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FEDERAL TRADE COMMISSION

COMPETITION AND CONSUMER PROTECTION

IN THE 21ST CENTURY

Thursday, November 6, 2018
9:00 a.m.

American University
Washington College of Law
4300 Nebraska Avenue, N.W.
Washington, D.C.

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FEDERAL TRADE COMMISSION

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1 P R O C E E D I N G S

2 WELCOME AND INTRODUCTORY REMARKS

3 MS. AMBROGI: Good morning, everyone, and
4 welcome back to the third and final day of the FTC's
5 hearing here at American University Washington College
6 of Law. We want to extend our thanks to AU for being
7 such gracious hosts over the last few days and also
8 thank you to our participants in today's hearing and
9 to those who have joined us in person or on the
10 webcast.

11 So the first day of the hearing really laid
12 the groundwork for how to think about the economics
13 and business of big data. Yesterday, we delved into
14 the specific factors to consider when conducting an
15 antitrust analysis of markets involving data,
16 including a focus on online advertising, as well as
17 the impact on privacy regulations on competition and
18 innovation.

19 Today, we are going to take a step back and
20 with a couple of great panels ask some broader
21 questions about where antitrust enforcers,
22 policymakers, and other stakeholders should go from
23 here.

24 I will conclude with our final disclaimer
25 that this event is being photographed and webcast with

1 huge thanks to our tech team, and by participating in
2 this event, you are agreeing that your image or what
3 you say may be posted at ftc.gov or one of the FTC's
4 social media sites. We have given this disclaimer
5 every day. It is a privacy disclaimer, so it is also
6 relevant to what we have been discussing.

7 Thanks, and let's go to our first panel,
8 Perspective on Data Policy, moderated by Peggy Bayer
9 Femenella, of the FTC's Bureau of Competition.

10 MS. FEMENELLA: Thank you, Katie.

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1 that promotes freedom of expression and open internet
2 and access to affordable communication tools and
3 creative works.

4 Next, we have Ramsi Woodcock. Ramsi is an
5 Assistant Professor of Law at the University of
6 Kentucky College of Law whose research focuses on
7 consequences of the information age for the antitrust
8 treatment of personalized pricing, dynamic pricing,
9 and advertising. He also has a secondary appointment
10 as Assistant Professor of Management at the Gatton
11 College of Business and Economics.

12 Katie McInnis is our third panelist. Katie
13 serves as policy counsel on privacy and technology
14 issues for Consumers Union, the advocacy division of
15 Consumer Reports. Her work focuses on technology and
16 the consumer rights to privacy, security, control, and
17 transparency.

18 Next we have Eric Null. Eric is Senior
19 Policy Counsel at New America's Open Technology
20 Institute. He has worked on consumer privacy issues,
21 such as children's privacy and broadband privacy, as
22 well as telecom issues, like net neutrality and
23 universal service fund.

24 And, finally, we have Tom Lenard, who is
25 Senior Fellow and President Emeritus at the Technology

1 Policy Institute where he works on privacy and
2 competition issues.

3 So we will go ahead and get started. Allie,
4 you can go ahead and begin our discussion, please.

5 MS. BOHM: Thank you. Thanks for having me
6 today.

7 It has become virtually impossible to
8 participate in society without revealing our personal
9 information. Most essential entertaining and useful
10 services demand personal data that are then used to
11 build detailed profiles of us and to deliver targeted
12 advertising.

13 Service providers follow us around the
14 internet scooping up -- and across devices, scooping
15 up more and more data to come up with more precise
16 ways to sell us products. Consumers are dissatisfied
17 with this state of affairs. Some find it abusive that
18 privacy is the price to pay to participate in modern
19 society. Some find it frustrating to be paying twice,
20 once with their data and once with their dollars. And
21 nearly all are outraged by data breaches, hacks,
22 revelations of corporate and state surveillance, and
23 other social and political scandals.

24 Consumers in the United States want more
25 control over our personal information and we demand

1 privacy protection. It is clear that the status quo
2 is not working and I think that is likely part of why
3 the FTC is having these hearings today.

4 So what are some solutions? Some advocates
5 have argued for stronger and more creative antitrust
6 enforcement. In fact, some have said that is the
7 solution. It is Public Knowledge's view that while
8 antitrust has a role to play in protecting competition
9 and consumers' privacy in the digital age, it alone is
10 woefully insufficient.

11 Here is why. First, competition could
12 incentivize companies to differentiate by innovating
13 in privacy protections. However, it could just as
14 easily promote more aggressive data collection in
15 order to give companies more competitive edge.

16 Second, any settlement after an
17 investigation or any consent decree as part of a
18 merger approval can only be a primary tool for
19 protecting privacy so long as it is enforced on an
20 ongoing basis which would require substantial FTC
21 resources. I probably do not need to tell the people
22 in this room that the FTC often prefers structural
23 remedies, such as asset divestiture, rather than
24 remedies that make it have to monitor companies on an
25 ongoing basis.

1 Third, antitrust may just turn one privacy
2 offender monopolist into several smaller privacy
3 offenders offending competitors, none of whom have
4 sufficient market power to be considered dominant and
5 to fall under antitrust enforcement going forward.

6 Fourth, the consequences and impacts of many
7 privacy violations are the same regardless of the size
8 of the company involved, and in most cases, antitrust
9 simply cannot get involved if it is a nondominant
10 player.

11 It is also not clear that the FTC can step
12 in when it comes to traditional backward-looking
13 antitrust enforcement. As this audience likely knows,
14 single firm conduct is typically only a violation of
15 antitrust law to the extent that it unreasonably
16 restrains competition. Despite antitrust's focus on
17 consumer welfare, it will not typically address
18 negligent or risky behavior by dominant firms even
19 when that behavior harms consumers.

20 So what can the FTC do? Narrowly, in
21 antitrust land, the FTC should use antitrust
22 enforcement to encourage nonprice competition,
23 including competition based on different levels of
24 privacy protection. Antitrust should recognize that
25 one of the harms of market dominance may be the

1 ability to coerce consumers to provide more personal
2 information in return for essential or unavoidable
3 services. In addition, the possession of data could
4 be considered as a potential barrier to entry during
5 merger review, even when the merger would not
6 otherwise have significant vertical or horizontal
7 competitive effects.

8 The FTC could also use its UDAP authority
9 through case-by-case adjudication to figure out
10 whether third-party trackers on -- or I should say
11 trackers on third-party websites are deceptive when
12 they track folks all around the internet without those
13 individuals' knowledge or consent.

14 The FTC could also conduct a 6(b) study of
15 how platforms are using data and how their data
16 affects competition. The advantage of a 6(b) study is
17 that it results in a published report. So if it turns
18 out, as Public Knowledge postulates, that antitrust is
19 not entirely the solution to the problems of
20 competition and privacy and big data, there will
21 actually be a record to help build other solutions.

22 Finally, the FTC should advocate with
23 Congress for passage of a comprehensive privacy law
24 that imbues the agency with much-needed resources and
25 with rulemaking authority. This is not a novel idea.

1 Even during the golden age of antitrust enforcement in
2 the 20th century, antitrust was never seen as enough
3 on its own. The same period that saw robust antitrust
4 enforcement also saw the first wave of consumer
5 protection laws.

6 I am happy to go into detail about what
7 Public Knowledge would like to see in any
8 comprehensive privacy legislation during the Q&A.

9 As a final thought, my organization strongly
10 supports competition, but competition is not always a
11 per se good. So for example, there is not enough
12 competition in the pharmaceutical industry and prices
13 are way too high. But that does not mean that we want
14 Joe Schmoe on the street selling fake drugs. He might
15 be able to sell them more cheaply than you sell real
16 drugs and it might drive down prices, but the costs to
17 society of having fake drugs on the market are not
18 costs that, we as a country, want to bear. And that
19 is -- and the role of regulation is to keep bad
20 actors, like Joe Schmoe, off of the market.

21 I think the same thing can be said in
22 privacy land and in data and big data land. We do not
23 want nefarious actors doing things that we, as a
24 society, would not want with our data, and the role of
25 regulators is to keep that from happening.

1 So I appreciate the opportunity to be here
2 and I look forward to discussing more during the Q&A.

3 MS. FEMENELLA: Thank you, Allie.

4 Ramsi, if you would like to go ahead and
5 give your prepared statement?

6 MR. WOODCOCK: Thank you. It is great to be
7 here.

8 We need to focus more in antitrust on issues
9 surrounding the exploitation of data than we have so
10 far and perhaps shift the focus away a little bit from
11 antitrust issues surrounding the extraction of data,
12 because that may well give us a sense of the way
13 forward here that is very different from what has been
14 put on the table so far.

15 So data allows firms to know more about
16 their customers and thereby to extract more value from
17 them. It allows them to tailor prices to their
18 customers through personalized pricing. It allows
19 them to raise prices when market demand surges as part
20 of dynamic pricing, which is spread over the last 10
21 to 15 years from one side of the economy to the other,
22 from Disney World now dynamically pricing access to
23 its parks, to Broadway shows dynamically pricing
24 tickets, to Amazon dynamically pricing hundreds of
25 thousands of products and changing those prices

1 hundreds of times per day.

2 Through targeted advertising, it also allows
3 firms to increase the willingness of consumers to pay
4 for products that, absent the advertising, they would
5 not, in fact, prefer. So this exploitative effect of
6 data should be the key focus for antitrust going
7 forward.

8 The reason why it has not been the key focus
9 for antitrust is because the exploitation of data is
10 not in itself anticompetitive, and it is a long-
11 standing rule in antitrust that a firm's decision to
12 raise prices in and of itself is not an antitrust
13 violation. So on a superficial level, it looks like
14 there is no way for antitrust to respond to this
15 vastly increased bargaining power that firms now have,
16 vis-a-vis, consumers as a result of the fact that they
17 now know so much more about them.

18 It turns out, however, if you look a little
19 bit more closely, that there is a very important role
20 for antitrust to play in this story. Because while
21 data allows firms to increase the amount of value that
22 they extract from consumers, competition places a
23 ceiling on that level of value that firms can extract
24 from consumers.

25 If you think about -- take any market

1 whether it is concentrated or not, competitive or
2 monopolized, if you think about what data does, it
3 allows firms to figure out how much they can raise
4 prices without alienating their consumers. So it
5 allows them to extract more value from consumers for
6 any given level of competition in the market.

7 However, the more competitive a market is,
8 the less the firm can raise prices and so the less
9 value it can extract. What that means is that the
10 data revolution gives antitrust enforcers a mandate to
11 deconcentrate markets, to expand competition across
12 the board, because only by doing that can we place a
13 ceiling on the amount of value that firms can extract
14 from consumers through data and lower that ceiling to
15 offset the increase in value that data is allowing
16 firms to take from consumers.

17 What that means is while antitrust cannot
18 attack individual exploitive practices as
19 anticompetitive because they are not in themselves
20 anticompetitive, the raising of price is not in itself
21 anticompetitive, by ramping up enforcement against
22 genuinely anticompetitive practices, practices that
23 result in markets being more concentrated than they
24 need to be, antitrust enforcers can create the
25 competitive environment that makes it harder for firms

1 to successfully exploit the data advantage that they
2 have gained over the past few years.

3 So what this means, in other words, is that
4 data gives us a reason to go back to the enforcement
5 levels of the '60s and '70s. It gives us a reason to
6 challenge every horizontal merger. It gives us a
7 reason to challenge every vertical merger. It gives
8 us a reason to pursue firms based purely on their size
9 as was done quite commonly in the '60s and '70s in
10 everything but name.

11 And once we do that, that lessens the need
12 for sort of the complex considerations regarding
13 limiting data extraction and privacy that so far have
14 preoccupied us. Because if the data is no longer
15 useful for exploitation purposes, maybe we can be less
16 concerned about its extraction to begin with.

17 Thank you.

18 MS. FEMENELLA: Thank you, Ramsi.

19 Katie will now give her statement.

20 MS. MCINNIS: Thanks, Peggy. And thank you
21 to the FTC for hosting these hearings and giving us
22 the opportunity to speak to you here today.

23 So there is an obvious power imbalance
24 between consumers and companies and there has been for
25 years. But, unfortunately, the amount of data that

1 companies can now mine, collect, and use on consumers
2 has exacerbated this imbalance. We, at Consumer
3 Reports, are working hard to make sure that that
4 imbalance is ameliorated to the extent that we can
5 help, but consumers really do need a federal data
6 privacy law that will give them the protections that
7 they need and really deserve.

8 This data protection law would have
9 reasonable data minimization that is tied to context
10 and consumer preferences. We would also like
11 permission for extraneous data collection, along with
12 detailed information about data security practices,
13 strong data security practices, ways for consumers to
14 get access to their information, and robust
15 enforcement. And, of course, any federal data privacy
16 law should include increased resources and rulemaking
17 authority for the FTC.

18 In addition, we think that a data privacy
19 law would not preempt stronger state laws. It should
20 create a floor and not a ceiling. Our states are
21 laboratories of democracy and we do not think that we
22 should prevent innovation on the state level to
23 further protect their consumers in the ways that they
24 see fit. Consumer Reports is trying to help consumers
25 evaluate the privacy and security choices that are

1 presented to them, but, unfortunately, privacy
2 policies are way too long, full of legalese and often
3 buried on websites and not easy for consumers to
4 evaluate one against another.

5 For this reason, Consumer Reports introduced
6 the digital standard in March of 2017. This is our
7 understanding of what is best as far as data security
8 and privacy practices for products and services for
9 consumers. We started evaluating products under this
10 standard this year. We have seen a huge response both
11 from companies and from consumers.

12 However, this effort depends on
13 transparency, which is one reason why we are pushing
14 for any kind of privacy law to include requirement of
15 SEC-type disclosures from companies as far as their
16 data practices and privacy policies. That way these
17 policies could be read by those who are already
18 reading them and they would have more information.
19 Regulators, policymakers, reporters, and groups like
20 Consumer Reports would be able to fully understand
21 what companies are doing with consumer information.

22 We also support any effort to get to this
23 endpoint, but we understand that, at some point,
24 consumers just also need in-the-moment disclosures as
25 well, which is why we appreciate this layered

1 approach. However, we will get into more of the
2 nuances of what we think about the data privacy law
3 today in this panel.

4 Thank you.

5 MS. FEMENELLA: Thank you, Katie.

6 Now, Eric will give his statement.

7 MR. NULL: Good morning, everyone. Thank
8 you to the FTC and thank you to Peggy for putting this
9 together.

10 Since I am a third consumer group to speak,
11 I will try to not repeat things and perhaps can keep
12 this relatively short.

13 But, you know, OTI, Open Technology
14 Institute, my organization, has been thinking a lot
15 recently, particularly about the level of competition,
16 particularly amongst social media platforms, but also
17 just among big tech platforms in general and thinking
18 about ways that we can sort of chip away at that a
19 little bit without necessarily doing something like
20 breaking up a company, for instance.

