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FEDERAL TRADE COMMISSION  
COMPETITION AND CONSUMER PROTECTION  
IN THE 21ST CENTURY

Wednesday, November 7, 2018  
9:00 a.m.

American University  
Washington College of Law  
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1                   PANEL 1: ANTITRUST ANALYSIS OF DATA

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

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

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

21                  Next to him, Renata Hesse is a partner at  
22 Sullivan & Cromwell, and she was previously the Acting  
23 Assistant Attorney General and the Principal Deputy  
24 Assistant Attorney General and the Chief of the  
25 Networks and Technology Section and a trial attorney

1 at the Antitrust Division at the Justice Department.  
2 She's done it all. And she's also served a tour of  
3 duty at the Federal Communications Commission as  
4 well.

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

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

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

25 And next to him is -- and next to me is

1 Professor Sokol, Daniel Sokol, who is a Law Professor  
2 at the University of Florida, and he is also of  
3 counsel in the D.C. office of Wilson Sonsini.

4 I am honored to have all of you here today  
5 to answer the hard questions, partly because I want to  
6 hear your answers to the thoughtful questions about  
7 the antitrust analysis of data and partly because your  
8 answering today means that I don't have to.

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

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

25 I'm going to bring that kind of thinking, if

1 I may, to the question of big data. So I want to  
2 focus on both those words -- big and data. Both  
3 separately are things that the FTC throughout its 100-  
4 plus-year history have thought about. For our  
5 particular panel, the question is, is there something  
6 different when we put those two words together, "big  
7 data," that is, both as an empirical matter, are we  
8 seeing something different here that we have not seen  
9 before in terms of behavior; and number two, if we are  
10 seeing certain things that are different, and even if  
11 we're seeing certain things that are the same, is our  
12 actual legal framework capable of dealing with these  
13 issues.

14 So I think there are certain differences  
15 between big data and what we've seen before. Some of  
16 it is simply the amount of data, but what does that  
17 mean? I think there's a data ecosystem that we need  
18 to understand better. So this includes data  
19 suppliers, data managers, service providers,  
20 aggregators, platforms themselves because it turns out  
21 all data is not created the same, its availability is  
22 different. So we also have a sense that big data --  
23 there's no one company that can collect all of it in a  
24 sense not the way we conceptualize oil like there's a  
25 finite amount.

1           No, the amount of big data that we're going  
2 to have in five years time or maybe even three years'  
3 time is literally going to dwarf all the data we've  
4 ever had in human history up until this moment. So  
5 number one, let's start with what does data mean?  
6 We're going to see a lot more nuance because I think  
7 that nuance matters when we get to issues of  
8 competition. The second issue is what can data do  
9 versus not do -- big data, that is.

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

20           And Alex, who's on the panel, has a  
21 framework that he works through, and we can sit and  
22 play through some of that. I'd say part of this is  
23 well known to people at the FTC because lots of  
24 companies have come to you as merging parties and  
25 said, wow, if we combine something like our IT

1 infrastructure, we'll have a lot of value that we'll  
2 be able to capture very quickly. We call these  
3 efficiencies. In practice, we don't see that often,  
4 because it actually turns out it's really difficult to  
5 combine different types of data, so that's sort of the  
6 first premise. And then even when you do combine it,  
7 again, it doesn't always work the way you think it  
8 does.

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

22           That's not to say that you don't take cases  
23 seriously, you don't investigate, but it just means  
24 that you have to really think through as we're going  
25 to see in the next panel with regards to remedy.



1           So where does that leave us? Number one,  
2           are the general theories of law still workable? The  
3           answer is yes, we think by analogy in law, does this  
4           case look like some other case? And the second thing  
5           is simply context. Where have we been thus far? When  
6           we see the actual mergers to date and conduct cases to  
7           date, there has, as of yet, not been a case that's  
8           been decided blocked, that is, on merger grounds or a  
9           conduct case where we actually have said there's a big  
10          data problem that we need to remedy. Thank you.

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

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

23           MS. LEVINE: You're assuming that they're  
24          economists because they're not lawyers. We come in  
25          two categories.

1 DR. BAYE: There's only two types of people  
2 in the world, lawyers and nonlawyers. So I want to  
3 offer up what I hope are some high-level thoughts that  
4 will complement kind of the legal view that Alex  
5 talked about and talk about the economics of big data.  
6 And there are kind of four high-level issues that I  
7 think are very, very important to contemplate,  
8 regardless of how you're viewing big data issues.  
9 Okay?

10 The first point I want to make is that the  
11 adjective "big" in front of data often conjures up the  
12 notion that somehow big data is bad. That same  
13 principle applies in other aspects of economics where  
14 people think big firms are bad and so forth. And the  
15 first caveat I want to offer up is as we're  
16 contemplating the legal framework with which we  
17 evaluate big data issues in antitrust and even  
18 consumer protection that we begin by thinking about  
19 nonspeculative theories of harm that are cognizable.

20 We typically think about cognizable in the  
21 context of cognizable efficiencies, but with respect  
22 to big data, it's important to recognize that it may  
23 be difficult to articulate a theory of harm. Just  
24 because something is big doesn't mean there's harm,  
25 and let me just give you two examples. So one

1 cognizable theory of harm might be that somehow big  
2 data is going to allow some greedy capitalist to  
3 exploit individual consumers by raising prices.  
4 That's a theory of harm that you can take to data and  
5 determine whether or not prices rise as a result of  
6 that data.

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

18           Being a monopolist is not a bad thing in  
19 terms of the antitrust law. You may not like it, but  
20 it's not illegal it to charge high prices.  
21 Competition policy is relevant when two entities merge  
22 and that merger gives them the power to raise prices.  
23 Okay? So from the point of view of merger analysis,  
24 it's important to ask the question whether somehow  
25 that merger is going to impact the ability of firms to

1 raise prices.

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

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

20 So the big point is, it's important to  
21 postulate theories that are testable, theories that we  
22 can actually take to data, and it's important that we  
23 not confuse competition issues with other issues like  
24 unfairness. Gee, it's unfair that a firm with big  
25 data might be able to do a better job of extracting

1 rents from its consumers. That in and of itself, as I  
2 see it, is not harm to competition. So don't confuse  
3 those issues.

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

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

25           So oftentimes when we do competitive

1 analysis, we're just looking at the price in a market,  
2 and I think big data makes that more complex, because  
3 there are typically more actors that are attached to  
4 the big data, and as an economist, if we're going to  
5 do a right job of evaluating whether a particular  
6 business practice is procompetitive or not, it's  
7 important to account not only for all the costs,  
8 potential costs of that conduct or that merger or  
9 whatever, it's also important to account for the  
10 potential benefits of that.

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

20 A platform's privacy policies may  
21 disadvantage certain participants on that platform,  
22 like some merchants, for example. But if consumers  
23 benefit and if the overall social welfare goes up as a  
24 result of those policies, one needs to take that into  
25 account when the whining merchant that's harmed by

1 that privacy policy, for example, comes in and cries  
2 foul. Thanks.

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

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

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

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

1 for access to data as a barrier to entry.

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

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

17           Selective discounting is a more attractive  
18 exclusionary strategy than across-the-board price-  
19 cutting because it's a less costly means of exclusion.  
20 And I want to illustrate the exclusionary  
21 possibilities of the asymmetric availability of data  
22 with two hypothetical examples involving Amazon's  
23 shopping platform, and I'm picking Amazon because the  
24 examples involving retail products tend to be easy to  
25 grasp and they avoid complications that you might get



1 into when consumers are not charged directly for  
2 services.

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

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

20 So selective -- so we're talking about  
21 selective and targeted price cuts to potential  
22 customers by Amazon. Now, that might seem like -- I'm  
23 sorry, yeah, to customers of the platforms that are --  
24 to the rival platforms. Customers -- targeting them  
25 with selective price cuts. And that might seem like a

1 pure benefit to competition, and in some cases, it no  
2 doubt would be, but it could also harm competition  
3 when it was employed by a dominant platform to  
4 exclude.

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

12 Either way, Amazon might be able maintain,  
13 obtain, extend, you know, enhance market power in  
14 online shopping, and all online shoppers might end up  
15 paying more, regardless of which shopping platform  
16 they use. Amazon might not even need to implement  
17 targeted price cuts to induce its rivals to back off  
18 competitively or at least not often, because once  
19 Amazon has the ability to selectively target customers  
20 of a rival platform that lacks a comparable ability to  
21 target Amazon's customers and the rivals recognize  
22 that ability, the threat of selective discounting  
23 might be enough to induce the rivals to avoid  
24 provoking Amazon by undercutting Amazon's prices. And  
25 even if the threats are enough, selective targeting

1 might be an inexpensive exclusionary strategy because  
2 the dominant firm doesn't have to reduce its price to  
3 its existing customers, only the customers likely to  
4 purchase from rivals.

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

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

24           If I had more time, I'd say something about  
25 the underlying economics, but instead I'll just simply

1 say that the exclusionary potential I've highlighted  
2 wouldn't arise unless the dominant firm is less  
3 vulnerable to targeted discounting than its rivals and  
4 an advantage and access to customer or supplier data  
5 could make that possible. Thanks.

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

9 DR. BAKER: Good.

10 MS. LEVINE: So thank you for the teaser.  
11 It's a great way to start the conversation.

12 DR. BAKER: Thank you, Gail.

13 MS. LEVINE: Sure. Thank you.

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

18 MR. GRUNES: Sure. Thank you, Gail. I'm  
19 trying to keep within the five minutes, and I'll  
20 probably fail miserably. So the first point obviously  
21 is that the competition issues raised by big data  
22 aren't going away. There are going to be more mergers  
23 where data plays a significant role one way or  
24 another, and there's going to be more occasions to  
25 consider the collection, use, and possible misuse of

1 data when looking at dominant firm conduct.

2 I think we also are in a position, I'd argue  
3 a little bit different from Danny in that we're now --  
4 we have a growing body of decisions in closing  
5 statements, so it's possible to look back and see if  
6 there are lessons to be learned. You can see DOJ  
7 grappling with access to data as a competitive issue  
8 in its 2010 closing statement in the Microsoft-Yahoo  
9 agreement. You can see the FTC staff asking questions  
10 about the competitive significance of large volumes of  
11 data Google was collecting from users in the half of  
12 its staff memorandum that was inadvertently released.

