how much are we -- there’s a question -- there’s tradeoffs involved in the privacy policy, and I think also the point Avi made earlier is important, that no privacy protection is also going to be a problem. So when we think about the costs and benefits of privacy protection policy, one of the big costs we want to think about from not protecting privacy is all of the privacy-protecting activities that individuals will engage in in the absence of regulation that protects them.

So if they don’t feel that their data are safe, they may not download apps on their phone. They may not do different kinds of things. They may shut off Facebook or never post pictures of their child online because they don’t feel that that privacy is protected. And, so, we think about those potential benefits from privacy protection. We want to take those into account.
At the same time, you know, my own research and research by others does show that sometimes regulation, well intended, can have real harms in terms of slowing the diffusion of technologies. I didn’t talk about this paper, but this other research I did with Catherine Tucker looked at privacy laws protecting health privacy led to less adoption of electronic medical records in U.S. hospitals. And then we show in another paper that this actually -- this slower adoption led to greater mortality, greater infant mortality, because this technology itself was saving infants’ lives.

And, so, there are, you know, real substantial costs to not protecting privacy but also to not having these technological innovations in healthcare and other spheres.

I just kind of want to give some, another point about just the very pessimistic results that I have about. I think the tradeoffs are real and I think they’re important to consider, but I don’t want the message to be -- so I think the message should be that we should be cautious, and the details matter, and there are a lot of ways we can go wrong. But I don’t want the message to be that that’s an excuse for inaction or for just throwing our hands up and not
I think what it means is that we should have modest expectations. We should put in some effort before we make rules and to try to look at the research, try to experiment, try things on a smaller scale, maybe where the impact is not going to be so bad if we get it wrong. And try things. And then, you know, be flexible.

If we have a policy, let’s monitor, and let’s see if it’s working or if it’s not working, and if it isn’t, let’s change it. So I don’t think that it’s something that we sit down and, you know, in a room devise the optimal solutions, you know, QED X star, and we go with that. I think we just want to be aware of the issues and then actively, continuously try to work on that.

Mr. Strahilevitz: I think I agree with what’s been said. It’s hard to do cost-benefit analysis for privacy because privacy harms are and always have been hard to quantify. Okay, so let’s start with that, but that doesn’t mean that when we’re trying to do something like cost-benefit analysis we have to throw our hands up in the air.

So one thing that you can try and do is look around you, and think about whether the ways in which
the legal system deals with privacy are typical or
exceptional. And, so, I want to provide two lenses
from doing that. One way you can do that is by
looking at how privacy gets treated versus how other
kinds of big goofs get treated. All right, so one
thing that’s really unusual about the way that privacy
is regulated by the Federal Trade Commission is that
the Federal Trade Commission does not start out with
fining authority for big privacy goofs. And, so, when
I explain to laypeople that it’s only because Facebook
had previously entered into a consent decree with the
FTC that the FTC has the ability to impose monetary
fines as a result of Cambridge Analytica, they’re very
surprised by that. You’re probably not surprised by
that, but people you talk to who are not lawyers,
regulators, policy people are probably extremely
surprised.

And, indeed, that makes the United States
exceptional when compared to the way that other
countries deal with privacy, and also other parts of
the U.S. regulatory system deal with big goofs, right?
So when Ford Pintos started exploding, right, because
of faulty gas tanks, we didn’t say, okay, Ford, you
know, if you make another car that starts exploding,
we will fine you for that but, you know, you get one
free goof. This was a badly designed car, you’re off the hook, right?

We kind of have that response with respect to privacy, at least from a federal regulatory perspective. There’s other things that will happen, like class action lawsuits that Facebook will be dealing with. They’ll lose some consumers. I’m not suggesting that they face no repercussions, but it is a little bit unusual how we treat privacy vis-a-vis other kinds of products, or other kinds of interests, and how the U.S. treats privacy versus the way the rest of the developed world treats privacy. And I think that can be informative in terms of how we should think about what the right approach is.

DR. TELANG: The generic takeaway is it’s hard to say anything simply because -- is there a generic takeaway that we can take, you know, from all the research and the meta research? It’s hard because it’s a very heterogenous problem. I think one thing that I feel we can take away is that, you know, consumers are really good at compartmentalizing, that they -- for us, the transaction costs are very high.

Even reading one line every time we transact with a website is just too costly for us. However, you know, there’s some research that I’m working on --
and one of the challenges of privacy research at some level is that if you go survey-based then you’re always, you know, overestimating everything, because if you ask people, and I think people already in the last panel talked about the variance between survey and behavior is so large that you wonder what you can glean. Plus there is a long-term issue, too, but, anyway, we are actually working with the actual transactions. We’re working with a very large bank which has very detailed information on how people transact. And one of the things that we clearly notice is that people care if something goes wrong with their financial -- that is, if something goes wrong with the credit card, with the bank, with something that has direct money involved, they are a lot more careful. They’re a lot more willing to punish the firm if it’s going to have -- if a fraud is going to happen on your bank or your credit card account, and we can see that in the data.

On the other hand, if Home Depot loses your data or if Target loses your data, we are a lot less willing to punish them. Our transaction behavior doesn’t change a whole lot, maybe because we think that, well, Lowe’s isn’t going to be any better. Maybe we think that the financial cost is really not
very high, the credit card is going to pick it up,
I’ll get a new credit card, I really don’t want to
kind of go through all the hassle.
So I feel like it’s very context-dependent.
If I feel that I’m going to incur a significant
financial harm, I think people really take action.
And if they feel that, well, the financial harm is
secondary, tertiary, might harm happen sometimes in
the future, might not happen at all, I think they tend
to kind of ignore many of the privacy red lights, if
you would, in that regard.

MS. BAMBAUER: So I just wanted to add one
thing. I think it might be useful to distinguish the
intrinsic value of privacy, that people might want
control over the access to their data and the ultimate
use of their data, from the downstream harms that
privacy might protect. And I find that if we identify
the downstream harms then we can try to measure them,
and that gives us a lot better of a chance, I think,
to do this tradeoff.

But with the intrinsic value of privacy, you
know, like I don’t quite know what a privacy goof, for
example, is. I know that when a Pinto explodes,
 nobody wants to be in that Pinto, but -- and everyone
basically ascribes roughly the same value to, you
1 know, to their health and life and also their money,
2 but the intrinsic value of privacy is not clear to me,
3 and I think Ginger Jin mentioned yesterday that a
4 problem in this area is that preferences -- to the
5 extent they can be measured at all -- are widely
6 varying. They are time-dependent. They are dependent
7 on so many things that I don’t even know if it’s
8 useful to think about intrinsic values, and maybe we
9 should be looking at the downstream.

