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2 back to Secretary Sullivan and ask what are the tools  
3 that can be used to facilitate cooperation under the  
4 various cross-border mechanisms? And why are they  
5 important?

6 MR. SULLIVAN: So in terms of why they're  
7 important, I mean, again, a lot of this is probably  
8 self-evident to those in this room, but the data  
9 explosion we've seen is only going to continue. And  
10 we now have these cross-border data flows that really  
11 do benefit stakeholders across our societies and our  
12 economies. So you've seen these cross-border data  
13 flows help enable consumers, for example, to access  
14 more  
15 and better services and products. They help our  
16 companies to increase the efficiency of operations  
17 and innovation, and they help nations in terms of  
18 their competitiveness and their ability to help create  
19 jobs and facilitate economic growth.

20 So this is all great. The problem we're  
21 dealing with is that different countries now take very  
22 different approaches to how they regulate these data  
23 flows specifically on privacy. And so what I wanted  
24 to just touch on a bit was what we do, the Commerce  
25 Department, in conjunction and partnership with the

1     FTC to deal with this issue, this dilemma. How do you  
2     continue to facilitate these cross-border data flows  
3     when you are dealing with countries that have all  
4     adopted varying approaches, legal regimes, or policy  
5     priorities.

6             I touched on the three frameworks, and I  
7     just quickly wanted to go through some of the tools  
8     within those frameworks, if I could, which from our  
9     perspective are absolutely critical to digital trade  
10    because, again, right now, there is no single  
11    comprehensive binding multilateral approach governing  
12    these cross-border data flows. So you know, again,  
13    I'm repeating myself a bit but we have stakeholders  
14    that we meet with all the time coming in, telling us  
15    about this constantly shifting and evolving and  
16    rapidly accelerating policy landscape that they have  
17    to deal with.

18            So in response to this challenge, one  
19    approach that we've taken, as I alluded to earlier,  
20    for example, is the APEC CBPR system. And it's  
21    basically a voluntary enforcement code of conduct  
22    based on internationally recognized data protection  
23    guidelines. It establishes principles for both  
24    governments and for businesses to follow to protect  
25    personal data and to allow the data flows between APEC



1 economies.

2 To join this system, an APEC economy has to  
3 designate a third party called an accountability  
4 agent. And that accountability agent is empowered to  
5 audit a company's privacy practices and take  
6 enforcement action as necessary in some instances, but  
7 if that accountability agent cannot do that, resolve a  
8 particular issue, an APEC economy, their domestic  
9 enforcement authority serves as a backstop for dispute  
10 resolution.

11 And in the United States, the FTC is our  
12 designated regulator, obviously, and enforcement  
13 authority for the CBPR system. And they enforce the  
14 commitments that are made by the CBPR participating  
15 companies to comply with the principles that they have  
16 committed to comply with.

17 I do want to note all CBPR participating  
18 economies also have to join the cross-border privacy  
19 enforcement arrangement, CPEA, to ensure cooperation  
20 and collaboration among their designated enforcement  
21 authorities. To date, if memory serves, I know the  
22 FTC has brought four enforcement actions against  
23 companies for making deceptive statements about their  
24 participation in CBPR, and it's also used its  
25 authority under the SAFE WEB Act to enhance

1 cooperation with other privacy and data protection  
2 regulators within APEC.

3 So, again, as I noted at the outset, FTC  
4 enforcement and international cooperation are  
5 absolutely critical to the credibility, to the  
6 integrity, and the success of the CBPR system. There  
7 are currently eight economies in APEC of the 21  
8 economies participating in the system: the US, Japan,  
9 Mexico, Canada, South Korea, Singapore, Australia, and  
10 Chinese Taipei. And the Philippines is currently  
11 working on joining the system as well.

12 I want to underscore that if this system  
13 were to scale across APEC, the framework would help  
14 underpin over a trillion dollars in digital trade. So  
15 we regard that as a very big priority and, again, we  
16 cannot emphasize enough just how critical the FTC is  
17 to that framework. And it's also a similar dynamic  
18 with the EU. It's been, the FTC, extremely integral  
19 to the success of both privacy shield frameworks.

20 We all know, and it's been touched on, about  
21 a year ago, GDPR was put into effect in Europe. And  
22 like the predecessor directed before it, it imposes  
23 certain restrictions on the ability of companies to  
24 transfer certain data from Europe to other  
25 jurisdictions, so we have Privacy Shield. And, again,

1 like CBPR, it's a voluntary enforceable mechanism that  
2 companies can use to promise certain protections for  
3 data transferred from Europe to the United States, and  
4 the FTC enforces those promises made by Privacy  
5 Shield-participating companies in its jurisdiction.

6           Again, I talked about how big APEC was and  
7 how these data flows underpin trade there. The EU is  
8 actually the largest bilateral trade investment  
9 relationship with the US in the world. That, too, is  
10 valued at over a trillion dollars. And I know the  
11 Transatlantic economy accounts for about 46 percent of  
12 global GDP, about one-third of global goods trade, and  
13 the highest volume of cross-border data flows in the  
14 world.