21 But essentially we are seeing this growth of
22 a couple large social media tech companies, who are
23 able to more and more collect data and be able to, for
24 lack of better word, exploit that data. And what ends
25 up happening or what has happened is basically they

1 end up crowding out smaller companies that could
2 sprout up or, you know, companies start with the idea
3 that they would get bought up by one of the bigger
4 players.

5 And so you end up having fewer and fewer
6 companies with more and more data and then you end up
7 creating this system, particularly for businesses and
8 minority -- communities of color, low-income
9 businesses that feel forced to use these platforms to
10 reach their customers and they cannot necessarily
11 expand beyond those because there are not really many
12 other options.

13 So obviously, there are a lot of ways we can
14 go forward with this, antitrust is one of those ways.
15 I am not an antitrust expert, so my understanding of
16 competition is probably a little less nuanced than
17 some of my other panelists and some of the people in
18 this room. So, you know, obviously, one of the more
19 extreme ones is to break up companies, which as I have
20 said, you know, we do not necessarily support,
21 certainly not at this time, particularly because how
22 would that work, how would you break it up. It is not
23 like AT&T where you can break it up into long distance
24 and local. So there are a lot of questions there that
25 may end up making things -- there are lot of things

1 there that might end up making things worse than
2 better.

3 Another option is to make behavioral
4 advertising less appealing and less profitable. That
5 way smaller companies that have less data and have
6 access to less data could compete on more a level
7 playing field with contextual advertising or
8 subscription models or something like that. That is
9 also not necessarily something we would like to do, at
10 least in the immediate term. The option that my
11 organization prefers, which my director spoke about
12 yesterday on the revenues panel, is emphasizing data
13 portability which allows users to port their data
14 between services to allow a competitive service to
15 take advantage of the data that someone has already
16 put into the world on another platform and just move
17 it to that platform and be able to target advertising
18 based on that information. But then also platform
19 interoperability, which is not to be confused with
20 data interoperability, which is about making sure that
21 data can be -- you know, there is like a standard for
22 the data to be ported.

23 Platform interoperability is more about
24 being able to use any platform and communicate with
25 anyone else on any other platform. We have an example

1 of this right now in the fediverse, which has services
2 like Mastodon and PeerTube, where they basically just
3 -- they all interact with each other and then you can
4 communicate across the platforms. We obviously do not
5 see that today because companies are trending toward
6 locking down their services and their data rather than
7 opening them up.

8 I will just say a couple things about
9 privacy, substantive privacy rights. You know,
10 obviously, a lot of us are thinking about and talking
11 about comprehensive privacy legislation, but also what
12 the FTC can do without any new legislation.

13 The three things I just want to emphasize
14 right now is data minimization, which Katie covered,
15 the right to control and access and delete and modify
16 data; and then enforcement of -- you know, strong
17 enforcement of whatever privacy regime we end up
18 coming up with. And I will leave it at that.

19 MS. FEMENELLA: Thank you, Eric.

20 And, now, Tom will go ahead and give his
21 statement.

22 MR. LENARD: Thank you, Peggy, and thanks to
23 the FTC for inviting me to speak. I think this has
24 been -- I have watched some of the hearings in the
25 last couple of days and I think they have really been

1 very good.

2 I want to make two related points. The
3 first one may seem obvious, but probably needs to be
4 said fairly often, is that policymakers need to do the
5 necessary analysis to make sure that privacy policies
6 actually do produce positive net benefits. And as
7 part of that -- and this is particularly important for
8 the FTC given its mission -- is assessing the
9 competitive implications of privacy policies.

10 The competition policies generally have a
11 strong economic underpinning and while there is now
12 more debate on the subject, I think there is still a
13 fairly widespread consensus that antitrust should
14 deter activities that are harmful to consumers. But
15 privacy is behind antitrust in terms of incorporating
16 economics and evaluating the relevant tradeoffs and
17 doing the analysis necessary to show that the proposed
18 policies have benefits greater than costs and
19 therefore actually do improve consumer welfare.

20 So for example, we know that collecting and
21 analyzing large amounts of data is the basis of much
22 of the innovation that has occurred on the internet
23 over the past 20 years. Many of the benefits of data
24 are realized when data are reused, combined with other
25 data sets, used to answer new questions that were not

1 anticipated at the time the data were collected. But
2 many privacy policies target those practices and
3 restrict the collection use and sharing and retention
4 of data. We need to more rigorously assess the cost
5 and benefits of those policies to know whether they
6 actually make consumers better off.

7 If markets are operating properly, if there
8 is no significant market failure, there is no reason
9 for the Government to intervene in the first place.
10 We know that consumers willingly exchange personal
11 information for the resulting benefits despite what
12 they say in surveys. And we also know that firms
13 suffer quite significant financial repercussions when
14 they experience data breaches, which gives them an
15 incentive to put the necessary resources or certainly
16 a lot of resources into avoiding them.

17 So are these factors consistent with the
18 notion that the market for privacy is subject to
19 serious market failure? That is a question that needs
20 to be analyzed in more detail.

21 We know the consumers routinely exchange
22 their information without reading and understanding
23 privacy notices suggesting that most consumers do not
24 find it rational to spend the time and effort to do
25 so. Is this consistent with various transparency

1 notice and choice proposals?

2 Perhaps, most importantly, I think this
3 needs to be the starting point really of most
4 analyses, we need to define more clearly the privacy
5 harms that are being targeted and that we want to
6 avoid. The recent informational injury workshop that
7 the FTC held and the summary memo that the BE and BCP
8 staff wrote, I think were a good step in that
9 direction. And this is critically important because
10 benefits, by definition, consist of a reduction in
11 harms. If there are no harms there can be no
12 benefits, only costs. And while we all know that
13 identifying harms is difficult, it is not enough to
14 simply assert that collecting information or sharing
15 information with third parties is harmful, per se.

16 Now, on the competition front, I think more
17 economic analysis would help illuminate the tension
18 that exists between privacy regulation and
19 competition. Some of these issues were discussed in
20 the last two days. There is quite a bit of theory and
21 evidence that many privacy regulations favor large
22 incumbents and make entry by new firms more difficult.
23 I think this is borne out by the early experience with
24 the GDPR, which imposes large up-front compliance
25 costs and appears to benefit the large tech platforms,

1 and we see smaller companies pulling out of the EU in
2 reaction to the costs of complying.

3 And on the consumer side it was referred to
4 yesterday as well -- there is a paper by Campbell,
5 Goldfarb and Tucker, which is a different argument,
6 but it kind of reinforces the other argument, focusing
7 on transactions costs shows that the opt-in consent
8 regimes favor large firms that offer a range of
9 services because it is easier, there is, in the
10 economist jargon, smaller transactions costs for
11 consumers to go through the procedures once with a
12 large company offering range of services than with
13 many smaller companies.

14 And, increasingly, regulations, such as the
15 CCPA, are being adopted that make it more difficult
16 for data to be sold or otherwise transferred to third
17 parties, and regulations like these can also be a
18 barrier to entry because firms entering a market often
19 need data on characteristics and preferences of
20 potential customers before they can get started and
21 collect data of their own from actual customers.

22 These regulations can also raise costs for
23 data brokers, which also can be a barrier to entry.
24 Data brokers can realize economies of scale and scope
25 and data that can benefit entrants and other smaller

1 companies that cannot realize those economies on their
2 own.

3 And, finally, in addition, making it
4 difficult to share with third parties can lead
5 companies to integrate with other companies in a way
6 that would be otherwise inefficient and, therefore,
7 may lead to antitrust concerns.

8 Thank you.

9 MS. FEMENELLA: Thank you, Tom. And thank
10 you, everyone, for your statements.

11 Let me go ahead and jump into questions
12 now. I would like your thoughts on whether data-
13 driven pricing threatens consumer welfare directly by
14 enabling firms to extract more surplus from consumers
15 for any given level of market power, and if so,
16 whether there is anything that the antitrust laws can
17 or should do about that?

18 Ramsi, would you like to lead us off on
19 responding?

20 MR. WOODCOCK: Yes. I think that the answer
21 to that question is yes. I mean, it really flows from
22 sort of basic economics involving differentiated
23 products. I mean, think about an airline in the midst
24 of a price war in a highly competitive market, it is
25 still able to charge more to first class passengers

1 than to economy passengers, and that is because
2 products are differentiated, if only in brand name,
3 which consumers care about, however irrational that
4 might be for them to do so. And the result is that
5 every firm always has a little bit of power over
6 price.

7 And as a result, the more data firms have
8 about their customers, the more they are able to
9 exploit that data to raise prices for those customers
10 who turn out to be willing to pay more regardless of
11 how competitive the market is.

12 That is why I like to think about data as
13 really presenting a sort of second dimension of market
14 power where the first is determined by the level of
15 competition in the market and the second dimension is
16 determined by the level of information you have about
17 your customers.

18 MR. LENARD: I think the -- I mean, the
19 question basically is about price discrimination,
20 which also was covered by several people in the
21 previous couple of days. It is true that price
22 discrimination transfers some, and in the case of
23 perfect price discrimination all, of the surplus from
24 consumers to producers. But price discrimination also
25 is efficient in terms of increasing overall welfare

1 when it increases the total output of the market.

2 So particularly in the case of products with
3 high fixed costs and low marginal costs -- you know,
4 one example is airlines, airline tickets -- price
5 discrimination may be necessary for the good to be
6 produced at all. If airlines could not price
7 discriminate, we would have -- it is not likely we
8 would not have any airlines, but we would have fewer
9 flights.

10 Lots of goods in the digital economy and the
11 information economy, like apps and software, also have
12 high fixed and lower or even zero marginal costs, and
13 price discrimination may, in fact, be essential for
14 those goods to be produced.

15 Also, price discrimination, I think contrary
16 to what sometimes is said, I think price
17 discrimination generally favors lower-income consumers
18 because it really involves charging prices based on a
19 consumer's ability to pay. A consumer's ability to
20 pay is, in general, related -- charging on the basis
21 of a consumer's willingness to pay. A consumer's
22 willingness to pay, in general, is correlated with
23 their ability to pay, which implies that price
24 discrimination otherwise -- other things being equal,
25 is going to charge lower prices to lower-income

1 consumers who otherwise might be unwilling or even
2 unable to purchase the product.

3 MS. MCINNIS: If I could just jump in.
4 First of all, this use of first-degree price
5 discrimination or dynamic pricing is a harm to the
6 consumer, first of all, because it is -- these
7 decisions are made about the consumer based on data
8 collection, which they did not agree to, and is rather
9 privacy-invasive.

10 Second of all, they do not have any sort of
11 transparency for how these prices were calculated.
12 And we have seen in markets that this is not
13 necessarily -- [3459] different pricing of different
14 products is not necessarily a good result.

15 We recently did a report on car insurance
16 pricing and found that people in a lower-income
17 community were being charged more for their car
18 insurance because they used a proxy of a zip code and
19 decided they were more at risk based only on their zip
20 code, which happened to be a minority majority
21 neighborhood. So this is not necessarily good.

22 Second of all, having dynamic pricing
23 diminishes the consumer's share of the consumer
24 surplus, which is not helpful either. And third of
25 all, consumers are unable to compare prices which is

1 one of the ways that we have competitive market. If I
2 cannot compare one price of an airline ticket to
3 another because they are all raised because I have
4 been searching for airline prices to New York all day,
5 that does not allow me to actually choose which
6 airline would serve me best.

7 Thanks.

8 MR. WOODCOCK: Well, just to put a finer
9 point on that, Katie, and sort of in conversation with
10 Tom here a little bit, price discrimination, when it
11 is imperfect, can benefit consumers. It can bring
12 consumers into the market who otherwise would be
13 priced out of the market at a higher uniform price.
14 But as price discrimination becomes more perfect --
15 and that is where we are heading; that is the whole
16 point of the data economy, to personalize the price
17 and get it up to willingness to pay -- the consumer's
18 benefit from that goes to zero.

19 So while it is correct that price
20 discrimination -- perfect price discrimination is
21 efficient, all of the efficiency gains go to the
22 producer and zero go to consumers. And under
23 antitrust, we operate under a consumer welfare
24 standard, not a total welfare standard. So a policy
25 that drives consumer welfare to zero is not an

1 antitrust interest.

2 Just to put it in intuitive terms, think
3 about the hypothetical disadvantaged consumer who is
4 brought into the market through personalized pricing.
5 If they are charged a price exactly equal to their
6 willingness to pay, which is where we are going with
7 personalized pricing, by definition, by economic
8 definition, they are indifferent between having access
9 to that product and not. They get nothing from it.

10 MS. BOHM: So I feel like I need a mic drop
11 to follow Ramsi. So I am a little intimidated. But I
12 do want to add one thing about sort of who is
13 benefitting, and price discrimination, you know,
14 probably means lower-income folks can afford to buy
15 things. I think the data sort of demonstrate that
16 that is not always true.

17 So Katie gave us one example that I think is
18 really good. Here is another one. The Wall Street
19 Journal recently did a study of price discrimination
20 and they were looking at Staples and if you were in
21 various zip codes what it would cost to buy various
22 products there. They found, unsurprisingly, that if
23 you lived closer to a rival store, you were getting
24 lower prices on Staples.com. That is rational, right?
25 They want you to buy online from them instead of going

1 to the Office Depot down the street.

2 It also turns out that the people who lived
3 near the rival stores tended to be higher-income. So
4 folks who lived further from stores, who were getting
5 higher prices, were also poorer folks. So I think
6 there is not only everything Ramsi said, but there is
7 also a real risk of further entrenching the economic
8 divide in this country because the people who do live
9 close to stores tend to be the people who live in
10 wealthier areas where stores want to come.

11 MS. FEMENELLA: So switching gears a little
12 bit, do you think businesses will start competing or,
13 in fact, are already competing for customers based on
14 consumer privacy choices? And if so, how do you think
15 this will affect privacy practices? Eric, do you want
16 to start us off?

17 MR. NULL: I am going to let Katie actually
18 attempt that first.

19 MS. MCINNIS: So we do see rise in the use
20 of consumer privacy-protective practices, such as use
21 of ad blockers is about to reach 30 percent this year,
22 more consumers have been interested in the use of a
23 virtual private network since Congress rolled back the
24 broadband privacy rule that the FCC passed in late
25 2016. But we also here at Consumer Reports, where we

1 released the digital standard, we have seen a great
2 response from businesses where they responded within
3 the next few days after we introduced the standard to
4 see what kind of criteria we were using and when we
5 would be rolling that out for all of the products to
6 have connectivity.

7 But we have seen consumers have been really
8 interested in our evaluations of product space and
9 privacy and security because they do not have the
10 tools available to evaluate these products. So I
11 think that we are only going to see a rise in
12 consumers being interested in products that preserve
13 their privacy and data security.

14 We have seen a great use of home products
15 like Alexa and Google Home and the rest, but, at the
16 same time, consumers are concerned about how much
17 these products are listening to them. So they are
18 interested in these accessibility and these
19 convenience products, but they are also really, really
20 interested in how much privacy their privacy is
21 protected. But, unfortunately, they just have not had
22 the tools to evaluate these products.