DR. GILMAN: So thank you. Interesting
11 conditions under which someone does want to be in a
12 Pinto, but so, you know, we’ve heard a lot, I think,
13 here about context, and maybe it’s not surprising that
14 people have done very fruitful research in specific
15 contexts, specific industries, specific technologies,
16 right, whether we’re talking finance, consumer credit,
17 healthcare, different research on healthcare systems’
18 adoption versus other issues in healthcare.

I mean, maybe in some ways, I mean, to pick
20 up on something that was mentioned about FTC, this is
21 convenient for the FTC’s approach to privacy, both on
22 the competition side and the consumer protection side,
23 right? We look at transactions, at mergers that may
24 unduly burden competition and do harm to consumers.
25 We have a framework for doing that, whether in the
information economy or elsewhere.

On the consumer protection side with privacy and data security enforcement we look for harms, right, specific harms, cognizable under the FTC Act or under special statutes, and evidence for concrete harms and concrete context. And, under unfairness, harms that aren’t offset, say by countervailing efficiencies. But I’m also wondering a little bit, first, it was mentioned, I think by Professor Strahilevitz -- maybe I just got it wrong -- but about our authority. Well, maybe two of you, conditions under which we can levy fines or pursue different remedies.

So one question I would ask is simply what adjustments might be recommended to our authority or not to improve our ability to address context-specific harms, whether on the competition side or on the consumer protection side? And then I guess second, sort of what’s left out? We don’t do everything. Are we optimistic or pessimistic about extending some of this learning to calls for much more general, overarching privacy regulation, whether we’re talking about, you know, compare and contrast, say, HIPAA with the GDPR approach or, you know, Fair Credit Reporting Act with the GDPR approach, federal, state, industry
or overarching?

I guess both -- so two hard questions if we could just go down the panel and I guess -- I think we’ve actually got eight minutes, but thank you, by the clock. We’re scheduled to go until 4:00. No? That’s what it says here. Okay. Well, sorry, if we could go briefly.

What was the question now?

DR. GILMAN: So FTC authority is one. Would you alter it based on any findings? Maybe that’s enough.

MR. STRAHTILEVITZ: I’ll take a stab at it. So I think one thing that would be really useful for the FTC to think about are, what are the kinds of problems that the courts have a hard time remedying? And so, you know, a classic example is the data breach, okay? So courts really struggle with data breaches for the following reason. Let’s suppose a whole bunch of data is breached. Let’s suppose that every American faces a baseline risk every year of 2 percent -- 2 percent chance they’ll be victimized by identity theft, okay?

Now, let’s suppose that the people whose data was breached face a 3 percent chance of identity theft. And let’s say we’re talking about tens of
thousands or hundreds of thousands of people. We know that the breach was costly, very costly. We know that it elevated the risk for people in the relevant pool by 50 percent, but courts are going to be looking for proof that a particular individual suffered identity theft, the classic harm in a data breach, as a result of this particular breach, okay?

You’ll want to -- at least there’s a circuit split in terms of dealing with these issues -- but you’ll want -- in order to have an airtight ability to get, first, standing and then establish the causal nexus, you’re growing to need to show a court that it’s more probable than not that particular individuals suffered particular out-of-pocket harms, pecuniary harms, as a result of a breach. And I think courts have a hard time with those kind of cases.

That’s not the standard model of how a court proceeds. The standard model of how a court proceeds is show me in a civil suit that it’s more probable than not that your injury resulted from their mistake. So that’s an area where we know statistically a lot of people are harmed, but we also know courts, Article III courts, are going to really struggle with it, where I think there’s a lot of room for the FTC to do really good work because the FTC can litigate and
enforce on behalf of the aggregate. And it doesn’t so much matter whether any individual happens to have been victimized because of the baseline risk of identity theft or because of the elevated risk resulting from a particular breach. And, so, I think that when the FTC thinks about its authority it should think about, okay, what are class action lawyers doing and is any of that accomplishing any good? What is self-regulation doing and is any of that accomplishing any good? What are state attorneys general doing, and is any of that accomplishing any good? Okay, what are the thing they’re bad at? Odds are good that those are things that the FTC can add the most value through.

DR. GILMAN: Thank you. Apparently, we’re also bad at time management, so I apologize for cutting this short. Thanks very much to our panelists for their contributions and thanks for your attention. We do not have a break here. We’re going to shift right to -- sorry?

We have a five-minute break, so I’m wrong about that, too. Five-minute break, but please come back promptly. We’ve got a panel discussing GDPR. Thanks to our panelists.

(Applause.) (End of Panel 4.)
PANEL 5: THE POTENTIAL IMPACT OF GDPR ON
COMPETITION AND INNOVATION

MR. STEVENSON: Hi, everybody. It’s 4:00. That means it’s time for the last panel of the day, and this is the panel on the potential impact of GDPR on competition and innovation. My name is Hugh Stevenson from the Federal Trade Commission.

We just heard a general discussion about the effects of privacy regulation on competition and innovation. And in a sense, this panel is now a kind of case study to look in more depth at that general question. And here it’s the effect of the GDPR, the General Data Protection Regulation that we’ve heard referred to a number of times throughout the conference.

This regulation, which entered into force in May of this year in the European Union, it’s obviously still early days for GDPR, but we have a distinguished panel here lined up to talk about its potential effects and the effects more generally, I would say, of the privacy approach reflected in the EU. When we talk about the effects of GDPR, it’s not just the effects of the new regulation that came into effect that added some new features to what existed in Europe before, but also the European approach, which as we’ve
We have lots of panelists here and little time, so I’ve asked each speaker to give a few initial thoughts before we proceed to questions. And we’ll start with Renato Nazzini, who’s a competition expert and a Professor at King’s College London, and I turn the floor to him.

MR. NAZZINI: Thank you very much, Hugh, and thank you very much for the invitation to be here. So in the five minutes that I have, I would like to cover three points on the impact of European privacy regulation, which is just recently the GDPR but previously the privacy directive, on competition. And I start with one first point. We heard a lot today about the impact of privacy regulation on competition.

And I think there is no doubt in terms of the theoretical work that has been done and also the empirical work is there, in my view, that privacy regulation may have a negative impact on competition, maybe start the competitive process by favoring or disproportionately certain players versus the others. And there is also no doubt that there may be an impact on innovation and productivity and so on.
Now, the point I’d like to make is that the European approach is not really a choice between data protection regulation or no data protection regulation. Data protection, the right to privacy and data protection, is a constitutional right, the right of a constitutional standing in European Union and a fundamental right. So the point is which data protection regulation to achieve the desired outcome should we have.