15           And the Privacy Shield program is absolutely  
16 key to underpinning this economic relationship. We  
17 have about 4,500 companies now participating in the  
18 program. They've all made these legally enforceable  
19 commitments to comply with the framework, and they  
20 range from startups and small businesses to Global  
21 1000 and Fortune 500 companies across every sector,  
22 from manufacturing and services to agriculture and  
23 retail.

24           And I do want to note that about 3,000 --  
25 nearly 3,000 -- of those companies are actually SMEs,

1 so it's not just the big tech companies that we're  
2 talking about.

3 So to help protect data against improper  
4 disclosure or misuse, the Commerce Department and the  
5 FTC do work together, and they move swiftly to ensure  
6 that participating businesses who join Privacy Shield  
7 and certify under Privacy Shield are complying with  
8 their obligations. And over the last two years,  
9 Commerce, for example, has implemented a buying  
10 arbitration mechanism and new processes to enhance  
11 compliance oversight and reduce false claims. And by  
12 the same token, the FTC has enforced companies'  
13 Privacy Shield declarations and commitments by  
14 bringing several cases pursuant to Section 5 of the  
15 FTC Act, which prohibits unfair and deceptive acts.

16 We also refer false claims participation in  
17 the program to the FTC, which have often resulted in  
18 FTC settlement agreements. And under those  
19 agreements, the FTC can obtain certain remedies such  
20 as remediation measures and compliance monitoring that  
21 are, I think, generally otherwise unavailable in an  
22 enforcement action. And to date, the FTC has brought  
23 about four false claims cases.

24 So, again, as with CBPR and APEC, the FTC  
25 has been just an essential element in bridging the gap

1 between the EU and the US approaches to privacy. And,  
2 again, I'll just end by saying you're not going to get  
3 buy-in legitimacy or credibility without that  
4 enforcement power and that collaboration and  
5 cooperation that we're all talking about today. So  
6 thank you.

7 MS. FEUER: Thank you very much.

8 I want to turn back to Jeff for a minute.  
9 So everyone has done, I think, a really fantastic job  
10 of outlining the tools. And, Jeff, you talked about  
11 these partnerships, and I guess I'd like to know a  
12 little bit more about the partnerships in terms of  
13 their status today, whether you think that they kind  
14 of could be adapted for a more, I guess, global  
15 enforcement model and whether you have any ideas about  
16 how cross-border cooperation and consumer protection  
17 matters could be improved.

18 MR. THOMPSON: Sure. Thanks, Stacy. So,  
19 yeah, the status of the partnerships -- as I  
20 mentioned, the partnerships stem from a 1997 meeting.  
21 There were three partnerships created across Canada --  
22 one in Vancouver, one in Toronto, Ontario, and one in  
23 Montreal, Quebec. At one point in time, we saw this  
24 increase to seven Canada-US cross-border partnerships,  
25 but that wasn't maintainable for a number of reasons,

1 primarily being there wasn't a lot of enforcement work  
2 in Atlantic Canada and Saskatchewan, for instance.

3           So, I mean, things changed. And, again, as  
4 I said, priorities change. So right now we have three  
5 partnerships, including the new Pacific partnership  
6 which replaced Project Emptor. The Montreal Canada  
7 project, Project Colt is also defunct currently, but I  
8 mentioned we're working on renewing these efforts and  
9 coordinating something there. So, right now, as it  
10 stands, there's the Alberta Partnership and the  
11 Toronto Strategic Partnership, and the Montreal  
12 Partnership.

13           As far as improvements go, one area for I  
14 think more global enforcement cooperation that we  
15 discuss a lot at the office is disruption. And by  
16 disruption, I'm not talking about actual enforcement  
17 action. I'm talking about cooperation with private  
18 sector partners, using the data that we capture in our  
19 central fraud databases to block, say, shut down  
20 foreign numbers, to get bank accounts blocked. In  
21 Canada, we're sharing information with banks and  
22 credit card providers to go after the subscription  
23 traps, the continuity schemes, the counterfeit sales  
24 of other goods online and nondelivery goods.

25           So the information we house that there's

1 other alternatives to enforcement, and those are some  
2 of the areas that need to be improved on  
3 internationally.

4 MS. FEUER: Thank you very much.

5 I now turn to Kurt Gresenz, who is the  
6 Assistant Director at the SEC's Office of  
7 International Affairs. And, Kurt, as we heard earlier  
8 from Jean-François Fortin, securities enforcement  
9 collaboration is truly global and truly impressive, I  
10 have to say. I'm interested in hearing more from your  
11 perspective to inform our thinking about the  
12 cooperation in the areas that fall within the FTC's  
13 jurisdiction.

14 MR. GRESENZ: Thank you, Stacey. Let me  
15 start out by giving the disclaimer I'm required to  
16 give, that these are my views, only my views, and not  
17 necessarily those of the Securities and Exchange  
18 Commission, its Commission, or its staff, which I like  
19 doing because that frees me up now to say what I would  
20 like to say, which hopefully follows what the SEC  
21 would say.