23 So that is one reason why Consumer Reports
24 has entered into this process of evaluating privacy
25 and security, but also another reason why consumers

1 need a data privacy law in order to even the playing
2 field a little bit here. But we have also seen that
3 consumers are asking more from their companies. We
4 have seen a drop-off of membership for Facebook after
5 the Cambridge Analytica scandal. So breaches of
6 consumer data do have a repercussion for the company,
7 especially in consumer trust.

8 So we see that this will only continue to
9 rise as consumers become more and more aware of how
10 much they are being tracked and how much their on and
11 offline activities are being correlated in order to
12 make decisions about them and their buying practices.

13 MR. NULL: Yeah, I will just jump in here
14 really quick. I think there are certainly lots of
15 privacy-protective services out there, SpiderOak for
16 cloud services, ProtonMail and FastMail, you know,
17 Signal for communications, DuckDuckGo for searching,
18 and so I think we will probably continue to see these
19 privacy-protective competitors sprout up.

20 As I mentioned before, it is sort of hard
21 for a privacy-protective social media network to
22 sprout up for a variety of reasons. But I think in
23 terms of whether -- you know, how could we get more
24 competition, consumers -- I heard this a long time ago
25 that consumers are not very good at internalizing,

1 like, potential harm in the future. People still
2 smoke even though there is a potential that they might
3 get lung cancer when they are older.

4 And the same thing is sort of true with
5 privacy where if you are looking at a free service
6 that you have to give a bunch of data to and you are
7 looking at another service where you pay \$10 a month
8 or \$5 a month or something, but it protects you from
9 privacy intrusions by ideally not collecting data
10 about you or collecting a very minimal amount of data,
11 it is a lot harder for a consumer to look at that and
12 say, well, that is worth X number of dollars to me,
13 even though in the future if you go with the free
14 company and they get breached and information gets
15 leaked about you, it may lead to identity theft. It
16 may lead to a variety of other harms, you know,
17 secrets about you getting leaked that you do not want
18 to know, you do not want the world to know.

19 And so it is hard for consumers to actually
20 make that comparison. I think maybe there is just a
21 way to be more explicit about it and maybe the
22 advertising for these privacy-protective companies has
23 to be clearer about that. I do not know. But I
24 think, as a consumer, me in particular, like it is
25 hard to part with dollars out of my wallet when I can

1 just go with a free service and sort of pretend that
2 there are no potential harms that could come from that
3 collection.

4 MR. WOODCOCK: If I can jump in. It does
5 seem like there is a serious market failure here when
6 it comes to privacy. But it also seems like consumers
7 recognize that not being completely private with their
8 data does benefit them, which is why I have tended to
9 focus more on sort of increased competition in markets
10 as being a potential solution to this problem rather
11 than increased privacy protections. Because in very
12 competitive markets, data cannot be used against
13 consumers so much, but firms still have access to that
14 data and they can use it to do the sort of beneficial
15 things with data that we all love, you know, computers
16 being able to serve us without us having to ask them,
17 and so on.

18 MR. NULL: And I will just add that I have
19 done a lot of work in -- well, a lot of us have done a
20 lot of work in broadband privacy, and one thing that
21 we have not seen in the ISP market is -- market, if
22 you can call it that -- is no one competes on privacy
23 even in the wireless market where people tend to think
24 that is, at least, a somewhat more healthy competitive
25 landscape, and I have found that interesting in terms

1 of, you know, if you have a competitive market, you
2 will probably get some providers that will compete on
3 privacy. But we do not see that in the ISP market.

4 MS. FEMENELLA: What is the role of
5 interoperability in addressing big data, privacy, and
6 competition? Allie, do you want to start us off?

7 MS. BOHM: Sure. So this will be relatively
8 brief. Interoperability is super important, and it
9 can be helpful for allowing new players to enter the
10 market and for individuals to leave privacy-violative
11 services. So if, for example, Facebook were
12 interoperable with this fantasy, really, privacy-
13 protective social network, you might actually go over
14 there if you could still message your Facebook friends
15 from there because you could leave without sacrificing
16 your contacts or your content from Facebook. But it
17 is not a panacea.

18 So email is a great example of something
19 that is fully interoperable. Yet, the vast majority
20 of people are on Gmail, you know, whether that is
21 because it has more storage or it is the best product.
22 I do not know. But people have gravitated there and
23 given it a disproportionate market share. So I think
24 there is a risk that even if we have full
25 interoperability, we are still going to have certain

1 players emerge as dominant and it is not actually
2 going to solve all of the problems in this space.

3 MR. NULL: So, I mean, I mentioned this in
4 my opening and so there are -- so separating out data
5 portability and data interoperability, data
6 portability is a much easier question to answer. I
7 think it is easier to sort of -- for lack of better
8 term, legislate it from the top down and say in some
9 way that there has to be some kind of data portability
10 option. I mean, we see it in the GDPR and we see it
11 in the California law.

12 And it is really -- the benefit there is to
13 make sure that users, if they want to, can move their
14 data from one service to another without having to
15 reestablish their entire social lives on a different
16 service and the provider -- the social network
17 provider gets the benefit of all that data to then be
18 able to target that person and potentially other
19 people.

20 So portability is relatively
21 straightforward. There are some thorny issues there.
22 Partially, something that we may get to is, you know,
23 what data should you be allowed to move between
24 services, what data that shouldn't you be allowed to
25 move, should that data be deleted from the social

1 network that you are moving it from? There is lots of
2 in-the-weeds sort of questions that come with that.

3 But it is the platform interoperability that
4 is a much tougher issue. So a lot of it has to do
5 with protecting privacy versus allowing
6 interoperability and portability to a certain extent,
7 depending on what you are porting out. My director,
8 Kevin Bankston, talked about this yesterday. You
9 know, what about your social graph? Can you port that
10 data out? Is that something that should be
11 interoperable for the user to be able to move? And so
12 what you are talking about now is data about other
13 people, rather than just data about you, and so that
14 gets into the question of what data can you move.

15 And Professor Pasquale said, you know -- or
16 put forth the argument that whatever data I upload, I
17 can then also move between services, and I think that
18 is a decent starting point, but I do not know if that
19 necessarily gets to the full issue because obviously
20 Facebook makes a lot of inferences about us and uses
21 data in a lot of different ways that we do not
22 necessarily know. That is why I couple the data
23 portability and interoperability issues with the right
24 to control access and amend and delete your data so
25 you can actually see what they have, and then that way

1 you can make an informed decision about whether you
2 want to port all of that data or not.

3 Unfortunately, what we have seen recently
4 because of Cambridge Analytica and some other issues,
5 that social network providers are actually locking
6 down their data more than they are opening it up. And
7 that is in part due to the public's reaction to
8 Cambridge Analytica, which was swift and intense. And
9 so that was partially due to the ability of users to
10 port their social graph and be able to use that
11 information elsewhere. And that is something that
12 Facebook fixed many years ago and then is actually now
13 becoming more locked down as a result of the Cambridge
14 Analytical scandal coming to light.

15 So, yeah, I think that data portability and
16 interoperability are -- portability is low-hanging
17 fruit sort of, say; interoperability is a much more
18 difficult issue. But I think they all should be --
19 both of them should be considered going forward in
20 terms of FTC hearings and fact-finding and that sort
21 of stuff. So thanks.

22 MR. LENARD: So I think if you look at
23 something like portability, you need to start out by
24 asking yourself what is the purpose of portability.
25 The purpose of portability is presumably to lower

1 switching costs. So whether it is a good idea or not
2 really is dependent on the context. So for example, I
3 think for most consumer-facing applications, retail --
4 you know, the fact that I might not port all my data
5 in my ten years of purchase history from Amazon to
6 somebody else does not prevent me from buying from
7 another retailer. There is really no switching costs
8 to doing that.

9 So the value -- I am sure there will be
10 substantial costs in a portability requirement and I
11 think the benefits would probably be minimal. There
12 might be other apps where -- there may be other
13 situations where it is important. If you had a
14 medical app where there was a history of medical
15 treatment or various things was important, then, you
16 know, that would be a barrier to switching.

17 In terms of something like Facebook, I do
18 not even quite understand how it would work. I mean,
19 you could port yourself, but you cannot port all your
20 friends. And if you are not going to be able to port
21 all your friends, I do not see why --

22 MR. NULL: I mean, you can port your
23 friends. That was the Cambridge Analytica scandal.

24 MR. LENARD: You are not porting them to
25 another social network --

1 MR. NULL: You are sharing their
2 information.

3 MS. BOHM: Well, that is actually how most
4 of the social networks started was they said, hey, can
5 we have access to your email account and we are going
6 to send emails to all your friends asking them to join
7 this social network. And I think one of the tricky
8 questions with data portability is, do I get to port
9 my social graph? And if it is Facebook, if I am
10 friends with Eric, is that Eric's data that we are
11 friends or is it my data and do I get to port it? And
12 that is one of the tricky questions where portability
13 is going to sort of be effective from a competition-
14 enhancing perspective. So I think you are stepping on
15 a very live question here.

16 MR. NULL: Sorry to --

17 MR. LENARD: I suspect -- I mean, I do not
18 know obviously, but I suspect a lot of people would be
19 unhappy if they found themselves ported without their
20 permission.

21 MS. BOHM: I think you are right. I think
22 that is one of the issues.

23 (Laughter.)

24 MR. NULL: Well, you are talking about
25 signing other people up for news services.

1 MR. LENARD: Well, you are porting all of
2 their -- put aside Cambridge Analytica, just as a
3 common practice to say, well, I want -- you know, it
4 just seems to me there are problems with it.

5 MR. WOODCOCK: I just wanted to point out
6 that even if we solve -- sort of data portability is
7 about solving the kind of economies of scale problem
8 with sort of data-intensive businesses --

9 MR. LENARD: I think it is about reducing
10 switching costs.

11 MR. WOODCOCK: Right. But by reducing
12 switching costs, you sort of make these markets
13 contestable in some sense, right. Because, you know,
14 there certainly are huge economies of scale associated
15 with data. I mean, that is why Gmail is the dominant
16 email platform because the more you know -- the more
17 users you have and the more you know about them, the
18 more you are able to sort of filter out spam and
19 protect your email servers, and that is a big part of
20 why Gmail has gotten so big.

21 So portability is sort of -- it will not
22 necessarily deconcentrate a market because you still
23 have those economies of scale and data, but it will
24 make the markets more contestable. So that if some
25 other platform comes along and it is willing to offer

1 something better, everybody can sort of switch and
2 port their data to the other platform and now you will
3 have a new platform, which will be the dominant firm
4 in the market until another one comes along.

5 But even if we solve that problem, that does
6 not eliminate the exploitation problem. I mean,
7 whether the market is contestable or not or whether it
8 is even highly competitive or not as a result of
9 portability, whichever firms have your data can use
10 it, can exploit it, to help the companies that you buy
11 from charge you higher prices. So there are two
12 separate issues at work here, I think.

13 MR. NULL: I am actually fascinated by Tom's
14 argument that the benefits would not necessarily
15 outweigh the costs of data portability and that
16 switching costs is the only benefit -- or reducing
17 switching costs is the only benefit. I mean, I think
18 the other benefit is that the new social network also
19 gets access to a treasure trove of data on you that
20 they can now use to target you with ads. Like that is
21 the business model, right? A free service -- free,
22 quote, unquote, a free service where you get targeted
23 with ads.

24 And a startup social media company has
25 access to basically no data. I mean, they have access

1 to public data, but they do not have access to, like,
2 all my posts going back 12 years now on Facebook
3 unless I am able to move that data with me. And so
4 you do that with X number of people, assuming X is
5 enough to make the business model sustainable, you
6 know, you have a viable competitor in the social media
7 market then.

8 So I think switching costs is obviously a
9 big one, but right now switching costs are basically
10 irrelevant because there is no one to switch to.

11 MS. MCINNIS: So we have been --

12 MR. LENARD: Let me just say one thing. I
13 have not done the analysis and I have not seen anybody
14 else who has done a general analysis of what a
15 portability requirement -- what the costs and benefits
16 of a portability requirement would be. But I do not
17 think -- it is probably straightforward and I do not
18 think -- I think it is probably quite context-
19 specific. It depends on which -- you know, what
20 things you are going to port.

21 MS. MCINNIS: Yes, that dovetails nicely
22 actually to what I was going to say, which is we have
23 just been discussing portability of social media data,
24 which I think is a little more of a life question,
25 like Allie stated. But there are other kinds of data

1 that consumers should be able to port in order to reap
2 consumer benefits, such as being able to port my
3 financial data to a new broker so that they can offer
4 me better tools and services based on past financial
5 history.

6 Part of the -- one of the letter of HIPAA is
7 portability, right? Like this law from over 20 years
8 ago is a law that acknowledged that we had to have
9 portability of your data in some means in order to
10 have some sort of protections around your medical
11 data. So I think the portability has to be included,
12 in some way, in this data privacy law that we create.
13 And I think this kind of really tough issue that we
14 have touched here today is a good reason why the FTC
15 should be viewed with rulemaking authority under this
16 law so that they can figure out some of these thornier
17 issues and we do not have to bog down Congress while
18 they figure out some issues at hand.

19 MS. FEMENELLA: So let's flesh out a little
20 bit of what you guys have all been discussing. So you
21 have addressed this a little bit, but does data
22 actually affect the bargaining power of consumers,
23 vis-a-vis, firms, and if so, how? And does it give
24 the firms an advantage or could it actually help
25 consumers fight back, leading to no net effect?

1 Ramsi, do you want to start off?

2 MR. WOODCOCK: Well, I think it is sort of
3 an interesting question whether data could be -- so I
4 think it is fairly obvious that data enhances the
5 bargaining power of firms because it lets them know
6 more about -- it lets them guess -- better guess what
7 the sort of maximum willingness to pay of consumers is
8 for products. But it is an interesting question
9 whether consumers could somehow benefit from data as
10 well.

11 Because just as there is a ton of data about
12 consumers out there, firms now have much more data
13 about their own costs than they ever did before. And
14 this has actually been underway far longer than sort
15 of the -- the consumer data extraction side has been
16 underway. For decades now, firms have had sort of
17 hyper-accurate information about each product that is
18 being scanned at the checkout at supermarkets, and so
19 on. They have automated their supply chains. They
20 have much better sense of what their costs are. That
21 is all data that consumers, in theory, could use in
22 bargaining with firms.

23 Because once -- that is sort of the flip
24 side, the equivalent of the consumer's maximum
25 willingness to pay is the firm's minimum willingness

1 to accept, if you will, in terms of prices. And if
2 there were some way for consumers to leverage that
3 information and use it against firms, then they could
4 at least offset their loss and bargaining power
5 associated with the data that is being extracted from
6 them.

7 The main challenge that is faced in making
8 that happen, though, is that consumers are
9 disorganized relative to firms. They are atomistic
10 and so they are not able to sort of -- and they do not
11 have any access to the data. They are not -- unlike
12 firms which are sort of observing consumers, consumers
13 are not out there observing firms' cost levels
14 directly. So we would need some way, first, to sort
15 of force firms to give up their data on their costs
16 and then we would need a way to sort of centralize
17 that information and use it in a way that consumers
18 can exploit to hold out for lower prices from firms.