13 These obviously are not easy issues, they're  
14 factual, technical -- and technical challenges to  
15 understanding the industries, both in terms of their  
16 business models and their competitive strategies. I  
17 think there's been progress in the past five years.  
18 There's more understanding about the way digital  
19 markets work. The German, French, and Japanese  
20 competition authorities have produced reports on big  
21 data, and the Australian authority is in the process  
22 of doing so.

23 Really great work has been done by the OECD  
24 on the digital economy and big data, and then I and  
25 Maurice Stucke hopefully have helped advance the

1 discussion a little bit through our book Big Data and  
2 Competition Policy. And, so, it's a long book. I  
3 have five minutes. I offer the book as part of the  
4 record in this proceeding.

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

17           Another issue with that is you had  
18 competitors complaining. So, you know, Danny says we  
19 don't know enough about these markets. Well, in that  
20 case, the competitors probably were the ones who knew  
21 the most about the markets and could articulate the  
22 exclusionary risk the best, but the FTC relegated the  
23 views of competitors to a footnote as, you know, it's  
24 sort of the usual agency hostility to views of  
25 competitors. Maybe not the right decision.

1           Just last month, Makan Delrahim -- so I  
2 don't want to just pick on the FTC. Last month, Makan  
3 Delrahim gave a speech in Haifa, in which he repeated  
4 a number of the myths about big data that Maurice  
5 Stucke and I have discussed in our book and that most  
6 European competition authorities now reject. Okay, so  
7 the moral of the story, first read our book; second,  
8 the rest of the world is moving forward, and the FTC  
9 and the DOJ should not be left behind.

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

20           So I'm not going to spend any more time on  
21 that, but I do want to get finally to the question of  
22 the timing of government action. So assume there's a  
23 problem, when is it right to intervene. So it's an  
24 institutional problem with fast-changing industries  
25 being too late to the dance, all right?. You know,

1 this was potentially identified as a problem in the  
2 Microsoft case that DOJ brought. You kind of get  
3 there and the bad stuff is already happening and you  
4 can't go back in time.

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

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

18 Last thought on this, the argument for  
19 earlier intervention may be supported by what's been  
20 called the now-casting radar, which is something that  
21 big data enables. That's the ability of a company,  
22 particularly a platform company, to discover  
23 competitive threats at an early stage through data and  
24 analytics, and then to take steps to destroy them, for  
25 example, merge with them, copy them, whatever, before



1 they've had a chance to take off. That companies are  
2 able to move this early also seems to me to justify an  
3 earlier governmental response. Thanks.

4 MS. LEVINE: All right. Thank you, Allen.  
5 These are provocative and challenging views of some  
6 proposed frameworks for analyzing these issues.

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

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

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

25 So just to note, it's sort of -- it sounds

1 kind of like the same debate applied to a different  
2 and new market. So I tend to think -- I usually find  
3 myself in the middle of those two poles, and I tend to  
4 think that we shouldn't just sit back and not do  
5 anything and not think about whether or not these are  
6 markets and analyze them, and I think part of what the  
7 FTC is doing here is making sure there's a forum for  
8 us to be able to do that and for us to have the  
9 conversation, which I think is an important one to  
10 have.

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

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

1 competition issues?

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

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

23           And the fundamental reason for that is that  
24 the U.S. construct is around what Mike said at the  
25 beginning. It's not bad for you to have monopoly

1 power and to exploit that monopoly power as long as  
2 you didn't get it unlawfully and as long as you aren't  
3 doing something with it that's bad. And that's how,  
4 you know, traditionally we thought about exclusionary  
5 conduct.

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

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

23 MS. LEVINE: Renata, thanks so much.

24 All right, Alex, I know that we've been  
25 talking a lot about competition law, naturally. I

1 think that you've said you wanted to address not just  
2 competition law but also matters of consumer  
3 protection law, so can you give us your thoughts  
4 there?

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

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

21 And we can already see some of this  
22 occurring with a lot of the apps that people have  
23 today, personal digital assistants and the like, as  
24 well as in the commercial context. Analytics have  
25 been tremendous in wringing additional efficiencies

1 out of, for example, the retail supply chain.

2 But big data also presents some highly  
3 publicized potential risks, including to personal  
4 privacy, and in some circumstances potentially to  
5 competition. So in the face of this breakthrough  
6 technology and the dynamic changes that are going  
7 across industries and across markets, from my  
8 perspective, it's imperative that antitrust enforcers  
9 maintain enforcement policies that continue to foster  
10 competitive dynamism and innovation in these  
11 businesses while still protecting consumers.

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

21 So now, more specifically, I'd like to go  
22 through and outline very briefly two enforcement  
23 proposals for analyzing big data issues in keeping  
24 with the aforementioned goals, and these are models or  
25 frameworks that I've had the good fortune to work on

1 with multiple distinguished colleagues.

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

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

21           We offer a three-step analysis for agencies  
22 to consider in choosing between antitrust and privacy  
23 or consumer protection laws as a matter of  
24 institutional preference. So first, you ask what is  
25 the character of the harm? Is it commercial,

1 personal, otherwise? Harm to consumer welfare or  
2 maybe economic efficiency is better addressed through  
3 antitrust, whereas personal individual harms are  
4 likely better addressed through consumer protection or  
5 privacy laws.

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

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

24 So turning from this first framework, which  
25 is sort of a high-level framework to decide between



1    which body of law, if you assume that the enforcer  
2    chooses antitrust, there's a second framework that I  
3    worked on with -- in an article last year with Greg  
4    Sivinski and Lars Kjolbye. We outlined a four-pronged  
5    analytical screen within antitrust for determining the  
6    competitive significance of data that tracks the logic  
7    of these prior matters that antitrust enforcers have  
8    already brought by treating data as an asset for  
9    analytical purposes.

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

21           These are more complex questions, but it's  
22    difficult to see where a captive data set that is not  
23    currently available to third parties in the stream of  
24    commerce is likely to present a competition issue.  
25    It's difficult to see that scenario.

1           And then, finally, is the relevant data  
2 unique or do reasonably available substitutes for the  
3 data exist? And this has been the key question in a  
4 number of cases brought by the agencies, including  
5 Thomson Reuters and others.

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

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

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

21           Just a housekeeping matter, this is the Q&A  
22 portion of our panel, so I'll be pitching questions to  
23 our panelists. This is your time to write in those  
24 questions on those note cards and pass them forward so  
25 we can -- we would be happy to entertain those, too.

1           So, Alex, let me just quickly ask you what  
2 you think of the notion of generalizing about big  
3 data. Some of the panelists today have already  
4 alluded to the notion that not all data is equally  
5 valuable. Should we be asking about the antitrust  
6 analysis of big data or data generally, or should we  
7 instead be asking about the competitive harms that  
8 come from the use of data?

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

17           First, there are numerous different kinds  
18 of data, and not all data are fungible. You have  
19 behavioral, you have transactional data, you have  
20 ambient or environmental data. They're all  
21 fundamentally different forms of data. And the  
22 value that is associated with data depends very  
23 heavily on its intended use, right? So not only is  
24 the data characteristically different or can be  
25 characteristically different across different types of

1 data, it also depends upon how someone is going to  
2 effectively monetize or use that data where you might  
3 have a competitive issue.

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

14           One of the things to really look for is, you  
15 know, most data is an input into machine learning or  
16 into AI, and that tends to be how it's monetized  
17 through those analytics. But the type of data that's  
18 desirable for purposes of most analytics is data that  
19 provides a multiplicity of signals and that offers  
20 multidimensionality for purposes of dynamic  
21 experimentation in machine learning, meaning that the  
22 machine learning is going through and looking at  
23 different patterns and different scenarios within the  
24 data to arrive at some type of -- go through an  
25 analytical process and arrive at some type of a work

1 product.

2           And, so, having different forms of data is  
3 critically important. The other point to make here is  
4 that the agencies have looked at data deal -- you  
5 know, deals involving data, deals involving data  
6 markets, many, many, many times. And what has been  
7 most critical in each one of those deals, for example,  
8 Thompson Reuters or Dun & Bradstreet-QED, which  
9 involved a merger of two companies that provided  
10 educational data, is whether or not the data sets  
11 actually have reasonable substitutes. Are they  
12 somehow very unique?

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

19           So those are all considerations that have  
20 formed part of the analysis that the agencies have  
21 gone through, both in looking at mergers and then in  
22 conduct matters. And in those circumstances, they've  
23 been able to arrive at what I think are reasoned and  
24 thorough examinations of the markets and conclusions  
25 that at least for purposes of some deals remedy the

1 potential harm. And they didn't have to -- or didn't  
2 have to modify or think about their analysis  
3 differently by virtue of associating the word "big"  
4 with data. It's really just data.

5 MS. LEVINE: Thanks so much.

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

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

24 MR. DR. BAYE: Great questions. Yeah,  
25 clearly, if consumers don't value privacy or they're

1 not willing to pay higher prices to preserve their --  
2 their purchase behavior, for example, it's going to be  
3 hard. It's going to be hard for a market to sustain  
4 that wish of consumers, because, ultimately, if you  
5 believe in markets, you know, markets are ultimately  
6 going to attempt to provide those goods and services  
7 that consumers want. And I think that's one of the --  
8 one of the tensions that we face as we contemplate  
9 privacy is that, you know, we're all very different.

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

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

1 that raise prices.

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

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

16 And the difference is, it's not like this  
17 great gold bullion that we're going to call big data  
18 is something that the firm, you know, built a mine to  
19 get. It's not a physical asset. It's an asset that  
20 the firm somehow collected from individuals. The only  
21 way you create big data is somehow attract consumers  
22 or induce consumers to turn that stuff over. I'm  
23 assuming here we're not engaging in, you know, fraud  
24 or deception, something like that. So, just bear with  
25 me for a moment.



1           So in an environment like that, if a  
2 competitive platform is at a disadvantage with respect  
3 to the data that it has, one hypothesis is it's at a  
4 disadvantage because it's not creating the value that  
5 consumers need to turn that data over in the first  
6 place. Right? So it's easy to cry foul, but it's not  
7 at all transparent that that foul is due to  
8 anticompetitive behavior. In fact, it could just  
9 simply be that the platform's offering lots of value.