22 Okay, so let me start out with building on  
23 some of the themes that have been talked about. One  
24 of the reasons, I think, that we have been successful  
25 in forging a pretty broad alliance of securities

1 authorities around the world that are cooperating is  
2 by virtue of the fact that the IOSCO principles of  
3 securities regulation are part of what national  
4 economies are assessed against as part of the  
5 financial sector assessment program that is done by  
6 the IMF. So essentially when the IMF and team comes  
7 into a jurisdiction to grade you on your financial  
8 resiliency and financial regulation, they're going to  
9 look at the IOSCO principles.

10 And the IOSCO principles say that your  
11 securities has to have certain minimum powers and also  
12 the ability to share information across borders for  
13 enforcement purposes. And I think that has been one  
14 of the key tools that has caused one of the things  
15 that Jean-François talked about from early adoption,  
16 say two dozen countries in 2002 under the MMOU to  
17 where we are now as 121, that it's an easy way to  
18 getting a failing grade by not being signed up to the  
19 MMOU. And national legislatures have, for the most  
20 part, made the amendments to their domestic law to  
21 enable them to meet the MMOU standards.

22 So in the scale of cooperation, Jean-  
23 François talked about over 5,000 requests that were  
24 made under the MMOU last year. The SEC is, as you  
25 might expect, a big user of those, probably 600 to 800



1 of those were ours. So we have an incentive in that  
2 process working smoothly. And where the parallels  
3 are, I think, for me is when I talk to my colleagues  
4 at the FTC, we're talking about consumer protection.  
5 And the concept of investor protection is essentially  
6 the same concept. The investor is our consumer. And  
7 one of the focuses of our enforcement priorities is on  
8 the mom-and-pop investor, the retail investor who  
9 really is somebody that will benefit from an active  
10 securities authority acting in their stead.

11 In the securities context, one of the things  
12 Jeff talked about was he mentioned you have people set  
13 up in one country, you have targeting of investors  
14 somewhere else and then you have sending the funds  
15 elsewhere. I would actually build on that. In an ICO  
16 case for example, the entities might be incorporated  
17 in two or three different jurisdictions. The  
18 investors might be targeted in the UK, Australia, and  
19 the US. They might be storing their documents in a  
20 fourth or fifth jurisdiction or in the cloud so it's  
21 very difficult to, you know, figure out where those  
22 are to begin with.

23 So those are the challenges, and building  
24 through those, and I think we've had a good discussion  
25 of the privacy challenges, but two things I want to

1 mention that also came up in the earlier points is one  
2 is what I call regulatory arbitrage, which somebody  
3 called regulatory competition. Cooperation works very  
4 well, but we also have to be cognizant that there are  
5 competing policy concerns with how we approach our  
6 enforcement tasks.

7           So for example, a sophisticated fraudster is  
8 going to have some basic awareness of what the  
9 regulatory scope is in a given jurisdiction. And  
10 these people may set up shop in particular places and  
11 do things in particular places for taking advantage of  
12 whatever the legal system is there, and often that  
13 legal system may be one that is less conducive to  
14 cross-border sharing.

15           So then as we advance down the path of the  
16 investigation, either related to that or other things,  
17 regulators move at different speeds. They may have  
18 different approaches as to how they approach  
19 witnesses. Are we going to go let everybody know in  
20 advance?

21           I will tell you that from an SEC  
22 investigative perspective, which I'm sure people  
23 around the room and at this table would share, that  
24 people acting in a manner that is entirely consistent  
25 with their own investigative processes and procedures,

1 but that may be contrary to what somebody is doing  
2 elsewhere. Those are things that are going to almost  
3 always result in people wanting to control their own  
4 investigation, perhaps at the expense of greater  
5 coordination. And I think that's where, you know,  
6 discussion is certainly important.

7           And I don't know if this is really privacy.  
8 Maybe this goes to confidentiality. Also, different  
9 authorities have different legal requirements when it  
10 comes to what types of information they have to  
11 disclose in a particular setting. So let's say that  
12 we transmit files to an authority who assigned  
13 assurances of confidentiality and then we read a  
14 newspaper report that talks about things that we  
15 disclosed on a confidential basis, and then we drill  
16 down and it turns out that, well, yes, they kept it  
17 confidential but not from a lawful request, and it  
18 might be a Freedom of Information Act request or  
19 something like that. So that's obviously going to be  
20 something that maybe you don't anticipate on the front  
21 end, but it might chill information exchanges going  
22 forward.

23           And then the case of the ambitious  
24 prosecutor, he or she who may leak to the press. I  
25 know that that's always a source of great

1     consternation, whether it's the SEC or DOJ or  
2     elsewhere, when you read confidential details that are  
3     unattributed by a source who's not authorized to speak  
4     about something that you thought you transmitted in  
5     confidence. So I do want to talk about those.