19 It strikes me that absent some kind of
20 legislative solution that was to do that, consumers
21 are going to be sort of permanently at a bargaining
22 disadvantage in the data economy.

23 MS. BOHM: So I tend to agree with Ramsi on
24 this one. I think pervasive data collection allows
25 firms to develop detailed profiles about their

1 customers and their customers' willingness to pay,
2 which allows for personalized pricing strategies and
3 manipulations of consumer choice, placing very, very,
4 very persuasive ads for particular consumers.

5 Companies can do this at scale because of machine
6 learning and algorithms. Individuals cannot.

7 You know, it may be true that I can now plug
8 into the internet and say, oh, I need a new shower
9 curtain, what does it cost at Target, what does it
10 cost at Bed, Bath and Beyond, and, you know, price
11 compare. But that has limited utility, particularly
12 when, as Katie pointed out, we are often seeing
13 personalized prices or lately, if you are searching on
14 Amazon, sort of the sponsored things go to the top. I
15 was trying to find a particular cell phone case and I
16 could not even find it until I put in the brand name
17 and, like, exactly what it was. It did not show up in
18 just like a search for "cell phone case."

19 So if you are not seeing products because of
20 what algorithms you are doing and you are not seeing
21 particular prices, you really just do not have the
22 information, as an individual, to leverage data
23 against the companies.

24 MS. MCINNIS: Yeah, I think data portability
25 is -- and data access is going to be hopefully a huge

1 bargaining chip for consumers in the future. I do not
2 think that we really have that ability now.

3 I do think that the emerging automated car
4 market will kind of necessitate that we answer some of
5 these questions, right? Who has access and who has
6 ownership of my driving data? In the past, that was
7 you and if you had an agreement with Progressive or
8 some other car insurance company that put a black box
9 in your car. In the future, we are going to want to
10 have access to this car driving data in order to make
11 sure that our automated driving systems are as safe as
12 possible. But at the same time, it reveals a lot of
13 sensitive information about users.

14 Hopefully, we want this situation between
15 consumers and companies to be more even, and I think
16 that as consumers have better acknowledgment of their
17 data and where they are creating it that, hopefully,
18 they will be able to take more ownership under a new
19 data privacy law and use this as bargaining chip.

20 I also think that -- although we discussed
21 it a lot in the last question, I do not want to dip
22 back in. I do think that it is a huge deal for
23 consumers to be able to avoid lock-in with any one
24 service. Consumers should be able to shop for
25 whatever group respects their choices the most. And I

1 think that is one of the huge issues that came out of
2 the Equifax breach, is that consumers felt the
3 immediate effect of this breach. Equifax really did
4 not in the long run and, yet, they have no
5 relationship with Equifax at all.

6 So having some sense that you have control
7 over your data is obviously an emerging thing in the
8 U.S. And I think that, in the future, we are going to
9 see more and more consumers leveraging their data in
10 order to get a better product or service or hopefully
11 maybe even change dynamics -- change the kind of
12 services that were being offered in the first place.

13 MS. FEMENELLA: So going back to the
14 portability issue, do you think there should be a fee
15 associated with being able to port your own data?

16 MS. MCINNIS: I would say no. I think the
17 question of, like, ownership rights over data is kind
18 of a thorny one because it is somewhat of a mutual
19 process between you and whatever service you are
20 interacting with. However, I think that as we saw,
21 again, with Equifax breach of having to protect your
22 data and to pay a fee for it was hugely onerous to
23 consumers.

24 I also think that having a fee associated
25 with the portability of your data could possibly

1 prevent the change from one service to another. So it
2 could affect some consumers more than others.

3 In addition, I think that this already is
4 asking for consumers to make a pretty deliberative
5 step to take their data and move it to another. I do
6 not think you should put a further burden on that
7 change.

8 MR. NULL: So I agree that consumers should
9 not have to pay to port their data. The question of
10 whether the receiving provider should have to pay is
11 an interesting one that I have not really thought a
12 lot about, and what that would mean and how much is a
13 reasonable amount to charge for that sort of thing. I
14 could certainly see exorbitant fees being charged and,
15 therefore, companies do not want to pay for the data,
16 but also could see some potential benefits there as
17 well.

18 Good question, though. Interesting. I will
19 continue thinking about that.

20 MS. MCINNIS: Yeah, I guess that brings up
21 an interesting solution. I guess it would be better
22 if companies could organize with each other what sort
23 of level playing field they can figure out so that
24 consumers do not have to pay a fee or -- and that is
25 actually a more, I think, conducive situation to

1 realize in an equitable outcome.

2 MS. BOHM: So I feel like I am sort of
3 bristling a little bit at this question. So my
4 organization comes from the philosophical, if not --
5 you know, certainly not the legal position, but the
6 philosophical position that you own your own data. So
7 if I own this information about myself that I have
8 given over to a company, let's call it Facebook right
9 now, and Facebook has been able to profit off of that
10 data -- so they already gotten a lot of value out of
11 it, it does not seem fair to me that I would then have
12 to pay to get my data back.

13 I am not even sure about another company
14 having to pay for me to be able to then bring my data
15 over and use that other company because it seems to me
16 that Facebook has already gotten a whole lot of value
17 out of this thing that I philosophically, if not
18 legally, should own. I do not think -- sort of the
19 philosophical ownership is not a controversial idea
20 that Public Knowledge dreamed up. I mean, if you
21 heard Mark Zuckerberg testify back in April over and
22 over again, you own your own data, we believe that you
23 own your own data, which is a really interesting thing
24 to hear from him.

25 So I do think that there is increasing

1 consensus in that space from that sort of
2 philosophical underpinning, and if that is the
3 underpinning, I just do not see how fees get involved.

4 MR. LENARD: Let me just -- I mean, I agree
5 this ownership question is obviously a difficult
6 question. But if you analogize it like what was just
7 done in terms of you paid for the service with your
8 data -- let's, for example, say, well, you paid for
9 the service with money, does that mean it is still
10 your money?

11 MS. MCINNIS: Well, I think that is a false
12 comparison because data is dynamic and you are always
13 creating it and there is always future ways that data
14 can be used, right? Like that is one reason why
15 companies want to make sure that they have such a
16 large network in order to then extract the amount of
17 data and then use data for future purposes. I do not
18 think that a lot of us could have anticipated the kind
19 of growth of a lot of the properties that we gave data
20 to in the early days of the internet and how they
21 would use it in the future.

22 There is also that -- yeah, I just do not
23 think that those are comparable things. But I do
24 understand that the payment idea maybe ruffles that a
25 little bit.

1 MS. FEMENELLA: Does data soften traditional
2 innovation-based arguments against antitrust
3 enforcement by ensuring that firms are able to extract
4 greater profits from less concentrated markets and,
5 therefore, to maintain R&D spending despite increased
6 competition in their markets?

7 Katie, do you want to respond to that?

8 MS. MCINNIS: Sure. I do not think the
9 framing here is exactly correct. I think sound
10 antitrust enforcement is conducive to innovation and
11 data does not soften that argument. A lot of startups
12 use their employee's data in order to get into the
13 market. That kind of R&D spending is already
14 encapsulated in the startup market that we already
15 have.

16 In addition, you see that there is further
17 concentration on markets even with great use of data
18 from employees or small data sets. The goal now for a
19 lot of startups is to be bought by one of the big
20 ones, which is not necessarily creating a full market
21 where there is a lot of competition, but rather
22 further centralization and that is still including
23 data.

24 In addition, I think that the R&D spending -
25 - like the R&D spending here, if it is going to be

1 based on data, that is a much smaller cost, I think,
2 than it used to be in the past. You can create a
3 product like Fitbit based -- in the beginning, based
4 on employee data, which was not necessarily -- that
5 does not change any kind of competition or antitrust
6 arguments in my opinion.

7 MR. WOODCOCK: I think the jury is still out
8 on whether sort of concentration is more conducive to
9 innovation or competition is more conducive to
10 innovation.

11 But if we accept the sort of argument, which
12 I think antitrust has largely accepted since the late
13 '70s, that some amount of sort of monopoly power or
14 concentration can be conducive to innovation because
15 it allows firms more profits which they can invest in
16 research and development, if we accept that and we
17 also accept that sort of the decline in antitrust
18 enforcement that took place starting in the '80s and
19 which has really persisted until this day was largely
20 a response to the view that maybe concentration is
21 good for innovation and so we do not want to deny
22 firms too much in the way of profits, the fact that
23 data now allows firms to extract more profits from
24 consumers, to extract more value from consumers than
25 they did before should raise an important question

1 about whether, therefore, sort of the balance that was
2 struck by antitrust starting in the '80s has been
3 upset.

4 Now, perhaps we have too much profit going
5 to firms. And if we were to ramp up antitrust
6 enforcement and increase competition in markets, if
7 that were to drive prices down a bit, that would
8 simply offset the increase in prices, brought about by
9 data and just return us to the sort of balance between
10 consumer and producer interest that was struck
11 starting in the '80s.

12 So if we think that this sort of balance
13 that was struck starting in the '80s was actually
14 conducive to -- you know, sort of struck the right
15 balance between funding innovation and benefitting
16 consumers, all we would be doing by ramping up
17 enforcement would be returning to that balance that
18 both sides of the equation seem to agree was the right
19 balance. So I think that, ultimately, data does sort
20 of reduce the power of arguments that increased
21 antitrust enforcement would harm innovation.

22 MR. LENARD: I mean, I agree with Ramsi that
23 I think the economics literature has not -- you know,
24 there is no clearance to the question of what type of
25 market structure is most conducive to innovation. We

1 do have -- I mean, in the tech economy, you know, we
2 have -- and it is not only in that, but it is
3 certainly a more prominent -- perhaps a more prominent
4 characteristic of the tech economy is you have these
5 kind of winner-take-all markets and races to be -- you
6 know, competition for the market. Certainly, one can
7 argue that those are quite conducive to innovation. I
8 mean, it ranges from Microsoft to Google to Facebook
9 and it is, to a significant extent, because there are
10 large significant network effects and other economies
11 of scale.

12 And when you have technologies like this
13 where there are large network effects and economies of
14 scale you do not want to -- you know, if you make the
15 market more, quote, competitive or more atomistic, for
16 want of a better word, you may very well lose those
17 network effects and those network effects and
18 economies of scale benefit consumers.

19 MS. FEMENELLA: Going back to the price
20 discrimination point addressed earlier, can you talk
21 about the difference between old-fashioned price
22 discrimination, like charging more for flights closer
23 to the date of departure, versus the use of modern
24 data-driven price discrimination?

25 MR. WOODCOCK: So would you just repeat the

1 question? I want to make sure that I have a good
2 handle on it.

3 MS. FEMENELLA: Sure. We are trying to
4 understand the difference in price discrimination now
5 because of the amount of data that is available. So
6 before, maybe they were price discriminating based on
7 the timing of when you bought your flight. So if you
8 needed a last-minute flight, you paid more money.
9 But, now, with all of the data that is available, they
10 can price discriminate differently not just at the
11 last minute.

12 MR. WOODCOCK: So one of the things that
13 data has allowed is sort of firms to exploit new
14 information about changes in demand in a way that they
15 could not in the past. So if you think about in the
16 past a firm might set one price and then after a month
17 or two would look at that price again and have more
18 information about how many orders were coming in, for
19 example, and then change the price in response, today,
20 a firm can do that almost in realtime because it has
21 information about -- for example, it might be getting
22 information through its website about how many
23 consumers are coming to the website and it has a
24 history associated with that that tells it that when
25 the number of consumers come to a website goes up,

1 generally, the willingness to pay goes up as well.
2 And firms could have even tested that by varying price
3 in response to the factors to come up with a robust
4 result.

5 What that means is firms now can change
6 prices much more quickly than output would be able to
7 adjust. So if you think about going back to the firm
8 that had to wait a month before it could change
9 prices, it might be an industry in which production
10 can also be varied over that timescale. And as a
11 result of that, today, when prices change, supply is
12 generally fixed for firms. So when they raise prices
13 it is basically acting as a rationer. It is rationing
14 access to a good that is in fixed supply. So it is
15 able to use the price increase to extract more value
16 from firms.

17 In the past, when the demand went up over
18 that time period, it would simply sell out of the
19 good. And from an efficiency perspective, it does not
20 matter whether the good sells out or whether the good
21 is rationed based on price because supply does not
22 change over those periods. But from a distributional
23 perspective, there is a big difference because when
24 price goes up, consumers end up paying more for the
25 good than they would if the good had just sold out

1 under sort of the old regime in which firms could not
2 vary price.

3 MS. BOHM: So I will take it out of the
4 economics for a second. There is sort of the old-
5 fashioned dynamic pricing, the airplane tickets gets
6 more expensive as we get closer to the flight. That
7 is true if you are buying the plane ticket from Dupont
8 Circle or from Anacostia. It does not care who you
9 are; it cares about the day that you are buying the
10 ticket. I think many of us find that less
11 problematic.

12 Then there is sort of the dynamic pricing we
13 are seeing today, which is there is all this data
14 about me as an individual. And so I live in Dupont
15 Circle and I am a lawyer and they have all of this
16 data and they say, oh, she really wants to go to New
17 York, so I bet she will pay more for the ticket,
18 whereas, you know, someone else who -- you know, maybe
19 it is because they can pay less and, you know, some of
20 us might think that that is actually a good outcome.
21 But maybe it is because, you know, they have sort of
22 figured out by data profiling this person that they do
23 not really want to go on this trip, you know, or they
24 do not -- you know, whatever the conditions are, and
25 they are given a cheaper ticket.

1 And it is not -- it is personalized pricing
2 now -- personalized dynamic pricing as distinguished
3 from sort of the price increases for everyone because
4 we are closer to the time of the flight, since we are
5 using airplanes.

6 MR. LENARD: Yeah, I think -- this is kind
7 of following up on that. I think it is -- at least
8 conceptually, it is important to distinguish between
9 two things. One is I think what is normally called
10 price discrimination, which is basically based on
11 differences in demand and differences in willingness
12 to pay. It is also the basis for public utility --
13 for efficient public utility price regulation and what
14 is called Ramsey pricing.

15 So that is one element that is based -- now,
16 the thing about filling empty airline seats is really
17 a different phenomenon. It is just, you know, you get
18 close to the flight and half the plane is empty and
19 you lower the price to try to sell those tickets.
20 That is really kind of a different phenomenon as is,
21 for example, Uber surge pricing if there is a big
22 increase in demand or whatever it is at 5:00 to
23 rationally available Ubers, you know, they may raise
24 the price. But that is different than price
25 discrimination.

1 MR. WOODCOCK: I like to distinguish between
2 -- so I define dynamic pricing as really the adjusting
3 of price based on new information, whereas price
4 discrimination, which can happen dynamically in the
5 sense that it is going to involve charging different
6 prices at different times depending on who the
7 customer is, is pricing that is based on sort of prior
8 information about the profile of the consumer or group
9 of consumers who are coming to buy at that particular
10 time. I think that may be a useful way to distinguish
11 the phenomenon.