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

18           MS. LEVINE: Fair enough.

19           Renata, let me ask you your thoughts on  
20 whether we should be using -- we at the agencies, we  
21 at the courts -- should be using data as -- defining a  
22 relative antitrust market as data. Is that  
23 appropriate in a merger context, in a nonmerger  
24 context? Can you think of examples where a data  
25 market has been used either by the agencies or by the

1 courts in this setting?

2 MS. HESSE: So, before I get to that, I just  
3 -- commenting on this discussion, I do think there's  
4 an element of the bigness of the data sets that, you  
5 know, that is relevant to how people feel about their  
6 impact on competition. So I tend to agree that, you  
7 know, data is different, but I also think that part  
8 of what people are worried about and, again, the  
9 question is whether antitrust is the right tool to  
10 address that concern, is that these data sets are so  
11 big that they make the machine learning dramatically  
12 easier or they make the artificial intelligence that  
13 much better or price discrimination that much better.  
14 So the bigness of the data sets isn't just a fun word  
15 to use. It is actually relevant to what the concern  
16 is that people -- that -- that's arising.

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

1 of potentially the impacts, the competitive analysis.

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

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

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

20 MS. HESSE: It looks like Allen --

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

24 MR. OKULIAR: Sure, and maybe I'll just  
25 qualify it. So I don't know that there's been any

1 definition of sort of a big data market. I'm not  
2 aware of that. But there have been cases where data's  
3 being monetized as a product and the agencies have  
4 defined that as a market. One of the examples that I  
5 gave was Dun & Bradstreet and QED, which is a merger,  
6 it was about five years ago or so. You know, and in  
7 that matter, the parties were selling K-through-12  
8 educational data, and so that was, I think, the market  
9 that they looked at. So there are some examples of  
10 that.

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

1 problem.

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

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

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

17 MS. HESSE: Right.

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

22 MR. SOKOL: Jumping in for just -- a very  
23 quick intervention. So the other thing there is it  
24 was historic data on financials that went back  
25 literally roughly 100 years. That's not what these

1 hearings are about. We're talking about, if I  
2 understand correctly, like information that's  
3 collected daily if not by the minute. And, so, the  
4 thing that made that a unique data set is not  
5 typically what we're thinking about when we see any  
6 number of companies collecting our data based on our  
7 location as -- closest to whichever cell phone tower  
8 we're at or what app we're opening, et cetera

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

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

23 I don't -- it might be hard to model it,  
24 especially in a free setting. But there's no reason  
25 you couldn't. The thing is, I think, in the U.S., we

1 don't have this idea of exploitative monopoly or  
2 exploitative abuse of dominance. And if do you, as  
3 Europe does and a lot of the rest of the world, I  
4 think it's a little easier to get at these issues than  
5 under the U.S. framework which is exclusion,  
6 collusion, predation.

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

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

25 DR. BAYE: Yeah, I mean, I concur. That was

1 kind of what I was trying to imply at the beginning,  
2 right? If you start out with a firm that already has  
3 big data and is using that to charge high prices,  
4 higher prices to extract additional rents, unless  
5 there's foreclosure or something else going on, that's  
6 not enough under competition law. But if two firms  
7 merge and you combine the two data sets and because of  
8 that you can enhance the prices that you're charging,  
9 I mean, that's anticompetitive.

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

18 DR. BAKER: But I thought Renata's point was  
19 that the merger could lead to worse privacy policies  
20 or something like that so that -- and that's in effect  
21 an increase in the quality adjusted price. And, so,  
22 it's not the price, per se, that you necessarily have  
23 to focus on. You can think of what -- competitive  
24 effects in terms of quality adjusted prices, for  
25 example.



1           MR. OKULIAR: I just want to note that  
2 one -- I mean, one practical difficulty that I think  
3 someone had mentioned is just how do you actually  
4 assess the change in price, assuming that the  
5 extraction of data can be analogized to a price or an  
6 increase in price, you know, how as a practical matter  
7 do you actually, you know, put that into an antitrust  
8 analysis and make sense of it?

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

17           We talked about getting it through a merger.  
18 Does it matter if the firm spent a lot of money and  
19 resources building and developing the data? Does it  
20 matter if the data was developed internally versus, as  
21 we said, in a merger or an acquisition? Does it  
22 matter if the data is nonrivalrous, and as one of the  
23 questions from the floor has asked, you know, can be  
24 generated -- a question from the floor posited --  
25 pretty easily by a new company?

1           Do those points matter when we're thinking  
2           about data as a barrier to entry?

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

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

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

1 barriers to entry.

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

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

25 Point two is when data's involved, there may

1 be additional reasons to think barriers to entry are  
2 higher. Data-related barriers to entry could extend  
3 to things like algorithmic learning by doing, you  
4 know, the more data you have, the better your product  
5 is going to be. Now, that's a product attribute, so  
6 I'm not saying it's a bad thing, but it could turn  
7 into a barrier for somebody else to enter.

8 MS. LEVINE: Please.

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

16 MR. GRUNES: Former client.

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

25 So this is when I start to worry about, you

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

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

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

24 You combine those two things, and it's  
25 potentially game over, so -- for competition, okay?

1 So maybe this does come back to the question of did  
2 you do it yourself or did you develop it through  
3 mergers. Maybe it comes back to the question of, if  
4 you're going to look at mergers, should you be focused  
5 on mergers in a product market, or is there something  
6 about data where you've got to look at adjacent  
7 markets or nearby markets kind of the way Europeans, I  
8 think, have done it a bit. Correct me if I'm wrong,  
9 Renata.

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

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

23 MR. GRUNES: So I guess my last response  
24 will be to say our old agency in Bazaarvoice, you  
25 know, took a merger between people where you'd think

1 the entry barriers were low, but the market  
2 participants thought they were high and successfully  
3 challenged it.

4 MS. HESSE: Bad documents.

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

7 MS. HESSE: Okay.

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

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

20 And then actually to Allen's point of do we  
21 have, you know, a series of cases? We do have an  
22 emerging series of cases, and, in fact, if we don't  
23 look at what competition authorities around the world  
24 have done in terms of their discussion documents but  
25 in terms of the actual cases, let's just, again -- big

1 picture -- look at these. Have we seen any deal  
2 blocked because of a data barrier to entry? The  
3 answer is no.

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

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

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

21 DR. BAKER: But doesn't the theory still --

22 MR. SOKOL: But this was --

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

25 MR. SOKOL: So this was, I'd say, not a big



1 data type merger the way we're thinking about big  
2 data. The way that -- not you and I, but overall,  
3 when the Wall Street Journal or Forbes or what have  
4 you covers something called big data, Bazaarvoice is  
5 two small companies in a nonreportable transaction. I  
6 don't think that that's what they're thinking about.

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

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

18 MR. OKULIAR: Can I just -- I just want to  
19 add very quickly. So I would be very concerned about  
20 overenforcement in this space and chilling innovation.  
21 I think that data gathering and data analytics are  
22 certainly forms of innovation, and I would really be  
23 framing this more as an analysis or a discussion of  
24 innovation competition in thinking about, for example,  
25 in the merger context whether you -- in the merger of

1 two parties whether there would still be sufficient  
2 number of parties innovating in the space to maintain  
3 competition. That's how I would be framing this and  
4 thinking about it.

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

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

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

25 Economies of scale talks about the depth of

1 data, the more data that you get, the easier it is to  
2 utilize that data, the more you can do with it. The  
3 economy as a scope is about the breadth of the data.  
4 Don't only have detailed data about Mike Baye; you  
5 have data from Jon and everyone else in this room.  
6 That's breadth. And as you collect that, you do  
7 better.

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

19 Susan comes back and says, well, it's really  
20 all about the long tail. You know? It's true that  
21 there's a lot of searches that a lot of people do and  
22 you don't need a lot of information on that, but when  
23 Mike Baye wants to find that bizarre book that only  
24 Mike Baye wants called David's Order Statistics, you  
25 know, there's just not a lot of searches for that.

1 And, so, if you got one player that kind of is a  
2 monopoly for those searches, it can do more than  
3 someone else, and that gives Microsoft Bing a  
4 disadvantage.

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

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

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

1 problems that we perceive.

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

4 DR. BAKER: May I just --

5 MS. LEVINE: Go for it.

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

8 MS. LEVINE: Please.

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

19 And there are other settings where multiple  
20 firms can achieve sufficient scale economies to  
21 compete, and maybe it's only a handful, and then we  
22 have kind of an oligopoly market, you know, relative  
23 to the size of the market. That is to say multiple  
24 firms can achieve the scale economies given the scope  
25 of industry demand.

1           And then we have an oligopoly market, and  
2 maybe there are only two. And then we have other  
3 settings where lots of firms can get sufficient scale  
4 economies and then we don't worry so much. And I  
5 wasn't sure that you were trying to argue that Google  
6 was a natural monopoly or simply just observing that  
7 you might have a market where only two firms could  
8 achieve sufficient scale economies to compete and that  
9 maybe Google still gets more than Bing but there's  
10 diminishing returns and Bing has enough, and you get  
11 competition.

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

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

24           So, I mean, again, I'm not trying to put  
25 words in either of their mouths. I'm just trying to

1 point out, hypothetically, if it's a structural issue,  
2 then it's a structural issue. Let's deal with that  
3 and figure out how best to deal with structural issues  
4 than try to, you know, prevent firms from becoming big  
5 because big data is a bad problem. You lose the  
6 benefits associated with that. That's the dialogue  
7 between Susan and Hal was about that.

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

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

21 DR. BAKER: Oh, it could be bad for  
22 consumers if what it does -- if the consequence --  
23 well, first of all, selective discounting can often be  
24 good for consumers. And I'm not arguing otherwise  
25 that -- because that could be a way in which

1 competition happens. But it could be bad for  
2 consumers if it operates to exclude rivals. And how  
3 could it operate to exclude rivals? Well, it could  
4 operate to exclude rivals by either raising their  
5 marginal cost of getting new customers or discouraging  
6 them from being aggressive competitors.