And I think that’s really the important policy debate. We haven’t had enough of it. We went straight into the GDPR, the privacy directive, and then the GDPR type, kind of process-based, heavy prescriptive regulation, which we can still have this debate now. You know, it is never too late to change something that doesn’t quite work as well, assuming that it doesn’t.

The second point that I’d like to make is that, of course there is also a lot of talk, and there has been a lot of talk about the GDPR, about the role of privacy regulation as an enabler of competition. And I’ll give you the most important example, which is the right to portability in the GDPR, the right of the individual who provided the data to obtain this data transfer then or have them transferred to another
Now, the point I’d like to make here is that this portability right, which is there -- or may be there also to address issues such as consumer switching in certain markets where data are important and there is a significant switching cost in the loss of data, financial services, messaging apps, social networks, and so on and so forth. It’s not really a competition remedy, and it’s not, therefore, going to be very effective, in my view, at addressing any competition concerns that we may have on these markets.

And the key reason for that is that actually together with switching costs and data, the other problem you have in this market is consumer inertia. There is quite a lot of research and certainly even case law in Commission practice in Europe on this point. Therefore, the right to portability, which depends entirely on the choice and the initiative of the consumer, is not really going to be very effective if we do not have a very well informed and active consumer.

I’d like to contrast it for just a moment with the open banking remedies in the U.K. Open banking in the U.K. is a set of remedies which is
there to address competition concerns in the retail banking sector. And one concern was very low levels of switching of consumers and actually small businesses as well. And the remedy there imposed on certain U.K. banks is -- it relates to actually the obligation of these banks to make transaction data available to other financial service providers, such as innovative fintech companies.

And this comes together with a very significant package of remedies really tailored to give consumers and small businesses the information they need to make an informed choice and prompting them almost to make the choice overcoming, therefore, their inertia. So that is a proper competition remedy, may work well or not, it’s too early to say, but that is a competition remedy, as opposed to the right to portability.

And so my second point was actually using privacy regulation to enhance competition, remedy perceived competition problems. It’s not likely to work very well.

And the third point I’d like to make in really a very, very short time is that one more thing to bear in mind is this idea of privacy regulation and privacy standards as a parameter of competition, and
whether a breach of privacy regulation can be an element of a case of anticompetitive abuse or anticompetitive practice against a company, for example, a dominant company. And there is an ongoing investigation against Facebook in Germany precisely on this theory.

Now, for example, the Italian competition authority has addressed that very problem -- the use by Facebook of data from third-party websites, you know, when the consumer is on third-party websites rather than on Facebook itself -- under their consumer protection legislation.

And, therefore, my third and final point is that actually while business and markets and perhaps life becomes more complex and privacy and data do become an element of competition analysis, in so many ways, I think there is a point in going back, perhaps sticking to basics in keeping these different tools that we have -- privacy enforcement, whatever it might be, private enforcement or regulation, competition enforcement, or consumer enforcement -- clearly distinct to avoid costly mistakes. Thank you.

MR. STEVENSON: Thank you very much for that.

We turn next to Garrett Johnson who we heard
-- from Boston University, we heard from earlier today, and we actually got an audience question about what is the impact of GDPR on innovation and competition and how can this measured. And I think Garrett can say a little bit on that subject from his perspective.

DR. JOHNSON: Thank you. So yesterday, several of you heard research from Jia, Gin, and Wagman on the short-run effects of GDPR on technology venture investment. They found an 18 percent reduction in the number of weekly venture deals and a 40 percent reduction in the amount raised in an average deal following the rollout of the GDPR. That’s obviously not great news.

Today, I want to tell you about some joint work that I have with Sam Goldberg at Kellogg, who is in the audience, and Scott Shriver at Colorado, where we’re looking at what happened online in Europe. The first way we’re going to look at this is we’re going to look at site visit and conversion outcomes on a panel of 2,300 websites. The second thing we’re going to look at is third-party interactions and tracking on a panel of 28,000 websites. And the final thing we’re going to look at is competition by looking at the number of sellers that publishers in Europe use...
looking at a panel of over 100,000 websites. So I want to stress at the outset that this is not so much research that’s hot off the presses as much as research that hasn’t even made it to the presses, so take things with a grain of salt. This is a case of, I think, supply rising to meet demand.

So, first, I want to talk about the results for the panel of websites and site visits and conversions. For 2,300 websites, we see something like a 10 percent reduction in site visits and something like a 10 percent reduction in sales or conversions after the GDPR. And this is of the 900 websites that are in our data that have that information.

Now, these findings are very provocative and very alarming, so I want to give you three big caveats. The first is that we’re still trying to determine to what extent this is a real decrease and not an artificial decrease of reduced ability to collect data in Europe.

The second thing is that when you’re looking at the effects of a policy that impacts an entire continent at a certain period in time, it’s pretty hard to find a good control that can give you a benchmark to evaluate that with. We’re using the 2017
data in Europe as a benchmark.

And, finally, this data, by nature, is extremely noisy and, so, we need to be careful in drawing strong conclusions for that. Now, the second thing that we looked at is compliance by EU websites in terms of the amount of third-party interactions or tracking that happens on those websites. The way that I went about this is I collected data from the top 2,000 websites in every European country, EU country, as well as Canada, the U.S., and globally for an overlap of 28,000 websites.

And what I did is I represented myself as being a French user via VPN and collected, using software, every single third party that interacted with my browser, whether it be through cookies or through HTTP requests or JavaScript. And what I saw there is in the week after the GDPR, there is a 12 percent reduction in third-party interactions relative to the days leading up to the GDPR. And because everyone is sort of scrambling to get in accordance with the GDPR, you might expect that that number would continue to go down, and, in fact, that is what happened in Denmark, that is what happened in the Netherlands.

But if you look at Bulgaria and Poland and
other countries, you actually see that it goes down
and then it bounces right back up again. So you look
at an average of all my data, these third-party
interactions by now are essentially where they were
pre-GDPR levels. So one thing that I want to do is
try to see what explains whether or not these
increases happened or not because we think it has
something to do with basically how afraid these
companies are of regulators in their local area, even
though the GDPR was supposed to be uniformly applied,
and so we used a survey metric of data providers that
tried to quantify just how lenient they think their
regulator is.

And that turns out to be a really great
predictor of whether or not tracking third-party
interactions went back up post-GDPR. And that’s after
accounting for wealth and for accounting for ad
blocking and characteristics of the website, like the
amount of content and ads that they have on the
website.