6             I think the last thing I want to talk about  
7     in challenges is one of the things that we are dealing  
8     with frequently at the SEC, and I think we sort of  
9     have a little bit of a handle on it, and I know it  
10    must be something that the FTC confronts, also, but  
11    the law has been unsettled for a number of years as it  
12    relates to the Electronic Communications Privacy Act  
13    and what type of records we can get from internet  
14    service providers, and maybe who a subscriber is, who  
15    is the identity of a particular account. Maybe that's  
16    something that is reachable, but what about the cases  
17    where you know there's communications and you want  
18    those communications, and maybe there's impediments  
19    there. I know that the criminal authorities can go  
20    through a warrant process for things like that. What  
21    is the recourse of an administrative agency where we  
22    don't necessarily have recourse to a criminal  
23    mechanism to show just cause, due cause, probable  
24    cause, reasonable suspicion, whatever the standard is.

25             So cooperation works, but we have to be, I

1 think, vigilant of the challenges to that, and like  
2 we've already talked about in the GDPR space, how do  
3 we get to a solution that works for most people most  
4 of the time.

5 MS. FEUER: Thank you very much. So let me  
6 ask you one follow-up, which is about your statutory  
7 authority which underlies your ability to cooperate.  
8 I know that you have some tools that you've had since  
9 the 1970s that are somewhat similar to what we have in  
10 SAFE WEB. And I'm wondering how they actually  
11 underpin what you do and how effective you think  
12 having that statutory authority has been.

13 MR. GRESENZ: So there are three sections  
14 that I'll talk about. And absent these three things,  
15 we would not be able to meet the IOSCO principles,  
16 which means we wouldn't be able to sign the MMOU,  
17 which means the Treasury Department would be unhappy  
18 when we were adjudged to be noncompliant in an FSAP in  
19 these areas.

20 The first one is what I call our access  
21 request authority, and what this says is the  
22 Commission has discretion to share confidential file  
23 materials with any person, provided that person  
24 demonstrates need and can make appropriate provisions  
25 of confidentiality. And I think more or less that

1 tracks what the FTC can do, although maybe the Safe  
2 Web is restricted to regulatory authorities, where the  
3 SEC, in theory, has discretion to share with any  
4 person.

5 Our Commission has delegated that authority  
6 to exercise the discretion to the staff in the area  
7 where I work with, which is cross-border enforcement  
8 cooperation. Now, typically, my office will look at  
9 any request for access for SEC files that comes from a  
10 foreign authority, and we will make a baseline  
11 determination of whether sharing is appropriate with  
12 that organization or not. Obviously, if they're an  
13 MMOU signatory, that question is easier. So that's  
14 the first one, the ability to give access to materials  
15 and files.

16 The second one is to use our compulsory  
17 power on behalf of a foreign authority. And I think,  
18 again, here, there's probably parallels all down the  
19 line with the FTC's existing authority, is we have to  
20 make sure that there's -- well, for us to start with,  
21 the requesting authority has to be a foreign  
22 securities authority, which means do they enforce laws  
23 that fall within their securities regulation.

24 Number two, the authority has to be able to  
25 provide reciprocal assistance. And, again, if it's an

1 MMOU party, that's already written in and baked into  
2 our principal cooperation mechanism. The sharing has  
3 to be consistent with the public interest of the  
4 United States, and we go through that process of the  
5 deconfliction process with the US Department of  
6 Justice. So that's something else that is taken care  
7 of.

8           And one interesting fact here is it's not  
9 necessary for the conduct to be a violation of US law.  
10 So, for example, if it's illegal in Country X but it  
11 may not be illegal here, we do have the authority to  
12 assist in appropriate circumstances.

13           The third piece after the access request and  
14 the compulsory authority, you know, of course, you  
15 list three and then you forget the third one. Let me  
16 come back to that one. I should have made a note when  
17 I was thinking about this.

18           MS. FEUER: Okay. Well, that's great.

19           So we have a lot here to work with to start  
20 us off on questions, and there are so many strands to  
21 the strands that we've brought out that it's hard to  
22 know where to start, but I am going to start with two  
23 questions that have come in. And the first really  
24 builds on, Kurt, what you were just talking about,  
25 that your investigative assistance power doesn't

1 require the law violation to be a law violation in the  
2 United States if it is a law violation in another  
3 country.

4           And we actually have a question on that.  
5 And this is, I think, to the consumer protection and  
6 privacy areas where I think laws diverge more than  
7 they do in the securities arena. But the question is  
8 this, when an act or practice would violate consumer  
9 protection law in a consumer's home country but it  
10 isn't against the law in the seller's country, should  
11 agencies cooperate? When there is a conflict of laws,  
12 what should consumer and privacy agencies do? And I'm  
13 going to throw that out to the panel and see who hops  
14 on it.

15           James?

16           MR. DIPPLE-JOHNSTONE: Is it helpful to say  
17 just in terms of our experience at the ICO's offices  
18 for that very reason is our legal gateways are framed  
19 with a public interest test? And that's a very widely  
20 drawn public interest test, so it doesn't need to be a  
21 specific offense in the UK for us to be able to  
22 cooperate and exchange information, for that very  
23 reason is there is quite a variety.