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

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

18 MS. HESSE: But does it have to fit into the  
19 predation? I mean, what's the framework you use to  
20 analyze that? Because what you just described sounded  
21 like the American Airlines case which was a predation  
22 case that DOJ lost. I'm just curious. I'm not  
23 challenging the theory. I'm just wondering, how do  
24 you judge whether the selective discounting is  
25 anticompetitive or procompetitive?



1 DR. BAKER: Oh, well, you have to -- I mean,  
2 the issue is -- has to do with the rival reactions.  
3 If the -- you know, in some markets, everybody  
4 competes more aggressively and everybody selectively  
5 discounts to each other's customers and you get very  
6 competitive outcomes. And other markets, you could  
7 get something like what I was describing as possible,  
8 which is the rivals back off.

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

17 MS. LEVINE: Any thoughts or responses to  
18 that?

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

1 theories of competitive harm?

2 MR. SOKOL: In short, the answer is yes.  
3 But actually, let me just go back to what we've been  
4 talking about here to give you proof of that, which  
5 is, in every single case that we've been talking  
6 about, we've been analogizing back to other cases  
7 involving data, to other cases involving exclusionary  
8 conduct or predatory conduct, and we have specific  
9 cases in mind, and we say, does this look like this  
10 other case enough that it gives us a theory of harm  
11 that is potentially winnable in court? I think very  
12 effectively, by the way, I say humbly on the same  
13 panel as one of the authors of the leading antitrust  
14 law case book.

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

24 Or, in the alternative, if we assume that  
25 the merger guidelines are actually not reflective of

1 practice but are aspirational of the practice that we  
2 want to see, is there something that seems to be  
3 missing from the merger guidelines in the way that we  
4 think about it? Well, every one of our theories, we  
5 seem to have been evaluating in mergers, I have yet to  
6 hear something incredibly new that the guidelines  
7 haven't thought through as of yet. And I'll just  
8 leave it at that.

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

18 And, so, that's why when we talk about -- we  
19 gravitate -- the closest we get is when we think about  
20 data as barrier to entry. That's how we got there in  
21 this conversation, that, because in the merger  
22 analysis, that's what sort of looks like exclusion.  
23 But you could also worry that acquisition of data  
24 would do just what I was describing, selected --  
25 targeted discounting. It could allow -- or there are

1 other kinds of exclusionary conduct that -- involving  
2 big data that you could worry about.

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

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

19 MS. LEVINE: We have fewer than five minutes  
20 left. I want to throw out a very practical question  
21 to this panel, because I know some of you have already  
22 told me you have thoughts on the question. If we're  
23 going to take big data seriously, what questions  
24 should staff at the agencies be asking to get evidence  
25 on the big data questions you've been talking about

1 today?

2 MR. GRUNES: So can I jump in on this one?  
3 All right. So what sort of data are we talking about?  
4 Is this industrial or personal? Is it user-generated?  
5 Is it observed? Is it inferred? How does it  
6 contribute to the rationale of a deal? What does the  
7 acquirer intend to do with it? And in a lot of these  
8 deals, I suspect the answer is, I don't know, you  
9 know, I'm going to figure out how to monetize it, but  
10 that's a legitimate question.

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

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

22 DR. BAYE: Just real briefly, regardless  
23 of whether it's a consumer protection matter or an  
24 antitrust matter, I would say make sure you're looking  
25 at the appropriate actual world and the appropriate

1 but-for world, because the tendency is, for example,  
2 to contemplate what the world might look like if it  
3 were perfectly competitive, how happy would consumers  
4 be, and that's not generally the correct but-for  
5 world.

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

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

21 MS. LEVINE: Are there a different set of  
22 questions you'd be asking to elicit that information,  
23 or is it the same sort of suite of questions that's  
24 been outlined already? Just that information about  
25 efficiencies.

1           MR. SOKOL: Oh, okay, right. So  
2 efficiencies are always difficult. They're difficult  
3 conceptually for courts. Quality efficiencies -- you  
4 know, something that Allen talked about, particularly  
5 difficult for courts to understand. On the agency  
6 side, you all get it better than courts do. You have  
7 frameworks. You have a way of getting at these  
8 questions.

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

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

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

25           (Applause.)

1                   MS. LEVINE: There's a break. All right,  
2 now for the important information. I've just been  
3 told there's a 15-minute break. Please enjoy.

4                   (End of Panel 1.)

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1           PANEL 2:  REMEDIES FOR COMPETITION PROBLEMS  
2    IN DATA MARKETS

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

15           So I'm thrilled to have these wonderful  
16 participants on this panel.  And I direct you to their  
17 full bios for their list of accolades, but just by way  
18 of short introductions, we have Andrew Gavil who is a  
19 Law Professor at Howard University and past Director  
20 of FTC's Office of Policy Planning; Courtney Dyer,  
21 who's a partner at O'Melveny & Myers; Frank Pasquale,  
22 Law Professor at University of Maryland's Francis King  
23 Carey School of Law; Kevin Bankston, Law Professor at  
24 University of -- sorry, I'm rereading Frank's bio.  
25 Moving right along.  Kevin is Director of New

1 America's Open Technology Institute; and then Daniel  
2 Sokol, Law Professor at University of Florida Levin  
3 College of Law and Senior of Counsel in the D.C.  
4 office of Wilson Sonsini.

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

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

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

21 I guess the big point I would like to start  
22 with is that remedies are all too often thought of and  
23 discussed in a context of a litigation mindset. And  
24 even this morning, you could see that a lot of the  
25 discussion about big data-related theories and issues

1 have been focused on litigation. And what I'd like to  
2 suggest is that the FTC has a far broader set of tools  
3 available to it, and I'll start by talking a little  
4 bit about the limitations of litigation remedies and  
5 the possibilities for far more flexible remedies using  
6 some of the other tools the FTC has, particularly  
7 competition advocacy, which the Office of Policy  
8 Planning has historically done a lot of.

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

17 But, if we look back historically -- and  
18 this was something the panel was talking about this  
19 morning as well -- it has become very difficult to  
20 bring Section 2-like cases, even for the Federal Trade  
21 Commission. It is a long process. It takes years in  
22 some cases. And if the notion is that we're going to,  
23 at the end of the day, have structural remedies, well,  
24 go reread the decision of the D.C. Circuit in  
25 Microsoft and look what the standards are for trying

1 to impose structural remedies in the case of conduct  
2 that is anticompetitive as opposed to conduct like  
3 serial mergers.

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

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

21           So what's the benefit of the agency being  
22 engaged sort of at an earlier stage following  
23 industries, looking at guidelines, looking at the  
24 possibility of comments on legislation regulation?  
25 Well, it's before the fact. So there's an opportunity

1 there to influence the direction of industry. The  
2 other advantages are cost-effective. It is a whole  
3 lot less resource-intensive than bringing enforcement  
4 actions to think in terms of an advocacy program.

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

14           If you start thinking about competition  
15 advocacy more broadly, suddenly, you have a wider  
16 range of potential ways to influence the direction of  
17 the market to use the FTC's voice through speeches,  
18 like I said, through comment letters, but also a whole  
19 range of things like these hearings, which are a form  
20 themselves of soft advocacy. And they are much more  
21 flexible, and you can use them in different ways to  
22 build agency expertise. And it might later translate  
23 into support for enforcement, but it should be part of  
24 the bigger package of remedies that we think about and  
25 talk about today, remedies for competition problems,

1 not necessarily remedies for anticompetitive conduct.

2 MS. AMBROGI: Great, thanks.

3 And now Courtney.

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

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

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

22 But once you define the asset and the  
23 agencies identify what they think needs to be divested  
24 to restore competition, I think it's really important  
25 to ensure that that data remedy doesn't lessen the

1 incentives of either the merged party or the remedial  
2 party to innovate and to use that asset to create  
3 value and to use that data to compete more efficiently  
4 in the market.

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

16 In others, the data has been a critical  
17 component to what the agencies have defined as the  
18 relevant product market. In Nielsen-Arbitron, the FTC  
19 required the divestiture of assets related to  
20 Arbitron's cross-platform audience measurement  
21 business, and it was then in development and Nielsen  
22 and Arbitron were the only two developing this  
23 business, but along with that divestiture required a  
24 royalty-free perpetual license to Arbitron's  
25 individual-level demographic data that it collected

1 through its audience measurement panel.

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

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

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

23           But once these assets are defined and these  
24 remedies are crafted, I think it's important to ensure  
25 that the remedy preserves the incentives of both of



1 the remedial party and the merged firm to use those  
2 assets to innovate and to not impose conditions in  
3 those agreements that get beyond what is necessary  
4 that may have an impact of deterring companies from  
5 applying kind of their own expertise and ingenuity and  
6 innovative spark to really derive assets from that  
7 data.

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

24 With regards to the merged firms, I think  
25 it's important not to deter them from taking advantage

1 of the efficiencies and the transaction by forcing  
2 them to pass along any R&D and any enhancements that  
3 they want to make to their new data set to the  
4 remedial party and to their competitor. And, you  
5 know, behavioral remedies that go along with these  
6 structural divestitures do have, through the compelled  
7 licensing, the risk of losing the incentives for the  
8 merged firm to continue to make the products better.  
9 Thanks.

10 MS. AMBROGI: Thanks, Courtney.

11 Professor Pasquale.

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

15 MS. AMBROGI: I can just pass it down.

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

20 Just thanks so much, Katie, for terrific  
21 organization here and for the chance to speak about  
22 the potential for remedies and especially to think  
23 about platform power and a new age of competition  
24 policy, particularly as Allen Grunes discussed in the  
25 last panel when the U.S. might be falling behind if it

1 doesn't think more creatively and expansively about  
2 the nature of its competition policy.

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

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

20           I start here just with respect to data  
21 interoperability. I think that's really critical and  
22 that the example of the FCC making people's cell phone  
23 numbers portable should stand as a great example of  
24 something that really increased the value of a certain  
25 service to everyone that was using it and that was

1 ultimately something that we could bring that sort of  
2 model and that sort of ideal to many different areas  
3 if we wanted to have an industrial policy that  
4 actually promoted competition or federations of social  
5 networks as opposed to one that leads to  
6 monopolization.