Another finding that we found is that the
place where you saw the most reduction in third-party
tracking was actually where there were the least
European users, so the websites that had 10 percent or
less European users had the largest reduction, and we
think that that’s probably a result of a set of incentives that says that you will receive a fine of 4 percent of your global revenue if you violate the rules.

Now, the last thing when it comes to competition on this point, the evidence is pretty mixed if you split by top ten tracking firms versus below. The top ten were affected -- or reduced less than the bottom ten or the firms below the top ten trackers. But if you split it by top 50 versus outside that top 50, that pattern reverses.

And, so, we have a third piece of evidence that speaks to the competition issue that I’ll go through briefly, and that is that we thought that when you tell firms that they’re going to be liable for sharing data with others and that they need to get consent that firms would be less likely to interact with more firms. And, so, we looked at a self-reported measure of the number of ad sellers that European web publishers use called the Ads.Text initiative, and there we basically found nothing, which we were quite surprised by. So there’s a small increase in the number of sellers that these websites are using, but, you know, there’s a small increase in Canada, too, and so there was really not -- there was
no sort of massive decrease as we might expect.

So with that, I’ll pass things on.

MR. STEVENSON: Thank you for giving us this preview of this very interesting research, and you all heard it here first.

So next we turn to Jim Halpert to get a practitioner’s perspective. Jim is a well-known privacy lawyer at DLA Piper and has been involved in some of these issues for quite some time. Jim?

MR. HALPERT: Thank you, Hugh, and thanks for the opportunity to speak. I’m actually here today with the head of our Polish IPT practice, Ewa Kurowska-Tober, who can speak further about Poland and the enforcement environment, which I think is a little bit different than the assumption behind the survey data, but it’s nonetheless a very interesting survey.

I’d make a few points that are more from a practitioner’s sort of practical perspective. I’ve seen it for non-EU entities that are -- that have some presence in Europe but do not have a lot of users, GDPR -- the decision about whether to comply with GDPR if they were a website operator was a fairly clear decision for those who were not among the largest. And you can see data that the top third of the 100 -- or a third of the top 100 websites responded to GDPR
by blocking EU visitors, and there are a number of articles about this.

The same thing is true of nearly 100 public-facing websites that a survey that Data.VerifyJoseph.com came up with as well. So you see a parade of entities that just were not making that much money in Europe who said it’s not worth it. So from a competition perspective, you know, probably the crafters of GDPR smiled at that because they don’t really want competition necessarily coming from the United States in the Internet market, but nonetheless, there clearly was, at least when this regulation went into effect, a drop-off effect on public-facing websites that just didn’t want to deal with the GDPR compliance through their ecosystem.

Another thing to think about is that requirements for granular consent necessarily disadvantage entities that have fewer customers and need to rely on the notice and consent being floated by the website operator and put them at a comparatively weaker position to craft a consent that will fit their business models.

We see this also in terms that -- and this is not something that’s public, but the term -- the processing term, processor terms or subprocessor or...
co-controller terms that were passed down to smaller
to bigger entities under GDPR. The fact was
that smaller entities took an awful lot of
obligations, contractually, and an awful lot of
liability that they probably were not able to handle,
but nonetheless, the formality of the processing
agreement led to bigger entities exercising their
greater bargaining power to drive through obligations
to be able to absolve themselves of compliance.

Another thing to look at in the ecosystem
environment like the advertising ecosystem -- and
Chuck Kerr who represents Better Ads is in the back
and does a lot of work; I know that Leigh Freund was
here as well -- is that the GDPR did create at least
temporary disruptions with a sort of whipsaw effect
where the entities, there were several of them that
are very big in the internet advertising environment
and were under a lot of scrutiny by regulators. So
they needed to, you know, break it -- to make an
omelet, you need to break a few eggs, and they needed
to come up with a compliance structure that was
auditable, and ecosystem providers needed to conform
to that.

I would suggest that a less granular set of
obligations on downstream entities that was more
outcome-spaced, would be a better way to avoid drop-off and disruption in the ecosystem, and I’m not here to praise the CCPA, the California privacy law, in all aspects. There are ways in which it’s very poorly drafted. But its processor obligations, its service provider obligations are very outcome-based.

Really, the question for the service provider, they need to sign an agreement saying to be a service provider then be outside of the disclosure obligations under the CCPA, they need to promise only to process the data, store it, use it for the duration of the service contract that they have with the entity that is the business that’s giving them the data, and not to sell it or use it or disclose it for any other purpose.

And that may be a more neutral way to get to an outcome where the core interest, which is in preventing further pollution, if you will, of the data -- personal data ecosystem out there is achieved without being so granular for obligations that need to be passed along to smaller entities that really can’t say no. Thank you.

MR. STEVENSON: Thank you, Jim.

So we’ve heard a little bit about the role of the regulator in the EU system under GDPR, and
there’s a data protection authority, or DPA, in every country, so it’s only fitting we include a DPA perspective on the panel, so we turn next to Simon McDougall from the U.K.’s DPA, which is called the Information Commissioner’s Office. And Simon even has innovation in his title, so he seems perfect for this panel. So we’ll give him a couple of minutes to describe their perspective.

MR. MCDOUGALL: Thank you. I’ve had this title, Executive Director of Technology Policy and Innovation for a whole five weeks now. Before that, I ran a privacy consulting practice for Promontory, which is now part of IBM, and spent most of the last few years helping large corporations with their GDPR implementation. So my comments now are informed as much by what I saw in my time in the private sector as now.

I want to just first talk to a couple of points that have already arisen. First of all, you could get the impression that Europe was some kind of blazing wasteland on May 26th and nobody got any ads, and that was all terrible. It really was not like that, and I don’t think anybody noticed any particular difference in their experience on a day-to-day basis. I also think that to quote Chairman Lai in

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his conversation with Henry Kissinger about the French Revolution, it’s too early to tell what the impact of the GDPR will be. And I think Rahul made a great point on the last panel that uncertainty is as damaging as prescriptive regulation. And what we definitely saw leading up to the GDPR and then afterwards was a lot of uncertainty. So it will be really interesting to see how this data pans out over the next few months and indeed next couple of years because right now the GDPR seems to be going okay, to be honest. And in terms of the market in Europe, you know, again, I’m not hearing anything terrible from my old private sector clients.

I want to mention one thing in relation to competition and then a couple of points around innovation as well. The points I’ll raise on competition is just to note in passing that the GDPR has some interesting mechanisms in it, which I think have the possibility of really enhancing competition in the medium term. And that’s codes of conduct and certifications.