12 Because when you price discriminate, unless
13 everybody comes to buy at the same time, you are going
14 to be charging different prices at different times,
15 but you are doing something slightly different from
16 dynamic pricing, which is we are able to sort of
17 incorporate new information and change price in
18 realtime.

19 MR. LENARD: Well, I think price
20 discrimination is really based on differences in
21 demand elasticities and willingness to pay. I do not
22 know exactly what is now included in dynamic pricing.
23 But the other phenomenon is really based on what is a
24 disequilibrium in the market. There is either an
25 excess demand or an excess supply and the price is

1 moving to try to move towards equilibrium.

2 MS. FEMENELLA: So with our time left, we
3 will switch gears a little bit. Many companies and
4 NTIA have been calling for a risk-based approach to
5 comprehensive privacy legislation that would base the
6 rules and remedies on the sensitivity of the personal
7 information involved and the risk associated with
8 breach disclosure or misuse. What are your reactions
9 to that approach?

10 Tom, do you want to start us off?

11 MR. LENARD: Sure. Well, obviously risk is
12 an important element in the whole thing. I guess what
13 I think any new approach needs to yield net benefits
14 relative to the status quo. The status quo really is
15 the current FTC approach of ex post case-by-case
16 enforcement-based privacy regulation. And I think it
17 is -- you know, obviously, there is disagreement about
18 that. But I think it is a pretty good approach.

19 Since, as I said before, benefits by
20 definition consist of a reduction in harms, you need
21 to start out by identifying the harms you are aiming
22 anything new at in order to get any estimate of
23 benefits. If there are benefits, you need to assure
24 that the benefits are sufficient to outweigh the
25 costs.

1 There is another element in the -- I think
2 there were two elements that I read that kind if stood
3 out in the NTIA document. One was the risk-based
4 approach and the other was what they call their focus
5 on outcomes, that they want to focus on outcomes
6 rather than dictate specific practices, which I think
7 could be a good thing if what they mean is something
8 like performance standard like in the environmental
9 context. A performance standard would say, well, we
10 are going to set the maximum level of pollution for a
11 plant and let the plant figure out how to do that in
12 the most cost-effective way. Well, that can be an
13 efficient way to do it. And then the relevant outcome
14 should be a reduction in privacy of harms.

15 But I think what the NTIA calls outcomes, I
16 really think of as inputs. I mean, they call outcomes
17 things like transparency, access, and control. I
18 think they are really inputs and they are supposed to
19 produce privacy benefits. But they do not really
20 explain how that happens, how those inputs are going
21 to produce privacy benefits, because they do not
22 really talk about privacy harms.

23 MS. BOHM: So I want to build on Tom's
24 discussion of harms. So when I hear risk-based
25 approach, I hear the industry saying, hey, we only

1 want to be held accountable for legally cognizable
2 harms. That may sound great, but it is actually
3 really hard in the case of privacy to prove legally
4 cognizable harms. So it is usually like financial
5 injury or physical injury. And, often, when it is
6 financial loss, they are really, really hard to trace
7 back to the source. Was your credit card number
8 stolen because of Target's breach or Home Depot's
9 breach or, I don't know, Lord & Taylor's breach,
10 right, tracing it back.

11 Even if you could trace it back, often, your
12 bank is going to pick up the damage so you are not
13 going to have any financial loss. There is not going
14 to be a legally recognizable harm. But there are
15 number of harms that come from misuse of data, from
16 data breach. There are a number of sort of nonlegally
17 cognizable harms that we need to take into account.

18 So this can be embarrassment or reputational
19 harms that jeopardize job or social opportunities.
20 Those could be re-endangering a domestic violence
21 victim when her data are accessed by her former
22 stalker or her former abusive partner; that could be
23 not having access to opportunities because the data
24 said you should not be shown this particular ad for
25 housing or this particular ad for senior management

1 position. This could be informational harms, so, you
2 know, the fragmented news, fake news. They could be
3 things like Cambridge Analytica influencing people in
4 the voting booth.

5 That is not to say that privacy legislation
6 or regulations should solve all of these major
7 societal problems. But it is to say that when we
8 think about what harms we are addressing, we need to
9 think really, really broadly about what the harms are.

10 Second of all, when we talk about sensitive/
11 nonsensitive information -- so many, many folks,
12 particularly our friends in industry, say, oh, you
13 know, yes, yes, we want to protect privacy, but only
14 for sensitive information. And by that they mean
15 first and last name, credit card information, maybe
16 your health status, maybe protected class status, but
17 everything else should be fair game. And in today's
18 world, it is so trivial -- first of all, so-called
19 nonsensitive information in the aggregate or even
20 point by point can, in fact, reveal very sensitive
21 information.

22 So take, for example, health status, often a
23 sensitive category. So the fact that someone has
24 cancer, probably sensitive, there are probably
25 restrictions there. Shopping history, usually

1 nonsensitive. But if someone is shopping at
2 Headcovers.com or TLCdirect, those are both websites
3 that specialize almost exclusively in hats for
4 chemotherapy patients. That information likely
5 reveals health status and can be used as a very, very
6 effective proxy to advertise based on or discriminate
7 based on or sort of fill in the blank based on health
8 status.

9 Also, nonsensitive information is often used
10 for very sensitive purposes. So if you believe
11 Cambridge Analytica, or for that matter, the Obama
12 Campaign, which used very, very sophisticated -- I
13 think I heard a presentation, do not hold me to the
14 potato chip types -- where they had figured out
15 whether you liked Cheetos or Doritos meant you were
16 more likely to vote Democrat or Republican. No one is
17 going to make your chip preference sensitive. But if
18 it is being used to influence you in the voting booth,
19 maybe it is sensitive.

20 So I would encourage, as we are thinking
21 about privacy in the digital age, that the sensitive/
22 nonsensitive distinction really in the age of big data
23 no longer makes sense.

24 MS. MCINNIS: So I would just like to jump
25 in on that. To take back to the NTIA's risk-based

1 approach here, we disagree entirely with the framing.
2 Consumers will always have privacy interest in their
3 data. Once it is in the hands of another, they have
4 an interest in how that data is used, possibly
5 breached, and how it is later passed to another party.

6 So we would rather that the NTIA use more of
7 a focus that we have seen in other privacy laws, like
8 the Wiretap Act or the Video Privacy Protection Act,
9 where the invasion of privacy was a de facto harm. We
10 would suggest that that is the framing here for the
11 NTIA, and that will be in our comments that we will
12 submit tomorrow.

13 In addition, we really encourage a broad
14 sense of what consumer privacy harm is. As Allie
15 mentioned, it is really hard to trace back the
16 consumer harm to one specific breach or another. But
17 we do know that consumers experienced a large amount
18 of financial and identity theft and reputational harm
19 based on the huge number of breaches in the past few
20 years, and we think a privacy law should recalculate
21 the incentives for businesses so that they actually
22 take into account consumer data privacy and protect
23 the data that they have either been entrusted with or
24 for whatever reason now have control over in order to
25 make sure that consumer data privacy is respected just

1 as much as whatever other incentives that -- whatever
2 other priorities the business has.

3 Thanks.

4 MS. FEMENELLA: With our last two minutes,
5 does anyone want to have any last thoughts before we
6 end our panel?

7 MR. WOODCOCK: Sure. I think it is fairly
8 obvious that consumers are not in a position to make
9 sort of optimal choices about how their data is used.
10 It requires a level of knowledge that I think it is
11 unfair to require of individual consumers. And it is
12 also the case that data leads to efficiency benefits,
13 you know, things that consumers like.

14 So the question is whether if we cannot sort
15 of create a market-based solution for the problem of
16 extraction of data, perhaps we can create a
17 market-based solution for the problem of exploitation
18 of data for purposes of harming consumers. And one
19 way to do that would be to promote much more
20 competitive markets across the board in the economy
21 today than we currently have in my view.

22 MR. LENARD: To pick up on something else,
23 actually. There is -- really the data available on
24 privacy harms is really pretty inadequate. I mean,
25 even the most tangible types of privacy harms, like

1 identity theft, identity fraud, there is really not
2 very good data. There was a paper a year or so ago by
3 Josephine Wolff and Bill Lehr, which makes that point.
4 And having looked for the data over the years, it is
5 pretty sparse.

6 Both the FTC and the NTIA have said that
7 they want to promote research in these areas. So this
8 might be one thing to do.

9 MS. FEMENELLA: Well, thank you all for your
10 valuable insights and for being on the panel.

11 We will be taking a short break now, then
12 starting back again promptly at 10:45. Thank you.

13 (Applause.)

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1 Chairman of the FTC.

2 Julie Brill is the Corporate Vice President
3 and Deputy General Counsel for Global Privacy and
4 Regulatory Affairs at Microsoft. Julie is a former
5 Commissioner of the FTC, where she served from 2010 to
6 2016, and was widely recognized for her work on
7 internet privacy and data security issues related to
8 advertising and financial fraud. In 2015, she was
9 named one of the top 50 Influencers on Big Data.

10 Maureen K. Ohlhausen is a former FTC
11 Commissioner, serving that role from 2012 to 2018, and
12 as Acting FTC Chairman from 2017 until May of this
13 year. Before that, she was a partner at Wilkinson
14 Barker Knauer, where she focused on FTC issues,
15 including privacy, data protection, and cybersecurity.
16 She previously served 11 additional years at the FTC,
17 most recently, as the Director of Policy Planning
18 where she led the FTC's Internet Access Task Force.
19 Before that, she worked at the U.S. Court of Appeals
20 for the D.C. Circuit, serving as a law clerk for Judge
21 David B. Sentelle and as a staff attorney. She has
22 authored a variety of articles on competition law,
23 privacy, and technology matters.

24 As we said in previous sessions, anybody
25 just arriving, this is being photographed and recorded

1 and transmitted as a webcast and an archive. And that
2 is our notice about public use of your images and
3 anything you might say. And we will collect question
4 cards.

5 But, now, I want to turn it over to our
6 panelists, each of whom will have brief opening
7 remarks before we get into a more free-ranging
8 discussions.

9 So let's start with Bill Baer.

10 MR. BAER: Thank you. I am going to make
11 very brief opening remarks because, in fact, the two
12 former FTC officials to my left and right have
13 actually been in that unique position of enforcing
14 Section 5 of the FTC Act, which does bring together
15 these issues of antitrust enforcement and consumer
16 protection enforcement. But I would say -- and we
17 will talk about this more, I think, as things go
18 on -- I do think it is important analytically -- and
19 the Commission has done a good job of this -- of
20 separating what is an antitrust problem and what is a
21 consumer protection problem where data privacy,
22 security need to be addressed.

23 The competitive market can create these sort
24 of externalities where competition is not taking into
25 account certain costs to society and the consumers

1 from a lack of competition on privacy and data
2 security. And those are areas where I think the
3 Federal Trade Commission, and to a lesser extent
4 certain other regulatory agencies, have a unique
5 ability to influence how we think about it, how we
6 regulate it to the extent the authority exists, and
7 how the Executive Branch and the independent agencies
8 interact with Congress to make sure that we are
9 actually making sure that consumers are not bearing
10 unreasonable and inappropriate costs of competition in
11 these markets.

12 MR. GILMAN: Julie?

13 MS. BRILL: Well, it is great to be here.
14 Thank you to Bilal and to Dan and to Katie for
15 inviting me to speak about this incredibly interesting
16 issue.

17 What I thought I would do to begin just with
18 my opening remarks is to talk a little bit about one
19 of the questions that I have noticed was discussed and
20 interwoven in many of the conversations over the past
21 couple of days. And that is, are companies competing
22 on privacy and what does it mean to actually be
23 competing on privacy?

24 And in my last slightly over a year at
25 Microsoft, as well as my year serving as the head of a

1 major law firm's global privacy and cybersecurity
2 practice, from my perspective and my vantage point, I
3 can say that companies are vigorously competing on
4 privacy, but it might be in ways that might not be
5 quite as intuitive or obvious to some individuals. So
6 I would like to talk about that briefly.

7 So, first of all, from Microsoft's
8 perspective, you know, we are competing in many, many
9 different types of markets, but if you want to break
10 it down into two just for the moment, we serve --
11 obviously, we have a very large cloud business where
12 we are providing services in the cloud to many other
13 businesses and individuals. And in that context, our
14 ability to protect data and to provide tools to our
15 customers so that they can be compliant with privacy
16 laws around the globe is a very important
17 differentiator, a very important competitive aspect
18 from what we do. Similarly, we differentiate with
19 respect to our use of data for end users, for
20 consumers.

21 So it is important to think about the actual
22 business model that is involved and to think about
23 what it is that entities are doing to differentiate
24 themselves in terms of their data practices and their
25 data policies.

1 I would like to drill into this a little bit
2 more if I can. Let's see if my slides did get loaded.
3 There has been a lot of conversation, I think, about
4 GDPR also over the last couple of days, and I have
5 learned an awful lot about GDPR over the last couple
6 years and I think it is important to truly understand
7 what GDPR does do and actually what it does not do.

8 There is a meme that runs through Washington
9 that GDPR requires consent for all sorts of data use
10 and it is very heavily focused on a consent-based
11 regime. That is actually not true at all. Indeed,
12 for having been written seven years ago, it as a
13 remarkably agile law. Is it perfect? No, by no
14 means. No law is perfect. We could sit around and
15 talk about any law, whether it is COPPA, FCRA, GLB,
16 and we could talk about the need to update and
17 modernize.

18 But GDPR for a law that is a baseline
19 privacy law that governs all forms of data use for an
20 entire continent and, actually, indeed for the entire
21 globe in many respects is remarkably agile. And I
22 will be getting to the competitive aspects of this in
23 a moment, but I just wanted to lay some baseline
24 understanding of the law.

25 There are three essential aspects to it:

1 Transparency, empowerment, and accountability. GDPR
2 does require very robust disclosures to be provided to
3 end users and also to be provided on behalf of
4 processors to customers; that is, to a processor's
5 controllers. So I will not get into too much lingo
6 here, hoping that everybody sort of understands some
7 of the basic lingo and terminology that GDPR uses.

8 But transparency is a very important aspect.
9 Empowerment is also a very important aspect of GDPR.
10 It provides all forms of control or many forms of
11 control to end users for how they can understand their
12 data and access their data and do things with their
13 data, like delete it, like correct it, things like
14 that. There is also a large emphasis on
15 accountability under GDPR where companies need to make
16 robust risk assessments about how they are using data
17 and document that risk assessment.

18 The core data subject rights, which I am
19 going to talk about in a moment -- I am getting
20 signals that my time is up. I am going to ignore that
21 if you do not mind. So thank you for letting me know,
22 but I am going to keep going, as a former Commissioner
23 often will do.

24 So there are some core rights at the heart
25 of GDPR with respect to end users that many companies

1 needed to implement in order to get ready for GDPR.
2 And as I was mentioning, these are some of the
3 empowerment tools that are given to end users. It is
4 the right to delete your data, to access your data, to
5 port your data, to correct it, and to restrict the
6 processing of it.