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

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

21 Regulation, ongoing regulation, again, isn't  
22 our focus but is something that I think needs to  
23 complement these other procompetitive elements. And I  
24 also just want to be sure to get into a few fines in  
25 thinking about how do U.S. fines for anticompetitive

1 behavior, how do they compare to fines in other parts  
2 of the world?

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

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

22 But we also have to keep in mind Hamiltonian  
23 tech policy, particularly K. Sabeel Rahman's article,  
24 "The New Utilities." And Rahman was a professor at  
25 Brooklyn. He is now leading the Demos Institute, and

1 I think that his work in terms of firewalling  
2 core necessities away and recognizing these  
3 infrastructural goods of imposing public obligations  
4 on infrastructural firms and creating public options  
5 all must be part of competition advocacy.

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

12 (Applause.)

13 MS. AMBROGI: Great. Thanks.

14 Kevin?

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

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

1 are you going to do?

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

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

17           So, for example, it was thanks to  
18 portability of contact data that several of today's  
19 social network incumbents were able to grow so quickly  
20 in the first place. And, now, several -- there are  
21 several tools -- several of the larger companies have  
22 offered data portability tools for many years now, but  
23 post-GDPR, they are working to improve them both in  
24 terms of comprehensiveness of the data and usability  
25 of the formats of the data.

1           But people have mostly just used these  
2 download-your-data tools to archive their stuff rather  
3 than move it, in part because they are download-your-  
4 data tools. Actually having to download your stuff  
5 and upload it somewhere else, especially if you're a  
6 mobile user, is a pretty big barrier. And that's also  
7 been a barrier to, like, the development of recipients  
8 of that data.

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

20           But then we get to the edge cases. Let's  
21 come back to the hypothetical. Getting my photos out  
22 is nice, but what about the photos I'm in that aren't  
23 mine? What about the tags that people have added to  
24 my photos that I didn't add? What about my comments  
25 to other people's posts? What about other people's



1    comments on my posts, things that aren't clearly mine?  
2    And most especially what about my social graph?  What  
3    about the network of friends that is really probably  
4    the most important thing I'd want to be able to move?

5            Many commentaries, including my  
6    organization, want companies like Facebook to free the  
7    social graph and make it more portable.  But,  
8    unfortunately, it's not as easy as number portability  
9    because we're actually talking about the data of other  
10   people and about other people.  Essentially, the same  
11   kind of profile and contact information that was at  
12   the heart of the Cambridge Analytica scandal in the  
13   first place and sometimes contact information that my  
14   friends haven't even chosen to expose to me on the  
15   platform in the first place.

16           Now, let's be clear.  Facebook has been  
17   finding ways to avoid letting users get this kind of  
18   information out of the platform for years based on  
19   privacy arguments that were also super conveniently  
20   and suspiciously aligned with their business  
21   interests.  For example, the privacy setting that lets  
22   you decide whether or not friends can download your  
23   contact information is set to default private unlike  
24   almost every other privacy setting on Facebook.

25           But especially now in the political and

1 legal environment that we have, I can't blame them for  
2 being very wary of sharing such data. And there is a  
3 privacy issue there. And that's not an easy --  
4 there's not an easy answer on how to square that  
5 privacy issue and the desire for meaningful  
6 portability, which takes us to the last important  
7 theme here, which impacts both portability and  
8 interoperability, that is, services talking to each  
9 other in an ongoing way.

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

19 Those types of open platforms have been a  
20 huge source of innovative features and tens of  
21 thousands or even hundreds of thousands of apps and  
22 new businesses and economic growth, but at this point,  
23 if I were one of the big guys, I'd be locking those  
24 ecosystems down pretty completely and only letting  
25 users interact with a much smaller population of

1 companies that are totally trusted and well  
2 established and totally vetted -- Spotify and not the  
3 little guy, Fortune 500 companies but not the smaller  
4 companies, you know, Google Drive and Microsoft  
5 OneDrive and iCloud but not the scrappy new drive  
6 entrant. And that is the trend, the direction where  
7 we're going.

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

14 MS. AMBROGI: Thanks, Kevin.

15 Professor Sokol?

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

17 (Brief pause.)

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

25 Number two, also missing from the list was

1 no remedy! Right? Every once in a while, it could be  
2 that the best remedy is to not to intervene because  
3 either it's on the merger side and we think that these  
4 are complicated markets. Alex, in the last panel,  
5 brought that up. Others do as well. Sometimes no  
6 remedy simply because we don't have a good remedy.

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

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

22 And some of these are great cases. I mean  
23 great in terms of doctrine. I loved Lorain Journal.  
24 I love Otter Tail. I love Aspen for what Aspen  
25 actually stood for. And, so, I think part of it is,

1 like, let's read the cases carefully, particularly the  
2 Supreme Court cases, for what they say and what they  
3 don't say.

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

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

25 And I suspect most people who are antitrust

1 people would say no. And I think that that's the  
2 right answer. And here's the problem. The essential  
3 facilities doctrine, I think, creates a lot of  
4 uncertainty. I think that it's just not the right  
5 tool in this particular setting, and some of that we  
6 teased out, why not, in the prior session. Some of it  
7 you heard a little bit about yesterday. And I'd say  
8 we'd be -- I'd be very -- very reluctant based on what  
9 we know in terms of the economics right now to impose  
10 this kind of framework.

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

24 MS. AMBROGI: Thanks. I think, as the  
25 opening statements reflect, there are a wide range of

1 potential solutions here, and each proposed solution  
2 has some upsides and some downsides to it.

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

13           So there's a wide variety of options and  
14 mechanisms to achieve these options. So we'll try to  
15 touch on what folks have discussed in their openings.  
16 And we'll begin by looking at some of the practical  
17 aspects that we in the antitrust community are maybe  
18 more familiar with through our agency work, and that  
19 is in the context of FTC and DOJ consent remedies, in  
20 the context of mergers, is data different than other  
21 assets like factories or retail stores? And does data  
22 present unique challenges when compared with some of  
23 these other assets? And if so, how can data remedies  
24 be tailored to effectively remedy competitive harm,  
25 and the point to remedy competitive harm as well as

1 what Courtney mentioned to preserve incentives that  
2 the merged party has to keep innovating and keep  
3 providing good products to the market. So we'll start  
4 with Courtney, if you want to respond to that.

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

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

22 I think it's important, and you'll see in  
23 these remedies that involve data, there's specific  
24 provisions on making sure that you give them the  
25 technical knowledge and access to employees and



1 information that they'll need to be able to use the  
2 data and get it to consumers, access to business  
3 records, customer contracts, et cetera, and then  
4 unfettered ability to hire employees without the risk  
5 of them getting counter-offered and hired back by the  
6 merged party. And those come in a variety of contexts  
7 and, obviously, are very case-specific.

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

18 I think what makes it a little more complex  
19 in a data context, too, is unlike a retail or factory-  
20 type divestiture and you've got goods and you got to  
21 deliver to customers, here, you've got maybe the same  
22 exact data, the number of bedrooms in a house, being  
23 delivered to a customer that might want to incorporate  
24 that into an MLS listing or otherwise, but you've got  
25 them wanting you to call the field a different name or

1 wanting you to format it with a comma in this space  
2 versus this space. So you've got all of these  
3 customer interfaces that are different, so you've got  
4 to be able to pass along that knowledge, too, so they  
5 can actually replicate what each of the customers of  
6 the acquired party had at the time. So it adds some  
7 complexities into that.

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

19 MS. AMBROGI: Makes sense.

20 Anyone else want to weigh in on this topic?

21 Frank?

22 MR. PASQUALE: I just wanted to -- just make  
23 a quick intervention to say that I really valued  
24 Senator Warner's staff's proposals for 20 different  
25 types of social media regulation, and part of the

1 foundations of those proposals was the idea that once  
2 an entity has a certain very large amount of data and  
3 a data advantage, that data advantage can become self-  
4 reinforcing and almost insuperable.

5 I was making that type of argument back in  
6 2008-2009 and was laughed out of some rooms where  
7 people told me, you're talking about Google now, but  
8 Google won't even exist in ten years. No one will  
9 have heard of the company, right?

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

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

25 But I want to say one thing about -- in

1 response to Katie's question. Is it the same, is it  
2 different? I think the answer is it's both, that data  
3 can have sort of similar characteristics to, you know,  
4 we're going to look at competitive overlaps and we're  
5 going to do some kind of slice-and-dice remedy.

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

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

24 So it could be that we could think of a  
25 remedy as more directed towards the competitive











































































































































































































































































































1 producing this information. They are creating medical  
2 records, they're collecting information, they're  
3 storing it and they are not necessarily going to want  
4 to give it away freely to their competitors, to other  
5 hospitals in their local area, even if there is a  
6 policy benefit or a public benefit for that.

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

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

24           And I think this ambiguity about property  
25 rights, and about even what there should be, is an



































































1 information economy or elsewhere.

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

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



1 or overarching?

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

8 What was the question now?

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

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

23 Now, let's suppose that the people whose  
24 data was breached face a 3 percent chance of identity  
25 theft. And let's say we're talking about tens of

1 thousands or hundreds of thousands of people. We know  
2 that the breach was costly, very costly. We know that  
3 it elevated the risk for people in the relevant pool  
4 by 50 percent, but courts are going to be looking for  
5 proof that a particular individual suffered identity  
6 theft, the classic harm in a data breach, as a result  
7 of this particular breach, okay?

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

17           That's not the standard model of how a court  
18 proceeds. The standard model of how a court proceeds  
19 is show me in a civil suit that it's more probable  
20 than not that your injury resulted from their mistake.  
21 So that's an area where we know statistically a lot of  
22 people are harmed, but we also know courts, Article  
23 III courts, are going to really struggle with it,  
24 where I think there's a lot of room for the FTC to do  
25 really good work because the FTC can litigate and

1 enforce on behalf of the aggregate.

2           And it doesn't so much matter whether any  
3 individual happens to have been victimized because of  
4 the baseline risk of identity theft or because of the  
5 elevated risk resulting from a particular breach.  
6 And, so, I think that when the FTC thinks about its  
7 authority it should think about, okay, what are class  
8 action lawyers doing and is any of that accomplishing  
9 any good? What is self-regulation doing and is any of  
10 that accomplishing any good? What are state attorneys  
11 general doing, and is any of that accomplishing any  
12 good? Okay, what are the thing they're bad at? Odds  
13 are good that those are things that the FTC can add  
14 the most value through.