And the difference there is that a code of conduct in GDPR-speak is where a body such as a trade association creates some rules specific to its vertical, and then a data protection authority will
sign them off. Certification involves certification bodies and a more complicated scheme.

We’re seeing a lot of interest right now in codes of conduct, less so in certifications because I think they’ll take longer to implement. I think if for certain markets we get simple, practical codes of conduct, then that could be very helpful to new entrants because it will reduce this uncertainty and add clarity.

Conversely, if we end up endorsing -- as European data protection authorities, we end up endorsing very complicated codes of conduct, obviously that could provide a barrier to entry by just creating more rules around particular environments that are deterring to smaller firms. So that’s something we need to look at, but I think good, clear codes of conduct can be very helpful in these circumstances to reduce this uncertainty.

But I want to spend a couple of minutes also talking about the innovation side of my job because I think often today competition and innovation have been conflated in different ways. So let’s talk about innovation in terms of its classical definition, whereby we’re talking about the process where we go from somebody having a really bright idea, some people
in the garage, an innovation hub of a large firm, an
academic, all the way through to realization, i.e., a
retail product goes out or a government does something
for its systems which is cool and wasn’t done before.
So let’s talk about innovation there.

My role is new at the ICO, and I’m building
an innovation department which we’re still staffing
with some amazing people, but we’re very focused on
innovation as innovation, and we’re doing a whole
range of different things to promote it. Three areas
quickly in the time I have.

Firstly, we’re engaging with thought leaders
around key areas, such as artificial intelligence,
digital ethics where a lot of this innovation is
happening. So we’ve been very active in helping set
up the Center for Data Ethics and Innovation in the
U.K., which is a government-backed center which is
just being founded now as we speak. And we’re working
with the Alan Turing Institute around explainable
artificial intelligence and how we can help ensure
this trust in AI.

I think there’s a huge risk here that AI
goes the same way as GM, where, hey, you guys have got
it, we haven’t got GM, genetic modified foods, in
Europe because everyone lost trust in that particular
technology. AI could easily go the same way unless
the industry explains to people what on earth is going
on. So explaining AI is a big thing.

Secondly, we are building a regulatory
innovation hub whereby we’re accepting that we’re a
horizontal regulator in a world of vertical
regulators. And when a firm comes with innovative
ideas to our financial services regulators or our
telecoms regulators and they have questions, we then
can help make sure it’s a one-stop-shop for that
regulatory question by being in the room with that
regulator or being at the end of the phone to help
them.

Thirdly and finally, we are setting up a
regulatory sandbox, leveraging the success of
financial services regulatory sandboxes with
innovative firms whereby firms can apply to be in the
sandbox. And if we say yes, they develop a close,
continuous, collaborative relationship with, in this
case, us, the ICO, where they can take their project,
they can pilot it, and they can work with us so that
they end up doing something exciting and innovative
but in a privacy-respectful way.

So my key message here is that as a privacy
regulator and I think it’s applicable to privacy
regulators around the world, we do not have to be passive here. We can be on the front foot and we can do interesting things to promote both competition and innovation. And there I’ll stop, thanks.

MR. STEVENSON: Thank you very much. We appreciate that particular description of the many interesting projects that the ICO has underway.

We have next Rainer Wesley, a friend and colleague from the EU Mission, and before that, formerly of DG Comp, and we give the floor to him.

DR. WESSELY: Thank you very much for inviting me to this panel. It will not surprise you that we in Brussels at the European Commission are following these hearings with big interest because most of, if not all of the topics discussed here, are equally of high relevance also for our internal discussions.

Originally, my intention was actually to start off to give you a very brief overview of how we deal at DG Competition at the European Commission with big data, data, and data protection in our Commission -- press the microphone, it is on, it tells me -- with data protection for specific markets. But taking that this was part of an earlier session this morning already and taking our time constraints, I will limit
myself to one key observation. We have gathered over the years a lot of experience, in particular in merger cases, of how to assess data and big data markets, but what we see recently is that the assessment of data protection in our competition and merger analysis is getting ever more important. And the reason for this is certainly that consumers give always more importance to their protection of the data, and we can see that, and this is reflected in our decisions.

And, actually, it also mirrors my own experience. Five or ten years ago I think I would not have cared so much about what happens to my personal data, but nowadays I think if I have an option where I can go for safer and more protective measures then I would always try to opt for that.

As our competition commissioner, Margrethe Vestager, put it already in 2016, we would not use our competition enforcement to fix privacy problems, but that does not mean that we will ignore genuine competition problems just because they have a link to data, which takes me now to the topic of today’s panel and the question of the actual or potential effect on innovation and competition of the GDPR.

And I would like to structure it in three points, basically where we are coming from. As Renato
already said before, data protection in Europe is
nothing new. We have had rules for many, many years,
over two decades. And, intuitively, I think that
would speak for questioning whether there should be a
negative impact on competition and innovation in the
first place.

Then I would look at where we are now. We
have created a very strong, level playing field across
Europe, which reduces compliance cost and reduces
burden for companies. And looking forward, I think I
will add some words on the entry barriers which
allowed -- through GDPR, as also Renato mentioned
already, we have built in innovation incentives,
thanks to privacy by default and by design. So I
think in the end and eventually the GDPR should
actually stimulate innovation and competition.

So if I look at where we’re coming from in
the past, we had a directive and a patchwork of many
national laws. Since the beginning of the data
protection reform and the discussion of the reform, we
saw that competition and innovation were at the heart
of these discussions. The aim was to create a level
playing field addressing the consumer trust deficit
and simplifying and harmonizing the data protection
leading framework as a key element of the digital
single market, which is, as many of you will know, one of the key priorities of the current European Commission.

In other words, the patchwork that existed in the past has been replaced by one single pan-European law. Instead of having to deal with 28 different data protection laws and 28 ways of interpretation, since May last year -- this year operators doing business in Europe can rely on one set of uniform rules.

This brings me to where we are now. The GDPR has put these rules into a new shape, making them more coherent and directly applicable. Of course, we had heard many concerns, and I heard them yesterday and today again, that certain economic experts say that their business models will actually not work with the GDPR and that they are competitively disadvantaged with big and foreign operators.

As already also mentioned, it is probably too early to make a long-term assessment at this point in time to see whether these claims are actually true. We have seen fear of some companies because of compliance, because of risk of fines, and there has been lot of uncertainty, but I think generally the first evidence that we see points in a different
For many companies, compliance with GDPR has actually brought along opportunity to bring their data house into order. They could look at what kind of data they actually collect, they could see what they use it for, how they assess it, and how they process it. For some of them, this brought actually new opportunities because they could find out what data they possess and use it in new, more innovative forms.