24           MS. FEUER: So that's helpful to know. By  
25 way of background, the FTC's -- yes, I work for the



1     FTC -- the FTC's authority to obtain investigative  
2     assistance for foreign counterparts relates to unfair  
3     or deceptive acts or practices, as well as violations  
4     of laws that are substantially similar to those that  
5     the FTC enforces. So we have a little bit more  
6     defined statutory language, although as you can see  
7     here, it allows to us cooperate with a wide variety of  
8     agencies.

9             Anyone else want to opine on this first  
10     question from our audience? Marie-Paule?

11             MS. BENASSI: Yes, thank you. It's a very  
12     important and interesting question. So in the  
13     European Union, we have laws which are harmonized,  
14     fully harmonized, or minimum harmonization. So our  
15     system of cooperation for enforcement actions are  
16     based on the minimum harmonization, when it is minimum  
17     harmonized. So it means that you cannot take an  
18     enforcement action for a violation which goes beyond  
19     the minimum harmonization and which would not be the  
20     same in one -- in your member state where the trader  
21     is established compared to the member states of the  
22     consumer.

23             But requests for information and other types  
24     of assistance I think can function. And what we see  
25     when we work with cooperation in an informal setting

1 with other jurisdictions outside of the European Union  
2 is that very often the principles -- at least the  
3 principles are quite the same. And so it's on this  
4 basis, I think, that in many cases exchange of  
5 information can be possible.

6 MS. FEUER: Jeff.

7 MR. THOMPSON: Yeah, I think this touches a  
8 little bit on what I was referring to with disruption  
9 as well. Enforcement is not the only answer where we  
10 can't enforce the law in another country or a law  
11 doesn't exist that prohibits a certain action.  
12 However, we may be able to work with, again, private  
13 sector partners or other agencies to block these  
14 services from being offered in Canada.

15 Binary options was a great example in Canada  
16 where we worked with credit card companies, and  
17 Canadian law prohibits the sale of securities if  
18 somebody is not registered. So, therefore, there was  
19 no binary options. Companies registered in Canada,  
20 therefore, any sales to Canadians are against our  
21 laws. So we're able to work with Mastercard and Visa  
22 and the credit card companies to prevent any Canadian  
23 transactions for binary options.

24 MS. FEUER: So that's very interesting. So  
25 there are really a range of options here from a very

1 broadly defined public interest standard to the  
2 European Union's concept of minimally or maximally  
3 harmonized laws, which essentially means whether every  
4 EU country has the exact same law or whether they have  
5 more leverage and freedom to implement laws  
6 differently. To the example that Jeff has given with  
7 disruption and also being able to cooperate across the  
8 civil and criminal divide, because we obviously  
9 cooperate with the RCMP as a criminal agency, and many  
10 of our colleagues, for example, the UK ICO, has  
11 criminal authority as well as civil authority.

12 Kurt, I saw you want to say one more thing  
13 here.

14 MR. GRESENZ: Yes, I was actually thinking  
15 about a topic that you and I have talked about. So  
16 one of the questions that can come up in the work that  
17 I do is there might be a hesitation on the part of  
18 some of our foreign counterparts to work with us in  
19 some cases if they are afraid that an SEC outcome will  
20 foreclose them from acting. And I think this is the  
21 result of different legal interpretations of what  
22 amounts to double jeopardy.

23 So you know, in the US, depending, we have  
24 different sovereigns for different purposes. What  
25 some of my colleagues overseas have said that

1 essentially should the SEC take some action, even  
2 administrative action against an actor where the  
3 conduct is based on something the foreign authority is  
4 looking at that that could potentially preclude the  
5 foreign authority from doing any action at all? So  
6 that's in one direction we have to be sensitive to  
7 that.

8           You know, the question there is let's say we  
9 ask for help in a case and they're looking at it and  
10 they say, well, we don't want to tell you because  
11 you're going to take action and then we're going to be  
12 left with nothing. And, again, we would work through  
13 that stuff, but it's a real issue.

14           You know, from our side, we take Foreign  
15 Corrupt Practices Act violations seriously. And from  
16 an economic perspective, my personal view is there's a  
17 really good strong reason to do that. That's not  
18 always the approach that some foreign jurisdictions  
19 take. And we have from time to time encountered  
20 hesitancy to help us on our FCPA investigations on the  
21 SEC side, not speaking for the Department of Justice,  
22 because of a view that well, you know, I don't  
23 understand how that falls into a securities violation.  
24 It could be just code for, well, we don't really look  
25 at it in that way from our country. So we don't think

1 we can help you. Again, people have to decide are  
2 they going to step up and are they going to help.

3 MS. FEUER: Right. So really interesting  
4 question and really interesting responses. I want to  
5 turn to another question that sort of focuses on one  
6 of the hot topics of today, which is this. Congress  
7 is considering passage of a comprehensive data  
8 protection and privacy law. How might that change or  
9 affect the relationship between US regulators and  
10 those in Europe and elsewhere, particularly as it  
11 relates to privacy investigations and litigation? And  
12 I'm going to put James on the spot first.