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

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

25           (Applause.) (End of Panel 4.)

1           PANEL 5: THE POTENTIAL IMPACT OF GDPR ON  
2                            COMPETITION AND INNOVATION

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

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

16           This regulation, which entered into force in  
17 May of this year in the European Union, it's obviously  
18 still early days for GDPR, but we have a distinguished  
19 panel here lined up to talk about its potential  
20 effects and the effects more generally, I would say,  
21 of the privacy approach reflected in the EU. When we  
22 talk about the effects of GDPR, it's not just the  
23 effects of the new regulation that came into effect  
24 that added some new features to what existed in Europe  
25 before, but also the European approach, which as we've

1 heard, varies in some significant ways from the  
2 American approach, dating back at least to the '95  
3 data protection directive.

4 We have lots of panelists here and little  
5 time, so I've asked each speaker to give a few initial  
6 thoughts before we proceed to questions. And we'll  
7 start with Renato Nazzini, who's a competition expert  
8 and a Professor at King's College London, and I turn  
9 the floor to him.

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

18 And I think there is no doubt in terms of  
19 the theoretical work that has been done and also the  
20 empirical work is there, in my view, that privacy  
21 regulation may have a negative impact on competition,  
22 maybe start the competitive process by favoring or  
23 disproportionately certain players versus the others.  
24 And there is also no doubt that there may be an impact  
25 on innovation and productivity and so on.

1           Now, the point I'd like to make is that the  
2 European approach is not really a choice between data  
3 protection regulation or no data protection  
4 regulation. Data protection, the right to privacy and  
5 data protection, is a constitutional right, the right  
6 of a constitutional standing in European Union and a  
7 fundamental right. So the point is which data  
8 protection regulation to achieve the desired outcome  
9 should we have.

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

18           The second point that I'd like to make is  
19 that, of course there is also a lot of talk, and there  
20 has been a lot of talk about the GDPR, about the role  
21 of privacy regulation as an enabler of competition.  
22 And I'll give you the most important example, which is  
23 the right to portability in the GDPR, the right of the  
24 individual who provided the data to obtain this data  
25 transfer then or have them transferred to another

1 supplier.

2           Now, the point I'd like to make here is that  
3 this portability right, which is there -- or may be  
4 there also to address issues such as consumer  
5 switching in certain markets where data are important  
6 and there is a significant switching cost in the loss  
7 of data, financial services, messaging apps, social  
8 networks, and so on and so forth. It's not really a  
9 competition remedy, and it's not, therefore, going to  
10 be very effective, in my view, at addressing any  
11 competition concerns that we may have on these  
12 markets.

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

23           I'd like to contrast it for just a moment  
24 with the open banking remedies in the U.K. Open  
25 banking in the U.K. is a set of remedies which is

1 there to address competition concerns in the retail  
2 banking sector. And one concern was very low levels  
3 of switching of consumers and actually small  
4 businesses as well. And the remedy there imposed on  
5 certain U.K. banks is -- it relates to actually the  
6 obligation of these banks to make transaction data  
7 available to other financial service providers, such  
8 as innovative fintech companies.

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

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

22           And the third point I'd like to make in  
23 really a very, very short time is that one more thing  
24 to bear in mind is this idea of privacy regulation and  
25 privacy standards as a parameter of competition, and



1 whether a breach of privacy regulation can be an  
2 element of a case of anticompetitive abuse or  
3 anticompetitive practice against a company, for  
4 example, a dominant company. And there is an ongoing  
5 investigation against Facebook in Germany precisely on  
6 this theory.

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

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

23 MR. STEVENSON: Thank you very much for  
24 that.

25 We turn next to Garrett Johnson who we heard

1 -- from Boston University, we heard from earlier  
2 today, and we actually got an audience question about  
3 what is the impact of GDPR on innovation and  
4 competition and how can this measured. And I think  
5 Garrett can say a little bit on that subject from his  
6 perspective.

7 DR. JOHNSON: Thank you. So yesterday,  
8 several of you heard research from Jia, Gin, and  
9 Wagman on the short-run effects of GDPR on technology  
10 venture investment. They found an 18 percent  
11 reduction in the number of weekly venture deals and a  
12 40 percent reduction in the amount raised in an  
13 average deal following the rollout of the GDPR.  
14 That's obviously not great news.

15 Today, I want to tell you about some joint  
16 work that I have with Sam Goldberg at Kellogg, who is  
17 in the audience, and Scott Shriver at Colorado, where  
18 we're looking at what happened online in Europe. The  
19 first way we're going to look at this is we're going  
20 to look at site visit and conversion outcomes on a  
21 panel of 2,300 websites. The second thing we're going  
22 to look at is third-party interactions and tracking on  
23 a panel of 28,000 websites. And the final thing we're  
24 going to look at is competition by looking at the  
25 number of sellers that publishers in Europe use

1 looking at a panel of over 100,000 websites.

2 So I want to stress at the outset that this  
3 is not so much research that's hot off the presses as  
4 much as research that hasn't even made it to the  
5 presses, so take things with a grain of salt. This is  
6 a case of, I think, supply rising to meet demand.

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

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

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

1 data in Europe as a benchmark.

2 And, finally, this data, by nature, is  
3 extremely noisy and, so, we need to be careful in  
4 drawing strong conclusions for that. Now, the second  
5 thing that we looked at is compliance by EU websites  
6 in terms of the amount of third-party interactions or  
7 tracking that happens on those websites. The way that  
8 I went about this is I collected data from the top  
9 2,000 websites in every European country, EU country,  
10 as well as Canada, the U.S., and globally for an  
11 overlap of 28,000 websites.

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

25 But if you look at Bulgaria and Poland and

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

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

21 Another finding that we found is that the  
22 place where you saw the most reduction in third-party  
23 tracking was actually where there were the least  
24 European users, so the websites that had 10 percent or  
25 less European users had the largest reduction, and we

1 think that that's probably a result of a set of  
2 incentives that says that you will receive a fine of 4  
3 percent of your global revenue if you violate the  
4 rules.

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

12 And, so, we have a third piece of evidence  
13 that speaks to the competition issue that I'll go  
14 through briefly, and that is that we thought that when  
15 you tell firms that they're going to be liable for  
16 sharing data with others and that they need to get  
17 consent that firms would be less likely to interact  
18 with more firms. And, so, we looked at a self-  
19 reported measure of the number of ad sellers that  
20 European web publishers use called the Ads.Text  
21 initiative, and there we basically found nothing,  
22 which we were quite surprised by. So there's a small  
23 increase in the number of sellers that these websites  
24 are using, but, you know, there's a small increase in  
25 Canada, too, and so there was really not -- there was

1 no sort of massive decrease as we might expect.

2 So with that, I'll pass things on.

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

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

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

17 I'd make a few points that are more from a  
18 practitioner's sort of practical perspective. I've  
19 seen it for non-EU entities that are -- that have some  
20 presence in Europe but do not have a lot of users,  
21 GDPR -- the decision about whether to comply with GDPR  
22 if they were a website operator was a fairly clear  
23 decision for those who were not among the largest.  
24 And you can see data that the top third of the 100 --  
25 or a third of the top 100 websites responded to GDPR

1 by blocking EU visitors, and there are a number of  
2 articles about this.

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

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

23 We see this also in terms that -- and this  
24 is not something that's public, but the term -- the  
25 processing term, processor terms or subprocessor or



1 co-controller terms that were passed down to smaller  
2 entities by bigger entities under GDPR. The fact was  
3 that smaller entities took an awful lot of  
4 obligations, contractually, and an awful lot of  
5 liability that they probably were not able to handle,  
6 but nonetheless, the formality of the processing  
7 agreement led to bigger entities exercising their  
8 greater bargaining power to drive through obligations  
9 to be able to absolve themselves of compliance.

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

24 I would suggest that a less granular set of  
25 obligations on downstream entities that was more

1 outcome-spaced, would be a better way to avoid drop-  
2 off and disruption in the ecosystem, and I'm not here  
3 to praise the CCPA, the California privacy law, in all  
4 aspects. There are ways in which it's very poorly  
5 drafted. But its processor obligations, its service  
6 provider obligations are very outcome-based.

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

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

23 MR. STEVENSON: Thank you, Jim.

24 So we've heard a little bit about the role  
25 of the regulator in the EU system under GDPR, and

1 there's a data protection authority, or DPA, in every  
2 country, so it's only fitting we include a DPA  
3 perspective on the panel, so we turn next to Simon  
4 McDougall from the U.K.'s DPA, which is called the  
5 Information Commissioner's Office. And Simon even has  
6 innovation in his title, so he seems perfect for this  
7 panel. So we'll give him a couple of minutes to  
8 describe their perspective.

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

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

25 I also think that to quote Chairman Lai in

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

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

22 And the difference there is that a code of  
23 conduct in GDPR-speak is where a body such as a trade  
24 association creates some rules specific to its  
25 vertical, and then a data protection authority will

1 sign them off. Certification involves certification  
2 bodies and a more complicated scheme.

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

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

19 But I want to spend a couple of minutes also  
20 talking about the innovation side of my job because I  
21 think often today competition and innovation have been  
22 conflated in different ways. So let's talk about  
23 innovation in terms of its classical definition,  
24 whereby we're talking about the process where we go  
25 from somebody having a really bright idea, some people

1 in the garage, an innovation hub of a large firm, an  
2 academic, all the way through to realization, i.e., a  
3 retail product goes out or a government does something  
4 for its systems which is cool and wasn't done before.  
5 So let's talk about innovation there.

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

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

22 I think there's a huge risk here that AI  
23 goes the same way as GM, where, hey, you guys have got  
24 it, we haven't got GM, genetic modified foods, in  
25 Europe because everyone lost trust in that particular

1 technology. AI could easily go the same way unless  
2 the industry explains to people what on earth is going  
3 on. So explaining AI is a big thing.

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

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

24 So my key message here is that as a privacy  
25 regulator and I think it's applicable to privacy

1 regulators around the world, we do not have to be  
2 passive here. We can be on the front foot and we can  
3 do interesting things to promote both competition and  
4 innovation. And there I'll stop, thanks.