In doing these checks, and there was also already mentioned some of them have also eliminated unnecessary risks, which we see in the recent past that risks of data breaches can lead to high financial interpretation of costs. I think there was a study last week which tried to put a price tag on the loss of revenues due to reputational risk which was a multi-billion sum.

Without consumers' trust in the way that data is handled, there can be no sustainable growth in the way of our data-driven economy. So the GDPR has harmonized and simplified data protection and this in return has led to a significant reduction of compliance cost and administrative burden. I think these are very tangible direct results and benefits for, in particular, small and foreign companies which
want to be active in the European market and which do not have the resources to make studies of legal requirements of different national systems. Now, looking forward, the GDPR has, as already mentioned, introduced mechanisms to lower entry barriers. We look at Article 20 of the GDPR, which stimulates and facilitates the entrance of new players. The right to data portability has a clear competition rationale, and there I would slightly contradict Renato because I think you can draw a comparison to the right of number portability in the telecommunication sector, and we saw that this was a very stimulating effect, and we hope to replicate this effect also for data portability.

MR. STEVENSON: Thank you.

We turn now to our final panelist, who is Orla Lynskey, a Law Professor and Data Protection Expert at the London School of Economics, who I see way down there. And we’ll hear her perspectives now.

DR. LYNSKEY: Thank you, and many thanks for the opportunity to provide some remarks for this hearing today. I think before I start I just want to highlight again the very different constitutional context in which this discussion has occurred in Europe because of the presence and the EU charter of
fundamental rights of both a right to privacy but also
a separate right to data protection.

And as a result, there is a legal obligation
to have data protection rules in place to protect the
data of European individuals. And I think that’s an
important differentiating factor between this
discussion in the EU and this discussion in the U.S.

I’d like to think about two interrelated
claims about how EU data protection rules can impact
on competition and on innovation. And the first is a
very obvious one, which is that the GDPR and its
predecessor, the 1995 data protection directive,
formed part of the legal and regulatory landscape that
competition authorities needed to take into account
when undertaking competitive assessments and thinking
about the application of competition policy.

Now, this sometimes led to the incorrect
assumption that the mere existence of data protection
regulation meant that these markets, data markets,
were functioning effectively for consumers. And I
think you can see this, for instance, in some of the
European Commission’s decisions. So if you look at
merger decisions like Google-Snelfie or Microsoft-
LinkedIn, you see before the GDPR had even been signed
off that the Commission is saying that the mere
potential for the right to data portability to be exercised meant that consumers couldn’t be locked in. And I think that’s an erroneous assumption to work from because we have clear empirical evidence that there are many impediments to individual control over personal data. So my own research has focused on the role and the limits of informational self-determination in European data protection law. But also I think we have a documented cycle of what Farrell, a former Director of the Bureau of Economics here, described as a dysfunctional equilibrium. And that is the fact that firms who do wish to differentiate their offerings on the basis of more privacy-protective products find that there is little incentive to do so because consumers have already resigned themselves to the fact that there is no better offering out there, and this creates a vicious cycle.

And I think we have — that idea was proposed in 2012. And if you fast forward to this year, the consumer organization which in the U.K. documented similar phenomenon when they say that we have a situation of rational disengagement from data protection policies. And that is that, in fact, the rational thing for a consumer to do might be to
simply not engage with those policies in certain circumstances because they are so complex and the ability to control data is so limited.

So, then, the second point I want to make is, or a query I want to ask is, what might GDPR do in order to improve this situation. And, here, I think that although the core system of checks and balances in EU data protection law has remained unchanged from the 1995 rules, the GDPR introduces some small but significant substantive changes that have the potential to really clean up the European data ecosystem and, in particular, online.

And, so, I just want to highlight one that has currently become the focus of complaints to European data protection regulators. And, so, if we consider how data is processed or the legal basis for data processing, one of the most commonly used ones online is consent. It’s not the sole legal basis for processing but it is one of the most frequently used. And consent has to be freely given, specific, and informed. So far, so similar to the 1995 rules.

However, what the GDPR does do is specify that freely given consent -- in considering whether consent is freely given, you need to take utmost account of whether or not the performance of the
contract is made conditional on the processing of data that is not necessary. And, so, here the idea is that you will use or acknowledge that consent is not freely given if it leads to unnecessary data processing and if, therefore, consumers can’t access services or goods that they wish to access as a result.

So this conditionality requirement is, in fact, a presumption, so there’s a presumption that if access is conditional on unnecessary data processing, that consent is unlawful; that, therefore, has the potential to seriously alter the way in which data-driven -- and in particular data-driven advertising models, and in particular programmatic advertising, is operated in Europe. Because if the European Data Protection Board, the new agency for data protection in Europe, takes a hard line or a strict interpretation of this provision, it could say that data as counterperformance for the offering of a particular goods or service is not necessary for the performance of the service. And we have several opinions of its predecessor, the Article 29 working party, to indicate that that’s the way in which it is thinking.

And this, I think, would then push us towards a model of advertising in Europe that is no
longer behavioral and programmatic but rather
contextual as was highlighted in the previous panel.

And just to say finally because I need to
wrap up, that these small but significant substantive
changes are coupled with very significant enforcement
changes. And the fines -- the 4 percent of annual
global turnover have received all of the attention,
but, in fact, in my opinion, what’s likely to be far
more significant is the creation of a new agency, the
European Data Protection Board, in order to ensure
consistency across Europe of decision-making, but also
the potential to mandate a representative organization
to take actions on your behalf, which is provided for,
for instance, under Article 80 of the GDPR.

And, so, we have the potential also here for
private litigation in order to really render
individuals’ data protection rights more effective.
And then I think we’ll be in a different data-driven
environment.

MR. STEVENSON: Thank you very much for
those comments. And I think that these and some of
the earlier comments remind us that here we are
dealing both with some different constitutional
contexts, as Renato and Orla mentioned, some different
administrative contexts, the kind of comitology of the
system in Europe for deciding the sort of -- the
rules, and also a different enforcement context.
There was a reference to the fines and what has been
added from GDPR on that subject.

I’d like to take up first the issue that you
just raised about the European Data Protection Board
and the other sort of related aspects of this system
that deal with interpreting the law and how that
looks. This is a 99 article sort of document, it’s a
long thing, the GDPR, but it has a number of
provisions that deal with interpretation. How
important is interpretation to the effect of GDPR on
competition and innovation and how fit for purpose is
the mechanism that’s been set up, the European Data
Protection Board and the DPAs within that?

Maybe I’ll start with Simon and then Jim and
then others who might want to comment.