13 MR. DIPPLE-JOHNSTONE: Okay. Well, I think  
14 in many ways, you know, we should look at the  
15 opportunities. There are many countries around the  
16 world which are looking either at their first data  
17 protection act or privacy act or enhancing the one  
18 they've got. And I think the key things are to make  
19 sure that, you know, as referenced by the  
20 international conference, that there are those  
21 opportunities to collaborate and cooperate to  
22 ultimately do what we're all there to do, which is to  
23 keep our citizens safe.

24 And this will continue to be a theme as we  
25 go forward. Countries like India are looking at the

1 data protection bill, going through their Parliament  
2 and their legislative process. They will be  
3 significant, given the scale and size of their  
4 economies and their country. So we should look for  
5 the opportunities to work better together.

6 MS. FEUER: And I thought you were going to  
7 mention GPEN again.

8 MR. DIPPLE-JOHNSTONE: Well, GPEN provides a  
9 great opportunity to do that, both in terms of the  
10 cooperation, but also more importantly the technical  
11 challenges, the assistance. One of the great things  
12 GPEN does, if I can make a plug for it, is coordinate  
13 around sweeps, so looking at upcoming threats and  
14 risks that might affect privacy authorities and  
15 sharing that load out and sharing that learning out in  
16 terms of all of us looking consistently at threats  
17 within each of our nations and then bringing together  
18 the results of that for a common discussion.

19 MS. FEUER: So any other observations on the  
20 question? It focuses on whether changes in privacy  
21 laws might affect cooperation, but I think the  
22 question is really broader. As we talked about this  
23 morning, many countries are in the process of updating  
24 their laws, whether it be consumer protection laws,  
25 privacy laws, securities laws, maybe? And so I wonder

1 how this whole issue of changing laws, changing  
2 standards affects the way or the opportunities or the  
3 challenges for cooperation.

4 And I'll throw that out to whoever wants to  
5 go first. Secretary Sullivan.

6 MR. SULLIVAN: So I'll just say, we in the  
7 International Trade Administration have been working  
8 with the National Telecommunications Information  
9 Administration and the National Institute of Standards  
10 and Technology, also sister agencies at the Commerce  
11 Department, to evaluate what, if anything, the Federal  
12 Government should do to address some of the privacy  
13 concerns that have certainly captured a lot of  
14 attention in the last couple of years.

15 I think this goes back to what I was talking  
16 about. This is my personal opinion. I think we're  
17 probably quite a long ways off from any global  
18 standard. I think -- you know, you talked about  
19 India, Brazil. A lot of countries, you know, many  
20 have been looking to GDPR as an example, but no one is  
21 replicating GDPR exactly. There are still these  
22 differences, and those are going to continue because,  
23 as I think I said earlier, different countries have  
24 different cultural norms and legal traditions and  
25 histories, and they have different policy priorities

1 that are all going to, you know, result in differences  
2 of kind if not degree.

3           Again, I sound like a one-trick pony, but  
4 this goes back to the APEC CPBR system because what  
5 that basically is, is it takes these internationally  
6 recognized norms that we all agree on, which came from  
7 the OECD guidelines and the fair information  
8 principles before that and said let's all agree to  
9 these baselines, because you are going to have these  
10 differences. And we have to find a way to bridge  
11 these differences between these different regimes that  
12 countries have.

13           I think, again, you know, there are  
14 aspirations for a single global standard. I don't  
15 think that's about to happen anytime soon, so we've  
16 got to figure out, you know, how these different  
17 regimes can be made to work together. The approach in  
18 APEC is this interoperability approach, which I really  
19 think has a lot of appeal, is very well developed, and  
20 has been embraced, as I said, by a lot of countries in  
21 APEC, and we've heard a lot of interest from other  
22 countries around the world because it really is very  
23 flexible and can be adapted.

24           On the one hand, it definitely protects  
25 privacy, but it can deal with technology because we in























1 that the offer we can make internationally is the  
2 right one.

3 MS. FEUER: So thank you very much to the  
4 panel for some incredibly thought-provoking ideas.

5 Before we break for lunch, I just want to  
6 mention that the Top of the Trade on the 7th floor has  
7 catering available for you to purchase. There's a  
8 handout on the table just outside with information  
9 about nearby restaurants. If you leave the building,  
10 you will have to go through security again unless you  
11 are an FTC employee. And be mindful that there is a  
12 small group of protesters outside the building, so  
13 leave ample time to get back in for our fascinating  
14 afternoon panels. Thank you.

15 (Applause.)

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1 us and extremely late for him. We still have a  
2 terrific relationship.

3 Then we have Fiona Schaeffer, who is an  
4 Antitrust Partner at Milbank LLP. She has practiced  
5 on both sides of the Atlantic. So she brings unique  
6 perspective in that sense and has lot of experience in  
7 multijurisdictional mergers in particular.

8 Then just to my left -- I was a little  
9 thrown off because I thought it was alphabetical and  
10 that's why I was -- yeah, you didn't look like Jeanne,  
11 anyway. So Jeanne Pratt, who is Senior Deputy  
12 Commissioner from the Canadian Competition Bureau.  
13 She oversees their abuse of dominance and mergers and  
14 noncartel horizontal conduct matters. She also has  
15 experience at the ACCC. So I'm sure that she will  
16 bring that to the discussion today.