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

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

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

18 Originally, my intention was actually to  
19 start off to give you a very brief overview of how we  
20 deal at DG Competition at the European Commission with  
21 big data, data, and data protection in our Commission  
22 -- press the microphone, it is on, it tells me -- with  
23 data protection for specific markets. But taking that  
24 this was part of an earlier session this morning  
25 already and taking our time constraints, I will limit



1 myself to one key observation. We have gathered over  
2 the years a lot of experience, in particular in merger  
3 cases, of how to assess data and big data markets, but  
4 what we see recently is that the assessment of data  
5 protection in our competition and merger analysis is  
6 getting ever more important. And the reason for this  
7 is certainly that consumers give always more  
8 importance to their protection of the data, and we can  
9 see that, and this is reflected in our decisions.

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

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

24 And I would like to structure it in three  
25 points, basically where we are coming from. As Renato

1 already said before, data protection in Europe is  
2 nothing new. We have had rules for many, many years,  
3 over two decades. And, intuitively, I think that  
4 would speak for questioning whether there should be a  
5 negative impact on competition and innovation in the  
6 first place.

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

17           So if I look at where we're coming from in  
18 the past, we had a directive and a patchwork of many  
19 national laws. Since the beginning of the data  
20 protection reform and the discussion of the reform, we  
21 saw that competition and innovation were at the heart  
22 of these discussions. The aim was to create a level  
23 playing field addressing the consumer trust deficit  
24 and simplifying and harmonizing the data protection  
25 leading framework as a key element of the digital

1 single market, which is, as many of you will know, one  
2 of the key priorities of the current European  
3 Commission.

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

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

19 As already also mentioned, it is probably  
20 too early to make a long-term assessment at this point  
21 in time to see whether these claims are actually true.  
22 We have seen fear of some companies because of  
23 compliance, because of risk of fines, and there has  
24 been lot of uncertainty, but I think generally the  
25 first evidence that we see points in a different

1 direction.

2 For many companies, compliance with GDPR has  
3 actually brought along opportunity to bring their data  
4 house into order. They could look at what kind of  
5 data they actually collect, they could see what they  
6 use it for, how they assess it, and how they process  
7 it. For some of them, this brought actually new  
8 opportunities because they could find out what data  
9 they possess and use it in new, more innovative forms.

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

18 Without consumers' trust in the way that  
19 data is handled, there can be no sustainable growth in  
20 the way of our data-driven economy. So the GDPR has  
21 harmonized and simplified data protection and this in  
22 return has led to a significant reduction of  
23 compliance cost and administrative burden. I think  
24 these are very tangible direct results and benefits  
25 for, in particular, small and foreign companies which

1 want to be active in the European market and which do  
2 not have the resources to make studies of legal  
3 requirements of different national systems.

4 Now, looking forward, the GDPR has, as  
5 already mentioned, introduced mechanisms to lower  
6 entry barriers. We look at Article 20 of the GDPR,  
7 which stimulates and facilitates the entrance of new  
8 players. The right to data portability has a clear  
9 competition rationale, and there I would slightly  
10 contradict Renato because I think you can draw a  
11 comparison to the right of number portability in the  
12 telecommunication sector, and we saw that this was a  
13 very stimulating effect, and we hope to replicate this  
14 effect also for data portability.

15 MR. STEVENSON: Thank you.

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

20 DR. LYNSKEY: Thank you, and many thanks for  
21 the opportunity to provide some remarks for this  
22 hearing today. I think before I start I just want to  
23 highlight again the very different constitutional  
24 context in which this discussion has occurred in  
25 Europe because of the presence and the EU charter of

1 fundamental rights of both a right to privacy but also  
2 a separate right to data protection.

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

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

17 Now, this sometimes led to the incorrect  
18 assumption that the mere existence of data protection  
19 regulation meant that these markets, data markets,  
20 were functioning effectively for consumers. And I  
21 think you can see this, for instance, in some of the  
22 European Commission's decisions. So if you look at  
23 merger decisions like Google-Snelfie or Microsoft-  
24 LinkedIn, you see before the GDPR had even been signed  
25 off that the Commission is saying that the mere

1 potential for the right to data portability to be  
2 exercised meant that consumers couldn't be locked in.

3           And I think that's an erroneous assumption  
4 to work from because we have clear empirical evidence  
5 that there are many impediments to individual control  
6 over personal data. So my own research has focused on  
7 the role and the limits of informational self-  
8 determination in European data protection law. But  
9 also I think we have a documented cycle of what  
10 Farrell, a former Director of the Bureau of Economics  
11 here, described as a dysfunctional equilibrium. And  
12 that is the fact that firms who do wish to  
13 differentiate their offerings on the basis of more  
14 privacy-protective products find that there is little  
15 incentive to do so because consumers have already  
16 resigned themselves to the fact that there is no  
17 better offering out there, and this creates a vicious  
18 cycle.

19           And I think we have -- that idea was  
20 proposed in 2012. And if you fast forward to this  
21 year, the consumer organization which in the U.K.  
22 documented similar phenomenon when they say that we  
23 have a situation of rational disengagement from data  
24 protection policies. And that is that, in fact, the  
25 rational thing for a consumer to do might be to

1 simply not engage with those policies in certain  
2 circumstances because they are so complex and the  
3 ability to control data is so limited.

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

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

22           However, what the GDPR does do is specify  
23 that freely given consent -- in considering whether  
24 consent is freely given, you need to take utmost  
25 account of whether or not the performance of the



1 contract is made conditional on the processing of data  
2 that is not necessary. And, so, here the idea is that  
3 you will use or acknowledge that consent is not freely  
4 given if it leads to unnecessary data processing and  
5 if, therefore, consumers can't access services or  
6 goods that they wish to access as a result.

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

24           And this, I think, would then push us  
25 towards a model of advertising in Europe that is no

1 longer behavioral and programmatic but rather  
2 contextual as was highlighted in the previous panel.

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

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

20 MR. STEVENSON: Thank you very much for  
21 those comments. And I think that these and some of  
22 the earlier comments remind us that here we are  
23 dealing both with some different constitutional  
24 contexts, as Renato and Orla mentioned, some different  
25 administrative contexts, the kind of comitology of the

1 system in Europe for deciding the sort of -- the  
2 rules, and also a different enforcement context.  
3 There was a reference to the fines and what has been  
4 added from GDPR on that subject.

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

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

18 MR. MCDOUGALL: I think having the  
19 consistency mechanisms in place is critical. And to  
20 echo some of the other speakers, we shouldn't forget  
21 that both this regulation and also the preceding '95  
22 directive, you know, work specifically around having  
23 the free movement of data around Europe, as well as  
24 with the regulation and introducing privacy as a  
25 fundamental right as well.

1           So it has always been around both those  
2 mechanisms and having a level playing field across  
3 Europe. We had a really practical problem in the  
4 buildup to GDPR where, quite rightly, many local data  
5 protection authorities were issuing lots and lots of  
6 guidance to help their national organizations, all the  
7 firms they regulated, get up to speed with GDPR.

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

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

20           MR. HALPERT: This is a great example --  
21 sorry. Simon offered a great example of the work that  
22 the EDPB needs to do, but the fact remains that the  
23 much ballyhooed one-stop shop and harmonized set of  
24 rules that Rainer described did not exist as to key  
25 elements of ambiguity prior to adoption or GDPR going

1 into effect. And the cost of GDPR implementation  
2 exceeded \$10 million for most firms that were  
3 multinational and had more than \$500 million in sales.

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

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

21 I'd also add that there is no uniformity  
22 with regard to issues like children's consent, labor  
23 laws. The German implementation of GDPR contained a  
24 whole separate labor code, labor privacy code that was  
25 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 MR. STEVENSON: Thank you. I think Rainer  
9 wanted to comment, and then Garrett.

10 DR. WESSELY: Well, yes, I think I can  
11 confirm that obviously the current definition and way  
12 of interpretation of the GDPR is extremely important  
13 but we have seen also from the EDPB that throughout  
14 last months there has been guidance. There have been,  
15 I think, in total 18 guidance papers in the meantime  
16 published, which builds on top of the guidance which  
17 was given previously already by the Article 29 working  
18 party.

19 So that is obviously a first challenge also  
20 to see where the guidance is most important in the  
21 first place. And to the uncertainty which is and was  
22 in the market, I think that is probably normal with a  
23 big new regulation like the one that we saw. But on  
24 the other hand, what we can see is that there have  
25 been certain companies which have decided to play safe

1 in the first place, said that they would suspend for a  
2 certain time the activity, vis-a-vis Europe would  
3 block European customers, but what we see now is  
4 actually already a trend that most of these pages are  
5 in the meantime accessible. Again, which shows that  
6 we have to clearly distinguish between the very short-  
7 term effects, the midterm, and the longer term  
8 effects, and that is exactly also where we then have  
9 to focus our guidance, I think.

10 MR. HALPERT: Absolutely. Totally agree.

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

13 DR. JOHNSON: So I think the question of  
14 interpretation is a really important one because, you  
15 know, we're here talking about this because the U.S.  
16 and certainly many business leaders or some business  
17 leaders are calling for a GDPR-style regulation in the  
18 United States. So the reason interpretation is  
19 difficult is that, as someone said, I think Simon  
20 said, you know, on May 26th, Europe didn't burn down.

21 Now, it would be hard to conclude from that  
22 that there were no impacts of GDPR. Certainly the  
23 research that was presented yesterday, and some of my  
24 research suggests that there are some impacts of the  
25 GDPR and some of those are troublesome. But a larger

1 issue is that, you know, what we have yet to see is an  
2 enforcement action in Europe that clarifies some of  
3 these issues.

4 So I think Orla brings up a really good  
5 point about the state of programmatic advertising in  
6 Europe. Currently, the sort of de facto way that most  
7 websites have handled this is an opt-out notice that  
8 shows up when you arrive on their website, and  
9 basically 90 percent of people are consenting or not  
10 going through the process of opting out.