MR. MCDougALL: I think having the
consistency mechanisms in place is critical. And to
echo some of the other speakers, we shouldn’t forget
that both this regulation and also the preceding ’95
directive, you know, work specifically around having
the free movement of data around Europe, as well as
with the regulation and introducing privacy as a
fundamental right as well.
So it has always been around both those mechanisms and having a level playing field across Europe. We had a really practical problem in the buildup to GDPR where, quite rightly, many local data protection authorities were issuing lots and lots of guidance to help their national organizations, all the firms they regulated, get up to speed with GDPR.

For international organizations, that meant there was an awful lot of different guidance to keep track of, and with the best will in the world, sometimes there was variation. We’ve just had the EDPB provide guidance on one particular area, which is around rationalizing the shopping list of conditions that might mean a firm has to undertake a DPIA, a data protection impact assessment, where there were differing lists across different countries.

That’s really practical, helpful stuff, so we do need these mechanisms, and over time hopefully we’ll see a lot of these wrinkles be smoothed out.

MR. HALPERT: This is a great example -- sorry. Simon offered a great example of the work that the EDPB needs to do, but the fact remains that the much ballyhooed one-stop shop and harmonized set of rules that Rainer described did not exist as to key elements of ambiguity prior to adoption or GDPR going
into effect. And the cost of GDPR implementation exceeded $10 million for most firms that were multinational and had more than $500 million in sales.

So the result was significant uncertainty with -- our firm developed a DPI assessment tool and had to customize it before this guidance came down to different requirements in different states. And this is a very common process. With regard to personal data breach, Ewa and I were speaking this morning and, you know, one assumes that risk to fundamental rights and freedoms of the data subject would be a uniform breach notice requirement across Europe.

Well, in Poland, the regulator, when given the advance notice, will not say in any circumstance, even a trivial one, that there isn’t a risk to the fundamental rights and freedoms of individuals, which is a different standard than in other EU member states. So really the EDPB needs to be very active to counter the centripetal forces that are at work among autonomous DPAs.

I’d also add that there is no uniformity with regard to issues like children’s consent, labor laws. The German implementation of GDPR contained a whole separate labor code, labor privacy code that was enacted. So while I don’t think that actually GDPR
1 offers a good model of uniformity at this point for
2 the United States to look to in its eventual privacy
3 regulation, and while I’m very sympathetic to data
4 portability and many of the other points that Rainer
5 mentioned, I think it’s really worth looking at the
6 EDPB as a work in progress to try to fulfill the idea
7 of a uniform set of rules across Europe.
8
9 MR. STEVENSON: Thank you. I think Rainer
10 wanted to comment, and then Garrett.
11
12 DR. WESSELY: Well, yes, I think I can
13 confirm that obviously the current definition and way
14 of interpretation of the GDPR is extremely important
15 but we have seen also from the EDPB that throughout
16 last months there has been guidance. There have been,
17 I think, in total 18 guidance papers in the meantime
18 published, which builds on top of the guidance which
19 was given previously already by the Article 29 working
20 party.
21
22 So that is obviously a first challenge also
23 to see where the guidance is most important in the
24 first place. And to the uncertainty which is and was
25 in the market, I think that is probably normal with a
26 big new regulation like the one that we saw. But on
27 the other hand, what we can see is that there have
28 been certain companies which have decided to play safe
in the first place, said that they would suspend for a
certain time the activity, vis-a-vis Europe would
block European customers, but what we see now is
actually already a trend that most of these pages are
in the meantime accessible. Again, which shows that
we have to clearly distinguish between the very short-
term effects, the midterm, and the longer term
effects, and that is exactly also where we then have
to focus our guidance, I think.

MR. HALPERT: Absolutely. Totally agree.

MR. STEVENSON: Thank you. Garrett and then
Renato.

DR. JOHNSON: So I think the question of
interpretation is a really important one because, you
know, we’re here talking about this because the U.S.
and certainly many business leaders or some business
leaders are calling for a GDPR-style regulation in the
United States. So the reason interpretation is
difficult is that, as someone said, I think Simon
said, you know, on May 26th, Europe didn’t burn down.
Now, it would be hard to conclude from that
that there were no impacts of GDPR. Certainly the
research that was presented yesterday, and some of my
research suggests that there are some impacts of the
GDPR and some of those are troublesome. But a larger
issue is that, you know, what we have yet to see is an
enforcement action in Europe that clarifies some of
these issues.

So I think Orla brings up a really good
point about the state of programmatic advertising in
Europe. Currently, the sort of de facto way that most
websites have handled this is an opt-out notice that
shows up when you arrive on their website, and
basically 90 percent of people are consenting or not
going through the process of opting out.

Now, the laws, as you say, if the regulators
want to take a hard take on this, the laws pretty
clearly say that they want opt-in consent, that’s
specific to purposes, so imagine as you’re a consumer,
you need to check, you know, 50 different companies
that get to know your website -- get to know that you
visited a website and eight different purposes, you’re
going to be checking a lot of boxes. And, of course,
that’s going to mean that basically no one’s going to
be checking these boxes.

And then you’d see a very different effect
of the GDPR on the web. So I think the truth will
continue to evolve here.

MR. STEVENSON: Thank you.

Renato.
MR. NAZZINI: Yes, very briefly on this point, and coming to that from a competition perspective, I think even the regulatory setup in Europe, what is very important and is happening to an extent is that competition authorities and data protection regulators talk to each other. Of course, interagency cooperation always comes at a cost in terms of resources and time, but I think it is very important, especially if, as Rainer was saying, certain of the provisions of the data protection of the GDPR ought to be interpreted in a way that fosters competition.

I’m very happy that the right to portability is there, obviously. I’m just saying that it is not a panacea for competition problems in these markets, in which it’s law. Data are a little bit more complex than just a six or seven or eight-digit number to port. And, for example, where interpretation will be important, and we have seen already good evidence that we are going towards that direction, you know, let’s interpret, for example, the right to data portability in a way which is more conducive to competition.

The regulation says, data provided by the individual, well, clearly a broader interpretation that provided by which includes as much as the data
which is necessary for others to compete as possible, that would be a good thing for competition. So I think this point is quite important.

MR. STEVENSON: Thank you.

Let me turn to another subject that often comes up in connection with GDPR, and that is the up to 4 percent of total worldwide annual turnover as potential sanctions, which has already been mentioned in the conference several times, even outside this panel. What effect do those provisions have potentially on innovation and competition? Are there certain effects, either pro or con, of having these -- I think anyone would describe them as, indeed I think even one of the authors of GDPR describe them as heavy sanctions. Orla?