7 Now, in order to provide those kinds of
8 rights at scale, it required a company like Microsoft,
9 which is not only dealing with our own data, the data
10 that we have and that we need to provide data subject
11 rights with respect to, but also we needed to enable
12 all of our customers to be able to comply with GDPR.
13 So we were, in many ways, kind of at the fulcrum and a
14 very important player in the entire ecosystem of
15 driving compliance with GDPR.

16 With respect to our own data, what we have
17 been able to do over the last five months or so since
18 GDPR went online is we have been able to measure the
19 extent to which individuals have accessed our tools
20 for complying with GDPR. And what we discovered is
21 that we have so far about eight million users around
22 the globe who are interfacing with their data, who are
23 actively looking at their data on our dashboard and
24 potentially doing other things with it.

25 One of the important lessons that we have

1 learned from our data, from our dashboard and being
2 able to analyze the number of individuals who are
3 accessing their data, is that actually in the United
4 States we have a lot of interest in individuals
5 controlling their data, seeing what it is, and
6 exercising some of their rights. Indeed, there are
7 more individuals in the United States who are
8 accessing their data than there are in all of Europe,
9 which is a truly remarkable statistic.

10 So as of right now, again, about eight
11 million users worldwide are accessing their data, and
12 out of those, it is about two million Europeans and
13 2.9 or basically three million individuals in the
14 United States.

15 So what does this say? This says that
16 individuals deeply care about controlling their data.
17 They want to have tools to be able to control their
18 data. We have been able to provide that kind of
19 information and those kinds of tools for them.

20 And does this indicate that we think that
21 there is a space and appropriate activity with respect
22 to a competitive play on privacy and providing these
23 kinds of tools is a differentiator? Absolutely. For
24 us, it absolutely is a differentiator. It kind of
25 plays more, though -- I think if you poll the market

1 and the kind of studies that we do internally, it is
2 not so much competition around privacy alone. It
3 really -- I think privacy needs to be understood in a
4 broader narrative around trust. And I think that
5 companies are positioning themselves in terms of
6 trusted players in the market. So privacy, security,
7 providing other tools, for instance, accessibility,
8 these all are part of a broader trust narrative on
9 which companies are absolutely computing.

10 So why don't I stop there, but I am sure we
11 will pick up the conversation more broadly.

12 MR. GILMAN: Thank you.

13 Maureen?

14 MS. OHLHAUSEN: Well, thank you to the FTC
15 for inviting me to participate today in this
16 discussion with my fellow former enforcers, Bill Baer
17 and Julie. And thanks to Dan for giving that nice
18 introduction. He mentioned my long government
19 service, but now I am enjoying some time off for good
20 behavior.

21 (Laughter.)

22 MS. OHLHAUSEN: So I am sure the other
23 panelists before us have described the tools that can
24 pull useful information from the flood of data that we
25 are enjoying these days and the tools that have great

1 potential to make our lives better and provide
2 significant benefits for consumers and businesses and
3 Government. But also I am sure they have discussed
4 that these tools raise some privacy and other consumer
5 protection concerns.

6 Now, data and big data can also be important
7 factors in competitive markets. Although there are
8 many facets of the interface between data and
9 competition, in my limited time today, I want to touch
10 briefly on just two points. The first one has been
11 rarely discussed and the second one has been discussed
12 much more frequently.

13 So the first point is about how competition
14 can help address concerns that inaccurate big data
15 analysis may harm some consumers. And my second point
16 is about consumer data in a competition analysis.

17 So turning to my first point, many
18 observers, including the FTC in its 2016 report called
19 Big Data: A Tool for Inclusion or Exclusion, so many
20 have raised concerns about the effect of potential
21 inaccuracies in big data analysis that may harm low-
22 income or disadvantaged or vulnerable consumers. And,
23 indeed, although I agree that big data can provide
24 many benefits, it is simply a tool. Like all tools,
25 it has its strength and its weaknesses and it can be

1 misleading and wrongly applied.

2 For example, data sets, though large, may
3 not represent the real world. And also there is the
4 multiple comparison problem or comparisons problems
5 where researchers discover irrelevant statistical
6 correlations that do not reveal anything useful about
7 actual causation.

8 Now, concerns about the effects of
9 inaccurate consumer data are legitimate and I have
10 long supported frameworks like the Fair Credit
11 Reporting Act that give consumers insight into data
12 used to make important decisions about them and the
13 chance to correct it. But regarding broader concerns
14 about big data itself harming disadvantaged consumers,
15 policymakers need to evaluate such concerns in the
16 larger context of the market and the economic forces
17 companies face.

18 Businesses have strong incentives to seek
19 accurate information about consumers, whatever tool
20 they may use. Indeed, they use big data specifically
21 to increase accuracy and our competition expertise
22 suggests that if one company draws incorrect
23 conclusions about consumers and, therefore, misses
24 opportunities to serve them, competitors with a better
25 analysis will strive to fill the gap. Thus, big data

1 analytics combined with the competitive market may
2 help provide low-income and other disadvantaged
3 consumers access to improve competitive offering.

4 Now, my second point is about the role of
5 consumer data in an antitrust analysis. And this is
6 not a new concept for U.S. antitrust agencies. The
7 agencies have analyzed consumer data in the context of
8 numerous merger reviews, such as in the 2009 DOJ
9 review of the Microsoft and Yahoo joint venture to
10 combine portions of their online search and search
11 advertising technology. There are also court
12 decisions resolving private antitrust actions that
13 evaluated data as a commercial good, particularly
14 consumer credit data.

15 So these agency actions and court decisions
16 demonstrate that acquisitions or conduct implicating
17 consumer data can be examined under traditional
18 antitrust laws. And, also, as Julie has mentioned,
19 companies are competing on the terms of privacy and
20 trust.

21 Now, I have concerns, however, with
22 proposals to use antitrust to stop mergers or
23 acquisitions by data-rich companies simply to address
24 privacy concerns, not where the transaction or the
25 behavior reduces privacy as a nonprice attribute of

1 competition or where a merger would create undo power
2 in the market for consumer data.

3 Although concerns about the creation of
4 large data sets with personal information are not
5 baseless, attempting to address these concerns by
6 fitting them into an analytical rubric preoccupied
7 with economic efficiency creates more issues than it
8 solves. For example, it ignores the fact that
9 consolidation of data across business platforms often
10 creates significant efficiencies and gains in consumer
11 welfare.

12 Moreover, concerns about big data often
13 revolve around the concept that compilations of even
14 small and disconnected pieces of data, including data
15 previously gathered and held by different parties, may
16 be analyzed to reveal additional personal information
17 about individuals, which then may be used for new
18 purposes.

19 If the perceived privacy harm is the same,
20 however, it would be strange to treat data combined
21 through a merger differently from that compiled
22 piecemeal by another type of entity, such as a large
23 internet company, through its own connection and
24 analysis. And, furthermore, modifying the antitrust
25 laws to encompass privacy concerns does not

1 necessarily solve those privacy concerns, but instead
2 creates incentives for firms to alter deal structures
3 or enter alternative contractual relationships to take
4 advantage of this asymmetric treatment under the law.

5 And then, finally, this approach risks
6 reducing competition and innovation from new products
7 that the combined data may enable, making all
8 consumers worse off, even those who do not share the
9 same privacy preferences or who are willing to trade
10 some reduction in privacy for increased quality or new
11 offerings.

12 So in sum, competition law offers, at best,
13 a convoluted and indirect approach to addressing
14 privacy concerns in connection with big data. Now,
15 although consumer data can be part of an antitrust
16 analysis, the more direct route to protecting privacy
17 lies in the consumer protection laws.

18 So thank you, and I look forward to
19 discussion.

20 MR. GILMAN: Thank you.

21 So we have been having for a few days --
22 well, and for years -- discussions about the
23 competition side, the consumer protection side, and, I
24 mean, to some extent, the nexus between them as well
25 as the divide between them. I think we would like to

1 start with something that is more competition-focused.
2 And this is a question for the entire panel, but maybe
3 we will start with Bill Baer.

4 So for the three of you, during your tenure
5 at the agencies, antitrust matters involving data
6 crossed your desks, whether it was a recommendation to
7 close or to take an enforcement action, open an
8 investigation. In your view, what were one or two of
9 the most salient matters involving data while you were
10 at your agency? What challenges did they pose and
11 what do you think about the resolution and what we
12 might learn from the matter going forward?

13 MR. BAER: Thanks, Dan. Let me talk about a
14 couple of matters that came across my desk. Indeed,
15 the first day on the job in early 2013, I was
16 presented with a representation to challenge a
17 consummated merger, the Bizarrevoice-Power Reviews
18 consummated merger. And while a lot of that challenge
19 related to a merger to monopoly and the potential
20 price effects from that, the fact that combining
21 really the only two commercial enterprises that were
22 going out to online retailers and selling a software
23 product that would allow for product reviews to be
24 compiled, basically centralized a whole lot of data, a
25 whole lot of information in the hands of one firm, in

1 a market that looked like it was really combined to
2 those third parties that were offering that service to
3 retailers.

4 And while, as I said, the merger monopoly
5 pricing benefits that these companies unwisely
6 discussed at great length in their business merger
7 planning documents, evidence that we got and was
8 successfully introduced to the Northern District of
9 California in an effort successful to block that
10 merger, we did also allege and express concern about
11 whether or not the combination of these data sets
12 would create significant insurmountable barriers to
13 entry.

14 We looked at the network effects associated
15 with everybody basically going to one service. We
16 looked at how that made for very, very high switching
17 costs and how that would potentially enable
18 Bizarrevoice to have unusual market power over price
19 and stifle innovation and basically be in a position
20 to prevent -- foreclose entry.

21 Data also came up in a manner we did not
22 challenge. We looked very hard at Expedia-Orbitz, an
23 online travel service combination that occurred in
24 about 2014, ultimately concluding that there was
25 enough competition from the retail sites themselves,

1 airlines, hotels, rental cars, that consumers actually
2 had options. And that there was not going to be a
3 unique set of data in the combined hands -- in the
4 hands of a combined Expedia-Orbitz. So we issued a
5 closing statement saying we just did not see a
6 competitive effect.

7 I will say if you go back over the years,
8 you know, looking at these issues has been something
9 both agencies -- and I have been at both of them --
10 have done. You can go back to reservation systems
11 back in the '80s. You can go back to the effort of
12 Westlaw and Lexis to combine, a matter looked at by
13 the DOJ some 20 years ago. Having unique ability to
14 control information and access to information was both
15 a price and a nonprice effect wherein the concerns
16 tended to be the same, which is will there be pricing
17 benefits, but also will there be an inability of other
18 firms to enter or expand into the market because there
19 is unique control over information, which, as I
20 understand it, was part of the DOJ concern in the
21 Westlaw-Lexis merger some 20 years ago.

22 MS. OHLHAUSEN: We have seen lots of mergers
23 where data was part of the important collection of
24 assets that the companies were trying to combine. We
25 have had mergers involving things like real estate

1 title plans or fire insurance maps, and we do a
2 traditional or the agency did a -- while I was there,
3 did a traditional antitrust -- I cannot say "we"
4 anymore -- did a traditional antitrust analysis, much
5 like Bill talked about. The agency would look at
6 whether data can be an important asset, is it unique,
7 is there some kind of barrier to entry that this
8 combination will create such that -- or market power
9 in this.

10 But, often, consumer data is easy to
11 replicate. It can be gathered easily. The FTC's
12 Consumer Protection Bureau has done some important
13 studies on the prevalence of data brokers and the
14 large amounts of information that are available in the
15 market to purchase. So there really has not been a
16 case that I can think of where consumers' data was
17 considered -- that the combination of that would
18 create some sort of competitive issue.

19 Now, when I was there and the Commission
20 looked at Facebook's purchase of WhatsApp,
21 commentators did raise privacy concerns saying, well,
22 the WhatsApp data was collected under a certain set of
23 promises and
24 if Facebook combines it with its data, then those
25 promises may be violated.

1 But I saw that as a privacy issue. And what
2 the Commission did there was the head of the Bureau of
3 Consumer Protection at the time issued a letter
4 reminding the company that it needed to adhere to
5 those promises to those consumers. If they did not,
6 then I would see that as a fairly straightforward
7 consumer protection issue.

8 Now, one of the other challenges, I think,
9 about looking at data in an antitrust review is where
10 we have found problems. The remedy has been to share
11 the data more freely; to make a copy of the data set
12 or the -- you know, of the title plant information,
13 which is how you do title searches for real estate.
14 And so importing a privacy analysis, you know, privacy
15 concerns into this analysis, again, is a very awkward
16 set because I do not think the people who are
17 concerned about privacy say, well, what a great
18 outcome, that data will be shared more freely, more
19 widely.

20 MS. BRILL: So I would -- rather than
21 talking about actual cases, just to distill out a
22 little bit what we heard from Bill and Maureen, I
23 would say that from a regulator's perspective, there
24 are two challenges to how you deal with whether it is
25 mergers or other potentially anticompetitive practices

1 dealing with data.

2 One is to determine whether the data is
3 competitively significant. And as we have heard, you
4 know, there is a lot of nuance to that issue. The
5 first question I think that would need to be answered
6 by the investigators and the regulators would be, do
7 the parties at issue actually own or control the data
8 or are they merely processing it for others? That
9 seems to me to be a major gating issue, right. If you
10 are not -- if you do not actually own or control the
11 data, but are merely processing it for others and
12 others are the ones who own and control it, then I
13 think you have much less of a competitive problem
14 potentially.

15 The second issue to determine whether data
16 is competitively significant is whether it is a
17 critical input or -- you know, assuming that you do
18 own it. Unless you are actually marketing that data
19 and there are two merger parties that are marketing
20 the data, there will be some increase in concentration
21 in that market for that particular type of data.

22 It is pretty -- in terms of whether data is
23 a critical input, you know, it could happen, but I do
24 not think we have seen that much of it at the FTC or
25 elsewhere. And that is because even if a party kind

1 of has its own data and its own data set, the real
2 issue is what are they doing with that as an input in
3 the downstream market. If there is competition in
4 that downstream market, even if someone -- other
5 players do not have that critical input, but they are
6 able to compete, then you really have to think a
7 little bit more broadly about whether, indeed, you
8 have a competitively significant data set. And then,
9 of course, there is the issue of reasonable
10 substitutes.

11 So all of those are questions that go into
12 just the first challenge of determining whether or not
13 the data is competitively significant. Maureen
14 pointed out that that is just sort of the beginning.
15 Once you do have competitively significant data that
16 you want to address in the context of a case, then the
17 question becomes what is the remedy. And we are
18 hearing a lot more about calls for sharing data,
19 sharing data sets.

20 First, of course, you need to get over that
21 first hurdle of do you have competitively significant
22 data and in the world of multi-homing and consumers
23 placing their data in many, many different places and
24 also in a world where what is really significant is
25 not one data set, but the heterogeneity of data that

1 is used for AI. And, hopefully, we will get to that
2 in a little bit.