11 Now, the laws, as you say, if the regulators  
12 want to take a hard take on this, the laws pretty  
13 clearly say that they want opt-in consent, that's  
14 specific to purposes, so imagine as you're a consumer,  
15 you need to check, you know, 50 different companies  
16 that get to know your website -- get to know that you  
17 visited a website and eight different purposes, you're  
18 going to be checking a lot of boxes. And, of course,  
19 that's going to mean that basically no one's going to  
20 be checking these boxes.

21 And then you'd see a very different effect  
22 of the GDPR on the web. So I think the truth will  
23 continue to evolve here.

24 MR. STEVENSON: Thank you.

25 Renato.



1                   MR. NAZZINI: Yes, very briefly on this  
2 point, and coming to that from a competition  
3 perspective, I think even the regulatory setup in  
4 Europe, what is very important and is happening to an  
5 extent is that competition authorities and data  
6 protection regulators talk to each other. Of course,  
7 interagency cooperation always comes at a cost in  
8 terms of resources and time, but I think it is very  
9 important, especially if, as Rainer was saying,  
10 certain of the provisions of the data protection of  
11 the GDPR ought to be interpreted in a way that fosters  
12 competition.

13                   I'm very happy that the right to portability  
14 is there, obviously. I'm just saying that it is not a  
15 panacea for competition problems in these markets, in  
16 which it's law. Data are a little bit more complex  
17 than just a six or seven or eight-digit number to  
18 port. And, for example, where interpretation will be  
19 important, and we have seen already good evidence that  
20 we are going towards that direction, you know, let's  
21 interpret, for example, the right to data portability  
22 in a way which is more conducive to competition.

23                   The regulation says, data provided by the  
24 individual, well, clearly a broader interpretation  
25 that provided by which includes as much as the data

1 which is necessary for others to compete as possible,  
2 that would be a good thing for competition. So I  
3 think this point is quite important.

4 MR. STEVENSON: Thank you.

5 Let me turn to another subject that often  
6 comes up in connection with GDPR, and that is the up  
7 to 4 percent of total worldwide annual turnover as  
8 potential sanctions, which has already been mentioned  
9 in the conference several times, even outside this  
10 panel. What effect do those provisions have  
11 potentially on innovation and competition? Are there  
12 certain effects, either pro or con, of having these --  
13 I think anyone would describe them as, indeed I think  
14 even one of the authors of GDPR describe them as heavy  
15 sanctions. Orla?

16 DR. LYNSKEY: Well, I think the fines were  
17 initially modeled, in fact, on antitrust fines with  
18 the antitrust and the competition provisions as the  
19 source of inspiration for that. However, I do think  
20 regulators, including the ICO, for instance, in the  
21 U.K., have been very quick to point out that they will  
22 continue to work with those data controllers and data  
23 processors that are endeavoring to comply with the  
24 regulation and that fines are kind of a backstop here.

25 But as I said, I think there are other

1 mechanisms, such as the potential for strategic  
2 litigation that is provided by the regulation, that  
3 will lead to, as we were just discussing, more  
4 interpretive clarity.

5           If I can come back to the point that Garrett  
6 made about the problematic impact of GDPR, well, if  
7 that is fewer third-party trackers, well, again,  
8 that's a question of whether or not you think that is  
9 problematic because, in fact, at the moment there is a  
10 complaint pending before the ICO in the U.K. and the  
11 Irish data protection commissioner that the entire  
12 realtime bidding system is inconsistent with many core  
13 principles of GDPR, including data minimization,  
14 fairness, transparency, and many others. And that is  
15 a question, then, of looking at the entire system that  
16 is in place and seeing whether or not that's data-  
17 protection-compliant.

18           And then on the issue of less investment,  
19 which the Wagman paper mentioned yesterday, I think  
20 this comes back to what Simon said, which is it  
21 depends on whether or not we can encourage investment  
22 in privacy-protective technologies and privacy-  
23 enhancing technologies. For instance, that paper  
24 doesn't consider at all the jobs that will be created  
25 for data protection officers and others.

1           So I think a narrow focus on simply the  
2 fines and the sanctions ignores all of these other  
3 potential mechanisms for interpretation and  
4 innovation.

5           MR. STEVENSON: Jim.

6           MR. HALPERT: Actually, I'd like to make one  
7 quick point with regard to the group actions point. I  
8 think that group actions can make sense, but they only  
9 make sense if the legal requirements are relatively  
10 clear. And it's a little bit troubling to think of  
11 group actions as the battering ram to get clarity,  
12 where in a system, the question of what's a legitimate  
13 interest of the data controller, for example, that  
14 overrides the interests of the data subject.

15           That's something that the regulators really  
16 should provide guidance on. I totally agree with you  
17 that the question about how realtime exchanges work in  
18 relation to data protection, some guidance would be  
19 helpful on that, but a regulator really should be  
20 doing that sort of work.

21           I'd also point out that there are very  
22 different sorts of incentives in class action  
23 litigation in the United States, and one shouldn't  
24 assume, as some do, that while GDPR has class action  
25 risk that should be, for example, the mechanism for

1 enforcement of the California Consumer Privacy Act or  
2 some federal law that was based on GDPR.

3           There's no e-discovery regime in Europe, so  
4 the asymmetrical costs, which are about a million  
5 dollars anytime a lawsuit is filed, that are only  
6 borne by the defendant, are very, very different.  
7 There are also -- are typically not the ability to  
8 obtain attorneys' fees; and, in fact, there are no  
9 damages available under GDPR group actions. So this  
10 is really an apples-to-oranges comparison, and I just  
11 wanted to give that frame and then give back the time.

12           MR. STEVENSON: I just wanted to put one  
13 more question out. We only have a few minutes left.  
14 And that is, and I know one of our Commissioners has  
15 sort of raised the issue of one thing that U.S. law  
16 does in some ways is to tailor the regulation that  
17 exists to the risk, to tailor regulation to the risk.  
18 Is that important to do here, and does the GDPR do a  
19 good job of tailoring the regulation to the risks that  
20 exist?

21           Renato.

22           MR. NAZZINI: I think I can have the first  
23 go at that. I mean, it seems the GDPR is actually a  
24 set of rules that in principle, I mean there are other  
25 exceptions and modulations, but apply to all firms and

1 all data with the higher threshold for certain  
2 particularly sensitive data, such as health data,  
3 political opinions, et cetera.

4 In principle, it's not the kind of risk-  
5 based, outcome-based regulation, but it's a process-  
6 based regulation which applies across the board. So  
7 it doesn't really do so, but I think it is fair to say  
8 that the objective of the regulation was actually to  
9 set out that level playing field across the board.  
10 And that's where some of the problems that Garrett and  
11 others actually have highlighted come from.

12 MR. HALPERT: In fairness, though, fines are  
13 geared to risk of harm, too, so there is some -- if  
14 one looks at the eye-popping sanctions, they do depend  
15 on high risk, for example.

16 MR. STEVENSON: Okay. Simon?

17 MR. MCDUGALL: Well, to echo what Jim was  
18 saying, yeah, there's definitely elements to the GDPR  
19 which do talk directly to considering risks. The  
20 accountability regime is also a new entrant, and I  
21 think it's critical to understanding how the GDPR can  
22 reward good behavior in firms large and small.

23 But I also want to say one word on just how  
24 this wraps into the other risks that large  
25 organizations and small organizations deal with and

1 reputational risk. And what I think we're seeing on  
2 both sides of the Atlantic right now is an ongoing  
3 breakdown in trust. And that's an ongoing breakdown  
4 in trust in many ways, but one of the ways is in how  
5 people -- whether people trust organizations in  
6 handling their data. And that has a massive  
7 competitive impact, and sometimes it's dragging all  
8 organizations down, so it's not a relative thing, but  
9 I think in many cases it favors the incumbent because  
10 people aren't going to make the leap into a new  
11 venture or a new technology if they don't really trust  
12 the environment they're in. And that's a critical  
13 part of the GDPR that it can help rebuild trust and  
14 give people confidence in using new services because  
15 they believe their data will be handled responsibly.

16 MR. STEVENSON: Orla, did you have a  
17 comment?

18 Oh, I'm sorry, Rainer.

19 DR. WESSELY: I would strongly agree to  
20 that. I mean, certainly it is process-based, and what  
21 we think that the challenge is that the GDPR has to be  
22 sufficiently flexible actually to adapt itself to new  
23 risks which we could not even predict at the time that  
24 the GDPR was planned.

25 Just let me make one additional point. We

1 try, as from the first day of the GDPR, to be as  
2 constructive as possible in the dialogue with the  
3 economic operators on the market. I think by now it  
4 is clear that GDPR is not used as a fining sword and  
5 so as a very smooth phasing-in, which is also  
6 underlined by -- I don't know whether you followed  
7 that, but Commissioner Joureva just said that in June  
8 next year, 2019, people have one day -- we will have a  
9 stock-taking exercise in order not to wait until 2020,  
10 which would be the set time for when we have to report  
11 back to the European Parliament. So next year, we  
12 should be able to address actually many of these  
13 questions and look into the effects on innovation and  
14 competition.

15 MR. STEVENSON: Any other last words on  
16 this? Yes, Renato.

17 MR. NAZZINI: Just one point about fines,  
18 actually. I think one positive aspect to the 4  
19 percent worldwide turnover fine is it actually -- an  
20 argument that obviously not too explicitly but it has  
21 been made and I've heard in Europe that, you know, you  
22 have to use competition enforcement to in effect  
23 bolster privacy regulation because fines were too low  
24 and ineffective cannot be made any longer.

25 So really, now, you have effective



1 sanctions, so in mergers, in abuse-of-dominance cases,  
2 et cetera, we shouldn't use competition policy to  
3 punish and deter privacy breaches.

4 MR. HALPERT: I'd add one point with regard  
5 to big data and data protection. If we're talking  
6 about an incumbent that has a lot of personal data, it  
7 is difficult to open up that data in personally  
8 identifiable format to other competitors without  
9 having some data protection measures in place. So  
10 there is some inherent tension here that's worth  
11 considering as we move into the pure antitrust  
12 analysis of this sort of problem, and I just wanted to  
13 raise that as something to think about.

14 MR. STEVENSON: Thank you very much. Three,  
15 two, one, we're out of time. So please join me in  
16 thanking our panelists.

17 (Applause.)

18 (End of Panel 5.)

19 (Hearing concluded at 4:59 p.m.)

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