DR. LYNSKEY: Well, I think the fines were initially modeled, in fact, on antitrust fines with the antitrust and the competitive provisions as the source of inspiration for that. However, I do think regulators, including the ICO, for instance, in the U.K., have been very quick to point out that they will continue to work with those data controllers and data processors that are endeavoring to comply with the regulation and that fines are kind of a backstop here. But as I said, I think there are other
mechanisms, such as the potential for strategic litigation that is provided by the regulation, that will lead to, as we were just discussing, more interpretive clarity.

If I can come back to the point that Garrett made about the problematic impact of GDPR, well, if that is fewer third-party trackers, well, again, that’s a question of whether or not you think that is problematic because, in fact, at the moment there is a complaint pending before the ICO in the U.K. and the Irish data protection commissioner that the entire realtime bidding system is inconsistent with many core principles of GDPR, including data minimization, fairness, transparency, and many others. And that is a question, then, of looking at the entire system that is in place and seeing whether or not that’s data-protection-compliant.

And then on the issue of less investment, which the Wagman paper mentioned yesterday, I think this comes back to what Simon said, which is it depends on whether or not we can encourage investment in privacy-protective technologies and privacy-enhancing technologies. For instance, that paper doesn’t consider at all the jobs that will be created for data protection officers and others.
So I think a narrow focus on simply the fines and the sanctions ignores all of these other potential mechanisms for interpretation and innovation.

MR. STEVENSON: Jim.

MR. HALPERT: Actually, I’d like to make one quick point with regard to the group actions point. I think that group actions can make sense, but they only make sense if the legal requirements are relatively clear. And it’s a little bit troubling to think of group actions as the battering ram to get clarity, where in a system, the question of what’s a legitimate interest of the data controller, for example, that overrides the interests of the data subject.

That’s something that the regulators really should provide guidance on. I totally agree with you that the question about how realtime exchanges work in relation to data protection, some guidance would be helpful on that, but a regulator really should be doing that sort of work.

I’d also point out that there are very different sorts of incentives in class action litigation in the United States, and one shouldn’t assume, as some do, that while GDPR has class action risk that should be, for example, the mechanism for
enforcement of the California Consumer Privacy Act or
some federal law that was based on GDPR.
There’s no e-discovery regime in Europe, so
the asymmetrical costs, which are about a million
dollars anytime a lawsuit is filed, that are only
borne by the defendant, are very, very different.
There are also -- are typically not the ability to
obtain attorneys’ fees; and, in fact, there are no
damages available under GDPR group actions. So this
is really an apples-to-oranges comparison, and I just
wanted to give that frame and then give back the time.

MR. STEVENSON: I just wanted to put one
more question out. We only have a few minutes left.
And that is, and I know one of our Commissioners has
sort of raised the issue of one thing that U.S. law
does in some ways is to tailor the regulation that
exists to the risk, to tailor regulation to the risk.
Is that important to do here, and does the GDPR do a
good job of tailoring the regulation to the risks that
exist?

Renato.

MR. NAZZINI: I think I can have the first
go at that. I mean, it seems the GDPR is actually a
set of rules that in principle, I mean there are other
exceptions and modulations, but apply to all firms and
all data with the higher threshold for certain particularly sensitive data, such as health data, political opinions, et cetera.

In principle, it’s not the kind of risk-based, outcome-based regulation, but it’s a process-based regulation which applies across the board. So it doesn’t really do so, but I think it is fair to say that the objective of the regulation was actually to set out that level playing field across the board. And that’s where some of the problems that Garrett and others actually have highlighted come from.

MR. HALPERT: In fairness, though, fines are geared to risk of harm, too, so there is some -- if one looks at the eye-popping sanctions, they do depend on high risk, for example.

MR. STEVENSON: Okay. Simon?

MR. MCDougall: Well, to echo what Jim was saying, yeah, there’s definitely elements to the GDPR which do talk directly to considering risks. The accountability regime is also a new entrant, and I think it’s critical to understanding how the GDPR can reward good behavior in firms large and small.

But I also want to say one word on just how this wraps into the other risks that large organizations and small organizations deal with and
reputational risk. And what I think we’re seeing on both sides of the Atlantic right now is an ongoing breakdown in trust. And that’s an ongoing breakdown in trust in many ways, but one of the ways is in how people -- whether people trust organizations in handling their data. And that has a massive competitive impact, and sometimes it’s dragging all organizations down, so it’s not a relative thing, but I think in many cases it favors the incumbent because people aren’t going to make the leap into a new venture or a new technology if they don’t really trust the environment they’re in. And that’s a critical part of the GDPR that it can help rebuild trust and give people confidence in using new services because they believe their data will be handled responsibly.

MR. STEVENSON: Orla, did you have a comment?

Oh, I’m sorry, Rainer.

DR. WESSELY: I would strongly agree to that. I mean, certainly it is process-based, and what we think that the challenge is that the GDPR has to be sufficiently flexible actually to adapt itself to new risks which we could not even predict at the time that the GDPR was planned.

Just let me make one additional point. We
try, as from the first day of the GDPR, to be as constructive as possible in the dialogue with the economic operators on the market. I think by now it is clear that GDPR is not used as a fining sword and so as a very smooth phasing-in, which is also underlined by -- I don’t know whether you followed that, but Commissioner Joureva just said that in June next year, 2019, people have one day -- we will have a stock-taking exercise in order not to wait until 2020, which would be the set time for when we have to report back to the European Parliament. So next year, we should be able to address actually many of these questions and look into the effects on innovation and competition.

MR. STEVENSON: Any other last words on this? Yes, Renato.

MR. NAZZINI: Just one point about fines, actually. I think one positive aspect to the 4 percent worldwide turnover fine is it actually -- an argument that obviously not too explicitly but it has been made and I’ve heard in Europe that, you know, you have to use competition enforcement to in effect bolster privacy regulation because fines were too low and ineffective cannot be made any longer.

So really, now, you have effective
sanctions, so in mergers, in abuse-of-dominance cases, et cetera, we shouldn’t use competition policy to punish and deter privacy breaches.

MR. HALPERT: I’d add one point with regard to big data and data protection. If we’re talking about an incumbent that has a lot of personal data, it is difficult to open up that data in personally identifiable format to other competitors without having some data protection measures in place. So there is some inherent tension here that’s worth considering as we move into the pure antitrust analysis of this sort of problem, and I just wanted to raise that as something to think about.

MR. STEVENSON: Thank you very much. Three, two, one, we’re out of time. So please join me in thanking our panelists.

(Applause.)

(End of Panel 5.)

(Hearing concluded at 4:59 p.m.)
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