17 So those are our panelists and you're going  
18 to hear from them, not from me. Just by way of  
19 background, a lot of the cooperation issues that are  
20 relevant to the competition enforcement discussion  
21 were addressed in this morning's session. So we'll  
22 try to get into a little bit more granular level so  
23 that we don't repeat what was discussed this morning.

24 Just I guess to set the stage in thinking  
25 about cooperation in general, we engage in enforcement

1 cooperation for a number of reasons. Often, we find  
2 that it will improve our own analyses. It allows us  
3 to identify issues where we have a common interest, it  
4 allows us to avoid inconsistent outcomes, and perhaps,  
5 most importantly, for the outcome to coordinate  
6 remedies.

7 So with that in mind, I have asked the panel  
8 to start off -- we're trying to understand strengths  
9 and weaknesses of enforcement cooperation, get some  
10 advice for the FTC. So before we delve into specific  
11 questions, I've asked each of the panelists to deliver  
12 the headline of their story. What is your elevator  
13 speech? Starting with Nick.

14 MR. BANASEVIC: Thank you, Maria. Thank you  
15 to you and to the FTC. It's really a great pleasure  
16 to be here and, hopefully, share some interesting  
17 insights.

18 My elevator ride is 27 floors up and it  
19 takes about half a minute. So I don't know if that's  
20 how long I've got. But I think my five-second message  
21 is don't neglect cooperation, it can really bring  
22 benefits. Of course, I think the first instinct that  
23 we have and what we're responsible for by definition  
24 is our own jurisdiction, and the bread and butter of  
25 that is doing individual cases and that's what we

1 focus on. That's, as I say, the bread and butter of  
2 our work.

3 Beyond that we have our policy, guidance,  
4 soft law role which is complementary to the actual  
5 case enforcement. I think my core message and,  
6 hopefully, I'll illustrate it during the panel is,  
7 although you're not going to necessarily spend the  
8 majority of your time, although you might spend a lot  
9 in an individual case on cooperation, I think it's  
10 trying really -- in terms of what agencies can gain  
11 and benefit mutually.

12 Don't view it as add-on activity, something  
13 extra that you have to do. It can really bring  
14 organic benefits to either an individual case -- and,  
15 hopefully, I'll give some examples -- and also to  
16 policy to avoid misunderstandings, to converge where  
17 possible. It's really something that should be  
18 fostered over the years. I've known Maria and her  
19 colleagues and colleagues at the DOJ for many years,  
20 and it's really very useful in terms of building  
21 trust, facilitating relationships, and understanding  
22 where each of us are coming from.

23 So from my perspective, I've had very good  
24 experiences over the years and I will give some more  
25 insights as we go on.

1 MS. COPPOLA: Thanks.

2 Marcus?

3 MR. BEZZI: Well, if Nick had been standing  
4 next to me in the elevator, I would say I agree with  
5 all of that.

6 I'd also say -- make the point that was made  
7 a lot this morning, that commerce is now more global  
8 than ever and, indeed, that's a trend that's  
9 significantly enhanced by the digital economy. And  
10 the corollary of that is that enforcers have to  
11 respond to the pace of change and globalization by  
12 working more closely together. We have to be more  
13 joined up and timely.

14 And we need to do this for three reasons.  
15 Firstly, because I believe that in doing so, we will  
16 facilitate more efficient commerce. It will actually  
17 be better for the commercial parties if we are more  
18 joined up. Secondly, it will make us better at our  
19 jobs. We'll be more effectively able to police  
20 compliance with laws in our jurisdictions. And,  
21 finally, because we've got scarce resources and  
22 working closely together is likely to prevent us from  
23 reworking issues, from seeking to reinvent the wheel  
24 or overlapping each other's work. It will make us  
25 more efficient. Thanks.

1 MS. COPPOLA: Great.

2 MS. SCHAEFFER: Well, hopefully, we're not  
3 in a Dutch elevator so there's room for me as well. I  
4 certainly agree with everything that both Nick and  
5 Marcus have just said.

6 I particularly like the idea that  
7 cooperation is not the icing on the cake, but,  
8 hopefully, the glue, as Kovacic would say, or the  
9 icing in the middle.

10 What does cooperation mean? It doesn't mean  
11 achieving the same result on the same timetable in  
12 every transaction or investigation. That's not  
13 cooperation. That's utopia. And that's never going  
14 to exist. But I do think it can and often does mean a  
15 greater understanding of the issues, an enhanced  
16 understanding, as you said, Maria, for your own  
17 investigation and how to address concerns. And it,  
18 hopefully, can be used to maximize all of the  
19 efficiencies in the process given the substantive  
20 constraints and the procedural limitations that each  
21 jurisdiction has to live within.

22 So I think from a private practitioner  
23 perspective, I agree there is a lot to be gained from  
24 cooperation. And I would love to use this panel to  
25 talk about practical ways that we can enhance



1 cooperation, again using Kovacic's human glue analogy,  
2 more at that human level than at the formal,  
3 procedural MLAT kind of level that I think we've all  
4 worked with or had our frustrations with over the last  
5 decade or so, and have found that it is these informal  
6 connections and understandings that have facilitated  
7 greater cooperation more than the very formalistic  
8 process.