3 It is really hard to say that in the area of
4 consumer data you are going to have one single data
5 set that is competitively significant. But once you
6 get to this issue of needing to find a remedy, sharing
7 data -- I think what I would urge regulators to think
8 about is if you are automatically going to kind of go
9 to that place -- well, first of all, are you breaking
10 some of the sort of normal traditional U.S. rules
11 about having some sort of legal basis to impose
12 compulsory licensing? You know, do you have a refusal
13 to deal. Are you in that world?

14 And then it is sort of at a bigger picture
15 sort of policy level. If data gets shared pretty
16 easily, you do have the concern that Maureen raised
17 about potential privacy issues. But also more focused
18 on the competitive effect, what does it mean if data
19 gets shared pretty easily in terms of innovation by
20 other parties? I mean, don't we want to incentivize
21 parties to really go out and compete with respect to
22 some of these issues and with respect to driving
23 innovations so that data becomes more competitively
24 significant kind of across the ecosystem. Easy
25 sharing, I think, actually would maybe inhibit that

1 kind of innovation.

2 So this issue of the remedies, assuming you
3 are in a place where you do have competitively
4 significant data and you do have a problem that needs
5 to be addressed, I think the issues of remedies is
6 actually the hardest of the issues as opposed to just
7 sort of getting through that process of do we have a
8 competitive problem to begin with.

9 MS. AMBROGI: Thanks, Julie. I think issues
10 involving innovation and how to best support that are
11 certainly things that we will keep discussing
12 throughout this panel.

13 One other question specific to antitrust and
14 big data, we are on the third day of our hearing on
15 the intersection of big data, privacy, and
16 competition, there has been a lot of discussion, and
17 leading up to this point, ink spilled about this
18 topic. We have heard about essential facilities,
19 refusals to deal, price discrimination.

20 My question is simply, are the concerns
21 about big data and antitrust warranted? And then a
22 secondary question is, can a merger involving consumer
23 data, if not a product or service for sale by
24 horizontal competitors, but rather an input used by
25 both merging parties give rise to an antitrust

1 violation, and if so, under what circumstances?

2 Maureen, would you like to start with that?

3 MS. OHLHAUSEN: Sure. So let me jump in
4 first about the issue of the essential facilities
5 argument and refusals to deal. I do not see why for
6 big data that would be any different than the concerns
7 and the analysis that we have in -- analysis involving
8 other types of property. Like we have hashed this out
9 quite a bit in intellectual properties and their
10 concerns about forced sharing. I mean, intellectual
11 properties really is just a kind of data, right? You
12 know, how do you -- what is the formula, what is the
13 code, something like that.

14 So I would definitely have concerns about
15 saying well just because it is big data we are going
16 to make it more likely to find an essential facilities
17 argument or more likely to say there is a lot of
18 refusal to deal that violates the antitrust laws. I
19 mean, now that it is impossible, but I think it should
20 be -- well, I am not a fan of the essential facilities
21 doctrine really for the reasons that Julie mentioned.
22 I think it suppresses investment and affects dynamic
23 competition down the road.

24 And then in the merger context, I think it
25 is theoretically possible that you could say consumer-

1 level data is such a key asset that the combination of
2 these two data sets could lead to market power in some
3 way. But I think there is a lot of reasons why it
4 seems less likely in this area than in other areas
5 where you found those combination of assets to be
6 problematic. It would have to -- again, the things
7 that Julie mentioned, that someone else could not
8 replicate it, that someone else could not -- there
9 could not be reasonable substitute for that data.

10 So I think that while it is theoretically
11 possible, I would be a little -- you know, it would be
12 interesting to see the first case that brings that.

13 MR. BAER: Let me pick up on that and focus,
14 Katie, on the question you raised about the input
15 market. And really, it is, again, traditional
16 antitrust analysis. If a merger is going to allow a
17 firm to, in some ways, create market power over a
18 critical input at the next level of competition, that
19 is a legitimate antitrust question, whether it
20 involves big data or not.

21 I mean, if you look back to a case I was
22 involved in 20 years ago, the Mylan case at the FTC,
23 that was actually single-firm behavior where a generic
24 firm basically was able to create market power in the
25 generic market for a number of generic products by

1 basically tying up the few suppliers of the key active
2 ingredient for a series of generics. And if you have
3 that situation involving data, I think you would
4 analyze it the same way the Commission did in the
5 Mylan case.

6 For me, switching over to a concluding point
7 Julie made, an interesting issue is the point Julie
8 raised about remedy. If you assume that you have in a
9 transaction, a merger, or an acquisition, the
10 potential for there to be control over whether you
11 call it an input or some sort of data that creates
12 market power, how do you remedy it? And if the answer
13 is not a license to somebody to give them the same
14 opportunity to compete -- and I understand the reasons
15 why Julie said that can be problematic -- what is the
16 answer? Is it simply seeking injunction against the
17 transaction?

18 MS. BRILL: It may be. So I am actually a
19 big believer that the antitrust tools that we have are
20 robust enough to deal with these issues, but I do
21 think it is important for the regulators to actually
22 understand the issue at hand. So as you may know or
23 keen observers of the FTC may know, I actually only --
24 even though I was a majority nonchair commissioner, I
25 did dissent, and when I dissent -- I dissented about

1 10, 15 times -- each one was in an antitrust matter,
2 not a consumer protection matter. And each of my
3 dissents was because I felt that the agency was not
4 taking a robust enough position.

5 So my view has long been that the antitrust
6 laws are actually -- we have some really good tools at
7 our fingertips to deal with issues, including, I
8 think, issues around data. My concern has long been
9 that regulators -- when I was a regulator, my concern
10 was, and my concern still is, that regulators really
11 are not thinking creatively and using the tools that
12 they have when they can be used.

13 So I do think that, as you said, the remedy
14 might simply be that look, if the problem would be
15 that sharing data raises the types of concerns that I
16 talked about, maybe you do look at simply stopping the
17 merger or doing some other creative things.

18 I think what I want to address though was
19 sort of the predicate of your question which is that
20 we have big data. I think it is important to think
21 about, like, what is big data. So on some level, as
22 Maureen, you know, the FTC has written a couple of
23 reports about this. And it used to be that we talked
24 about the three Vs, volume, velocity, and...

25 MS. OHLHAUSEN: Variety.

1 MS. BRILL: Variety. Thank you.

2 I think I would actually now in -- now that
3 I am seeing things kind of on the ground and from the
4 side of a tech company, I would say that, yes, there
5 is volume; yes, there is velocity. Variety is super
6 important, too. I would say that we would probably
7 need to add in analysis. I cannot think of a V word
8 for that. But algorithms are an incredibly important
9 aspect of what is happening with respect to big data.
10 And how the incredible increase in computing power
11 that we now have, along with data science, marrying
12 that up, really makes big data very significant when
13 it comes to the issue of analysis.

14 But what is significant about big data is
15 not just its bigness. So I think it is a misnomer to
16 simply think about volume. So maybe I would subtract
17 that V from what is competitively significant.
18 Instead, I think it is really important to be thinking
19 about the actual nature of the data, the sensitivity,
20 if we are thinking about privacy of the data, and its
21 relevance to any particular algorithm or analysis at
22 hand.

23 As you think about -- and you will be as
24 regulators thinking about the competitive significance
25 of big data in an AI world, I think you need to be

1 thinking more about heterogeneity than about bigness.
2 In order to really have a robust AI technology, you
3 need to have a variety of inputs. So that, to me,
4 more than -- I mean, volume is important, but what I
5 am hearing from data scientists, what I am hearing
6 from technologists is that computing power, analysis,
7 and variety heterogeneity are really what is key and
8 then, also, of course to the extent that you have
9 specialized issues at hand.

10 So to your point about like thinking about
11 Mylan or thinking about medical data, thinking about
12 roofing analyses we did back when Maureen and I were
13 both on the Commission, that is highly specialized
14 data and often that is very difficult to replicate.
15 So I think as regulators move forward in an AI world
16 where AI is going to provide so many benefits to
17 society, but also needs to be dealt with appropriately
18 and responsibly I think it is going to be important to
19 be thinking about big data with a lot more subtlety
20 than simply waving your hands and saying, you know,
21 bigness is bad and we need to worry about large data
22 sets.

23 MR. GILMAN: Here is a question that follows
24 up maybe some on Julie's slides, but also on both
25 policy discussions and empirical work that were

1 presenting yesterday having to do with GDPR. Just to
2 frame the question, I want to at least distinguish
3 having real grounds for competition concerns on the
4 one hand from having done a full-blown analysis on the
5 other.

6 So both GDPR and the new California Consumer
7 Privacy Act of 2018, which will go into effect in
8 2020, assuming that things go as charted, extend
9 certain protections to consumers by imposing new
10 responsibilities and, of course, costs on firms. Some
11 smaller firms have said the compliance costs under
12 GDPR are particularly burdensome for them. There is
13 some preliminary evidence of GDPR's impact on tech
14 investment and some ad hoc reports of U.S. firms
15 declining to do business in Europe.

16 And, of course, there is an interesting
17 dynamic here when we are talking about tradeoff. We
18 have both theoretical and empirical work suggesting --
19 I mean, in some ways, even large firms doing their
20 darndest to be good actors can support standards
21 policies that are very hard for smaller firms,
22 innovators, entrants to meet.

23 And so here reflecting on provisions of
24 GDPR, which does make some, but maybe not other, small
25 firm/large firm distinctions, the California Act, do

1 compliance costs at some point or come to some point,
2 raise special concerns for innovation and competition?
3 Do these types of laws place, at least under some
4 circumstances, privacy rights or interests in tension
5 with competition or innovation?

6 MS. BRILL: Can I jump in on this one?

7 MR. GILMAN: Yes, mm-hmm.

8 MS. BRILL: Okay. So I will kick this off.
9 This is actually a really interesting, I believe
10 ultimately philosophical, question about the role of
11 any regulation and its competitive impact. I have
12 heard a lot of the discussion around GDPR as
13 potentially imposing competitive barriers for small
14 firms. I think we need to take a step back and really
15 think about regulation in any space and what it could
16 do to small players or players that are not ready to
17 comply.

18 Think about the Food and Drug Act. Think
19 about auto safety laws, Sarbanes-Oxley, even if I
20 daresay COPPA. All of these regimes are developed
21 whether it is because Congress or the European
22 Parliament or other policymakers decide that there
23 needs to be some boundaries placed around competition.
24 That is what regulation is. You are basically saying,
25 you know, you are no longer free to do anything you

1 want in this space; you are going to have to comply
2 with some rules.

3 And when those rules are put into place,
4 there is always disruption. I mean, I will focus
5 on -- you know, we could do the tobacco law, we could
6 do Food and Drug. The Food and Drug Act was probably
7 first enacted over a hundred years ago. You know,
8 suddenly, selling snake oil was not okay. Is that
9 disruptive? Yes, it is disruptive. Does it affect
10 competition? Sure. For snake oil purveyors, it
11 affected competition.

12 But what it means is that society has said
13 there are certain boundaries we are going to place and
14 these policies that we are now putting in place are
15 going to need to take a precedent over free rein in
16 that particular space in the economy.

17 Does GDPR do the same thing? Arguably, yes.
18 It does create boundaries around the way in which data
19 can be used. It creates rules and a system for
20 dealing with data and dealing with personal data.
21 Does this have a disruptive effect? Yes. Will the
22 effect be temporary or permanent? I think that is
23 going to be a big question. So some of the data that
24 was cited yesterday, four months' worth of one
25 particular type of data, I would really want to see

1 how that compares to what happened when other
2 regulatory regimes were put in place in terms of
3 investment.

4 But the real question is what is going to
5 happen in the long term and whether the policy
6 decision to impose those boundaries made sense over
7 the long haul. And I would say that with respect to
8 GDPR, what you are going to see is there will be a
9 huge amount of procompetitive impact from laws like
10 GDPR. I do not want to talk about California yet
11 because I think we are still waiting to see what that
12 will actually look like. It does not go into effect
13 until 2020, I believe. And there may be some further
14 amendments to it.

15 But from my perch, we have seen a lot of
16 competition with respect to GDPR, particularly in the
17 cloud space. That is, you know, you have cloud
18 providers, Microsoft being one, that is informing --
19 we are informing our customers we will help you
20 comply. We have a comparative advantage just as we do
21 in security. We have the technologists. We have the
22 ability to figure out how to keep your data secure.
23 We have the ability to create tools for you to comply
24 with GDPR. You come to the cloud and what will happen
25 is you are free as a medium, small or even very, very

1 large company, you are free to focus on your business
2 and you do not have to focus on building an
3 infrastructure that we have built for you.

4 And by the way, if you come to a place like
5 Microsoft -- and we are not unique in this. I mean,
6 there are other cloud providers that are doing this,
7 too. If you come to us, you will be able to tell your
8 consumers, your end users or your business customers
9 that you are using a very trusted cloud provider and
10 that they can trust where their data is going. So
11 there is huge amounts of competition in this space.

12 So I would say that you know -- I could go
13 on, but I want to let my fellow panelists address this
14 issue. I would say the real issue is not is GDPR
15 anticompetitive because it is hard for small players
16 to comply. The real issue is, is there competition
17 happening because of a regulatory regime being put in
18 place. And the answer to that is yes. Will small
19 players have difficulty? The truth is, from our
20 perspective, the smallest of the players are actually
21 the most agile and the new startups are actually more
22 agile. They are able to build to GDPR.

23 The real difficulty that we are seeing with
24 respect to some of our customers is medium-sized,
25 older firms with legacy data systems, they are the

1 ones that are having the most difficulty. So it is
2 really, again, not an issue of smallness versus
3 bigness; it is an issue of agility or not agility;
4 Newness, not newness. And then when you are looking
5 at the competitive landscape, you really need to look
6 at those entities that are providing these kinds of
7 services and using kind of the Adam Smith philosophy
8 of, you know, we have a comparative advantage, you go
9 do your business, we will do our business, and we will
10 help you do your business better.

11 MR. BAER: I agree with, as I often do, with
12 most of what Julie had to say. And to the extent I
13 elaborate, it is more of an elaboration than a
14 difference.

15 We are talking about a competitive market
16 where we talk about privacy and data security, big
17 data, where the market may not work to reward the
18 people who do the best job of providing data security
19 or where the incentives may be to focus on sales and
20 less on protecting your individual privacy rights.
21 And so in that context as a political decision, there
22 may well be, as Julie says, a need for governments to
23 intervene not as antitrust enforcers but as
24 regulators. We do not like to do that. We would
25 prefer the market correct problems, but there are

1 situations. The environment is a good example, as is
2 food, drug, and cosmetic safety. And so we intervene.

3 We know that there is some cost to
4 intervention. But, again, as Julie said, focusing,
5 channeling through the regulatory process competitive
6 incentives to make privacy more of a concern is a
7 legitimate goal of government. It kind of trumps the
8 presumption in favor of free markets if the harm or
9 risk of harm is big enough.

10 But I think part of the reason you go there
11 in this space is even though Microsoft may be
12 extraordinary at providing protection for privacy and
13 for security and is able to market that, it is very
14 hard for the average consumer out there to know
15 whether it is marketing material -- it is a privacy
16 snake oil, right. So having GDPR, other kind of
17 regulatory things, that set a floor in terms of what
18 you must do, channel incentives, is actually a way to
19 basically allow us to make decisions about a provider
20 we are going to use, knowing there is some kind of
21 privacy safety net out there. Without that, I think
22 we are left out on the wilderness.

23 MS. OHLHAUSEN: So I agree with both Bill
24 and Julie that any regulation is likely to have a
25 competitive impact. That is one of the reasons why

1 the FTC has had this long history of robust
2 competitive advocacy, where the agency has commented
3 on regulations and their likely impact on competition.
4 And it is across the board. It is not just privacy;
5 it is health, dental hygienist, nurse practitioner,
6 you know, the list goes on and on.

7 So I do not think the question is should
8 there be regulation or no regulation. I think there
9 is fairly wide agreement that privacy is an important
10 value, it should be protected to a certain extent. I
11 think the question for competition and innovation down
12 the road is are you protecting it at the right level
13 such that in the long run consumers are going to be
14 better off. Because what is not necessarily capable
15 of easy measurement is the innovation that is not
16 happening because the use of data is being restricted
17 too much.

18 I think that is a harder question, but often
19 people raise the question about whether the European
20 regulators are picking on American companies, right,
21 the big American tech companies. And they say, no, we
22 are. These just happened to be the companies that are
23 in this space doing this. And I like to back up from
24 that and ask the different question of why is it that
25 the American companies have been the ones who have

1 really innovated in this space and created these new
2 products or created these new markets and satisfied
3 demands for consumers and lead to a whole lot of
4 benefit in consumer innovation.

5 Now, that does not mean, oh, we should have
6 no regulation. But I think we need to think about it
7 at that level, also. Are we going to make innovation
8 by using data too difficult, such that we are going --
9 consumers are going to miss out on some benefits down
10 the road that could actually be well worth the
11 exchange in how much their privacy and data is
12 protected.

13 MS. AMBROGI: So we have a question from the
14 floor, this one on the issue of potential remedies or
15 solutions for some of the big data challenges. Could
16 a broad data portability requirement offset some of
17 the call or need for compulsory data-sharing as a
18 remedy? And my annotation is, even if not an
19 antitrust violation, would such a requirement increase
20 competition by reducing switching costs?

21 MS. BRILL: So I will jump in on that. GDPR
22 does have a portability requirement in it. And it is
23 interesting when you sit back and think about that
24 requirement to provide users with the ability to port
25 their data. It is an empowerment tool. It is

1 focusing on privacy as control as opposed to the right
2 to be left alone. So it is a much more -- it is part
3 of a much more modern concept of privacy. But also
4 from, I think, a U.S. regulator's perspective, it
5 looked a lot more like an antitrust or competition
6 element to GDPR.

7 So I actually think that the portability
8 requirement could have a lot of procompetitive
9 effects. Portability needs to be coupled, though,
10 with interoperability. Because it is one thing to
11 give a user their data; it is another thing for them
12 to be able to actually upload it and use it in a
13 functional way on another platform.

14 So one of the things that is happening right
15 now is that a couple of the very largest players,
16 Microsoft being one, Google being another, we are
17 working on an open source project to have sort of some
18 uniform standards by which data can be ported so that
19 it will truly be interoperable. So we are sort of
20 recognizing the call that the Europeans have made that
21 portability should help augment competition going
22 forward, but the only way it is really going to work
23 is if you have truly interoperable portability, and so
24 we are working on that through an open source project.

25 I do think it has promise. It is going to

1 take a little bit of time. If you go back to the
2 dashboard that we showed you and all that interaction,
3 eight million people looking at their data, correcting
4 their data and whatnot, we are not seeing a lot of
5 portability requests because like where would it go?

6 MR. GILMAN: What is the denominator?

7 MS. BRILL: Of what?

8 MR. GILMAN: Eight million over what?

9 MR. GILMAN: Millions and millions and
10 millions. But, having said that, it as a very
11 significant number. And I think what is especially
12 significant is the relative proportionality or the
13 relativity of that interest in control.

14 And this goes to something that I was going
15 to comment on Maureen's point about being careful when
16 we develop laws in the United States about privacy and
17 what the effect might be on innovation. I absolutely
18 agree that that is something we need to take into
19 consideration, but we also need to see that relative
20 to the rest of the world, U.S. citizens seem to care
21 an awful lot about privacy and that we need to sort of
22 debunk this notion that privacy is of lesser
23 importance than some of these other policy matters
24 like innovation. It is very important.

25 MR. BAER: Just one quick add to that.

1 Relating to the degree of difficulty involved in
2 making portability work, you think about the
3 procompetitive benefits of the FCC rule some years ago
4 that allows you to tell your cell phone number from
5 one carrier to another. That is like wading into a
6 baby pool at a public swimming pool as compared to the
7 ten meter, you know, 3.0 degree of difficulty dive in
8 terms of finding a way to make sure that even though
9 you have portability, that you have functionality, you
10 know, interoperability with it.

11 So it is important, it is possible, but it
12 really requires a whole lot more than in a simpler
13 situation, a simpler world.

14 MS. BRILL: Right.

15 MS. OHLHAUSEN: And my only question there
16 is will consumers really use it. Will it achieve the
17 goal that the drafters -- you know, the people who
18 came up with requirement in GDPR want it to achieve?
19 And if it does not --

20 MS. BRILL: And I think that is a good
21 question.

22 MS. OHLHAUSEN: And if it does not, then
23 where do they go from there?

24 MS. BRILL: I think it is a great question,
25 but until we get to a place where it is functional or

1 interoperable, we will not know. So that is why we
2 need -- you know, industry is really taking the lead
3 here. We are working with the regulators in Europe
4 and they are very pleased that we are moving forward
5 with this open source project to help that, to see the
6 reality to their dream of being able to truly port
7 data. I think your analogy to the cell phone
8 portability -- the cell phone number portability is a
9 great one.

10 MR. BAER: You can use it.

11 (Laughter.)

12 MS. BRILL: I have.

13 MR. GILMAN: Can I maybe just follow up here
14 a little bit. So it seems there is a consensus on the
15 panel, not controversial. I think in the larger
16 world, consumers have privacy interests that might be
17 more or less well served by competition in one domain
18 or another. There is a consensus that regulations can
19 serve varied ends and will have some competitive
20 impact. It does not mean that they are a net loss for
21 consumers. There is a question what they are supposed
22 to do and achieve, right, are they responding to some
23 sort of significant and demonstrable market failures
24 that would likely be durable. Can the harm be
25 efficiently ameliorated?

1 So in one sense, of course, we have
2 regulation here. In another sense, one model or
3 another. The snake oil example seems to me to be
4 instructive and maybe -- well, we have two out of
5 three former FTC Commissioners here. FTC has done a
6 lot of work on snake oil, nutrition marketing,
7 dovetailing with FDA, calibrating regulations, and
8 certain sorts of assurances in [10359] with the actual
9 risks.

10 So how do we get at sort of not the question
11 whether there are legitimate consumer concerns that
12 something -- whether it is GDPR or FTC enforcement
13 might respond to, but the magnitude and species of
14 consumer harm we are addressing, the question whether
15 the tool is well tailored to meet it. How do we
16 assess, not the question whether there should be some
17 floor or not, but where the heck it should be on the
18 competition side or the consumer protection side?

19 MS. OHLHAUSEN: So let me offer just by
20 analogy some of the things that have been really
21 useful. You mentioned in the FDA context. So the FDA
22 used to prohibit health claims about foods,
23 essentially. And a cereal manufacturer felt that
24 the science showing the benefits of having more fiber
25 in your diet was so strong that they decided to push

1 the envelope and just go ahead with the advertising
2 in that.

3 The interesting thing that happened from
4 that -- and there is good FTC economic studies about
5 this -- is it led to this great increase in consumers
6 eating fiber in their diets because they -- the
7 competitive dynamic that happened of a company saying,
8 hey, you know, eat our cereal, it has fiber in it, and
9 consumers read their cereal boxes a lot more than they
10 read any government advice about diet, and then other
11 companies came in and they also introduced these
12 products.

13 So we need to be careful. And that showed,
14 actually, that that advertising restriction was
15 actually making consumers worse off, was suppressing
16 very useful information, and the products were not
17 appearing in the market because the companies could
18 not advertise them.

19 So I think that looking at some kind of
20 natural experiment like that through an economic
21 study, if possible -- I do not know whether it would
22 be looking at where innovation has happened in
23 products that use data in the U.S. versus other areas,
24 you know, trying to get at that, like where -- how do
25 we figure out what the right level is, because it is

1 very difficult to measure in the abstract what does
2 not happen. You have to be able to compare it against
3 something else.

4 So I do not know if it is possible to use an
5 economic study that looked at where were data-
6 intensive businesses developed, in what part of the
7 world and then what their privacy regimes look like.
8 I mean, the hard part is also there are a lot of
9 different factors that go into business success. But
10 just looking at other examples from other types of
11 regulation, we have been able to do that kind of
12 experiment.

13 MS. BRILL: I just want to throw one concept
14 out here for us in the U.S. It is a somewhat foreign
15 notion, but many people around the world do not think
16 of privacy as simply an attribute of a product, but
17 think of it as a fundamental right. I think to the
18 extent that we have global players or companies that
19 want to exist on a global market, you have to take
20 into account the fact that the rest of the -- many
21 regions around the world do not look at privacy and
22 data use in the same way that we have traditionally
23 looked at it.

24 Frankly, I think if you take a close look at
25 the California law and what is going to be happening,

1 what is happening in other states, there is a paradigm
2 shift in the way that privacy is being thought of.
3 And I am not disagreeing with the question. I think
4 it is an important question to ask what is the harm,
5 but when you are thinking about harm, I think we are
6 going to have to start looking at the harm to rights
7 in addition to the harm to sort of what we more
8 traditionally think of for individuals, because that
9 is a way that privacy and data use is shifting around
10 the globe.

11 MS. OHLHAUSEN: I mean, I think that is
12 right and I think it is often articulated as a
13 fundamental right outside the U.S. In the U.S., you
14 know, it is a constitutional right. It is very
15 important. But what --

16 MS. BRILL: Vis-a-vis, the Government. Vis-
17 a-vis, the Government. Absolutely.

18 MS. OHLHAUSEN: Right, right. But, also,
19 I mean rights, different rights need to be balanced.
20 So one of the things that I -- one of the examples
21 of taking these things too far that I heard, which
22 I found so sad, was that in Japan after they had
23 the tsunamis and the nuclear incident, some local
24 groups -- and, you know, there were so many people in
25 need -- said could we get a list of people who are

1 blind or disabled because they may be stranded and,
2 you know, they cannot kind of get out on their one.
3 And the answer they got was, well, no, because that
4 would be a privacy violation. I think your right to,
5 you know, receive life-saving services from the
6 Government would need to be balanced against your
7 privacy.

8 So I do not think that saying it is a
9 fundamental right is the end of the discussion. I
10 think it is important to realize that even fundamental
11 rights can be in conflict with each other and need to
12 be balanced.

13 MS. BRILL: So I agree with that. I was
14 pointing it out because I think it is important to
15 understand that if companies want to be competitive on
16 the global stage, they need to either embrace this
17 notion and understand what it means or not. But if
18 you fail to embrace the notion that in many other very
19 important markets, privacy is a fundamental right then
20 you will not be able to effectively compete in those
21 markets.

22 In terms of problematic issues that arise in
23 the data space, I am aware of that circumstance you
24 are describing and I think that that was a tragedy.
25 Yet, we can find examples on the other end of the

1 spectrum where the failure to have broad-based privacy
2 laws in the United States may have led to other major
3 problems. We could look at the Cambridge Analytica
4 scenario and the extent to which data was for a time
5 very freely shared with third parties without
6 consumers having control or understanding about it.

7 You know, had there been -- it is a question
8 I am asking. I am not going to say that GDPR would
9 have stopped that, but had there been some kind of
10 baseline privacy legislation in the United States, the
11 question is whether that type of activity would have
12 been less likely to have happened or potentially less
13 severe. And I think that is an important question to
14 ask.

15 So I agree with you, we need to balance
16 rights for sure. But we also need to understand where
17 the rest of the world is going if we actually want to
18 have companies that are competitive around the rest of
19 the world.

20 MR. BAER: I think that is a great point and
21 even if companies failed with a U.S. regimen, failed
22 to adhere to it, the fact of FTC enforcement action
23 and significant penalties, you would prefer it to be a
24 deterrent at the front end. But at the back end,
25 other companies will learn if sanctions are imposed.

1 MS. AMBROGI: So this is, in part, a
2 question from the audience, but it touches on issues
3 that Maureen and Julie have raised in terms of company
4 analytics and the role for competition to provide a
5 venue by which good analytics rise to the forefront.

6 So a two-part question, how can society
7 operationalize Julie's point about assessing the type
8 of analysis that firms can do with their data, and
9 then also for Maureen, what is the mechanism by which
10 competition could produce accurate consumer-enhancing
11 data analytics? Is there a role for enforcement or
12 advocacy? And I know we have just a couple minutes.

13 MR. GILMAN: Yes. If everyone could just
14 take a minute and then we are done.

15 MS. OHLHAUSEN: I will go first on the part
16 addressed to me. Has anybody read the book,
17 Moneyball? So Moneyball is all about using better
18 analytics, using data more accurately to come to a
19 better outcome, right. The Oakland A's were terrible,
20 so they hired a good data cruncher who had this idea
21 that the way players were being chosen was not -- the
22 data was not being used appropriately, other types of
23 data.

24 So I do think that, you know, the same kind
25 of thing can happen in a whole host of products. If

1 you have better analytics, you can target better
2 opportunities or make your product better. So I think
3 that is the common kind of thing. But I would
4 recommend Moneyball to anyone who wants to know one
5 particular application.

6 MS. BRILL: To the first part of the
7 question about how does one operationalize this issue,
8 I think it is really important. I am going to talk
9 about operationalizing it from the regulator's
10 perspective. I always used to say that regulators
11 were about five or six years behind where technology
12 was. That has definitely accelerated. I think having
13 chief technology officers and having the technology
14 folks at the FTC and at other regulators has
15 definitely helped kind of shrink that gap. But even a
16 six-month gap is enormous these days because
17 technology is moving so quickly.

18 I would say that if you really want to
19 operationalize an analysis of how data is used in
20 these sort of more complex AI systems at the FTC,
21 which it has been doing through these hearings, really
22 needs to get a deep understanding of what is going on
23 today and what will likely be going in six months and
24 a year at some of the firms that are really thinking
25 about this deeply.

1 MR. GILMAN: Good, thanks. Well, in the
2 seven seconds remaining, I think that all I can really
3 do is thank our panel for your time and really the
4 substance of your excellent contributions. And thank
5 everyone watching here and over the webcast. Thank
6 you very much. And we will see you at the next
7 hearing.

8 (Applause.)

9 (Hearing adjourned.)

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