9 MS. PRATT: Well, I agree with everything  
10 that everyone said. The only thing I would add is I  
11 don't think cooperation is only good for enforcement  
12 agencies, I think it's good for business. It allows  
13 competition law enforcement agencies to benefit from  
14 the experience of one another, reach conclusions  
15 quicker, and with less probability of conflict and  
16 ultimately, hopefully, increased timeliness and  
17 effectiveness of the outcome.

18 But it's -- as all of these people have  
19 said, it's more than about sharing information, it's  
20 that human glue. It's having the trust amongst  
21 agencies to be able to have productive discussions, to  
22 be able to exchange theories of harm, to talk about  
23 what they're hearing from the marketplace, to sort of  
24 be in a united front with the businesses so that they  
25 understand that it is in their benefit and it will be

1 more efficient for them to cooperate with all of us  
2 together.

3 And so I think the result, hopefully, is  
4 that investigations aren't longer, are more focused,  
5 and the probability of outcomes being conflicting  
6 outcomes is minimized, and ultimately for all of us,  
7 the predictability, consistency, and effectiveness of  
8 outcomes across jurisdictions is maximized.

9 The Canadian Competition Bureau, as you  
10 heard from Commissioner Boswell this morning and as  
11 you heard from some of my colleagues from the RCMP, I  
12 think Canada generally is a strong advocate for  
13 international cooperation and we're always looking for  
14 opportunities to cooperate further, including with  
15 respect to not just merger cases, but unilateral  
16 conduct cases as well.

17 MS. COPPOLA: Thanks, Jeanne.

18 Okay. So there's a lot of human glue. So  
19 we seem to all agree that there's a lot of great  
20 things that come out of cooperation, cooperation is  
21 very important. I guess drilling down to the next  
22 level, what can parties expect for agencies, and I  
23 guess for Fiona, what can agencies expect at a more  
24 detailed level from cooperation. Why don't we start  
25 with Marcus this time.

1 MR. BEZZI: Thanks, Maria.

2 Well, there are things like sharing case  
3 theories, if waivers are given there will be sharing  
4 of information. If we use our formal processes, they  
5 can expect them to take a long time. In our  
6 experience, MLATs -- well, I'll just relate one story.  
7 We used an MLAT in a criminal matter recently and were  
8 absolutely stunned to get a result from the process in  
9 one year or a little bit less than one year. That's  
10 the fastest that anyone can ever think of. Mostly,  
11 they take two years, three years, four years.

12 We've got 19th Century formal cooperation  
13 procedures, 19th Century timetable for our formal  
14 cooperation procedures. So really we spend most of  
15 our time on the informal. And I must say, I listened  
16 to some of the sessions this morning and heard people  
17 talking about the IOSCO MMOU. I was very envious  
18 hearing about how quickly their processes work. They  
19 really do seem to operate at a more reasonable speed  
20 given the speed of commerce today.

21 I should say that in mergers, the informal  
22 cooperation works extremely well and we don't have to  
23 rely upon the formal. A lot of the time in Australia,  
24 we use the processes to coordinate remedies and people  
25 can reasonably expect us to do that in a fairly

1 efficient way. I think that is a good aspect of the  
2 current system.

3 MS. COPPOLA: Thanks.

4 Jeanne, do you want to --

5 MS. PRATT: Sure. I mean, we cooperate very  
6 closely with the Federal Trade Commission and with the  
7 US Department of Justice and the DG Comp. Those are  
8 the three jurisdictions or three agencies that we  
9 cooperate most with. And if you're a party either on  
10 the merger side or on the conduct side, you can expect  
11 that we would have in-depth discussions related to  
12 investigative approach, theories of harm, market  
13 definition, concerns expressed by market contexts in  
14 the various jurisdictions and, frankly, our analysis  
15 of the data and evidence that we've seen.

16 In some cases, you will see us do joint  
17 market interviews of joint market context. We'll have  
18 sometimes joint calls with the parties and we'll  
19 coordinate that interaction with the parties to make  
20 sure that the risk of uncertain or conflicting  
21 messages is minimized.

22 And where cross border competition concerns  
23 are identified, you can expect the Canadian  
24 Competition Bureau to engage agencies in remedy  
25 discussions, because we need to make sure that those

1 remedy discussions are considered in the broader  
2 context, including the need for remedies in one or  
3 more jurisdictions and whether a remedy in one  
4 jurisdiction may actually be sufficient to address  
5 concerns in another, so that we may not need our own  
6 consent agreement in Canada. We also look at whether  
7 a common monitor should be appointed or looking at the  
8 consistency of the language around preservation of  
9 assets or hold separate arrangements.

10 And in some cases that cooperation with the  
11 Canadian Competition Bureau may ultimately lead to us  
12 accepting a remedy that is proposed from a sister  
13 agency and it can, where appropriate, ensure the most  
14 efficient and least intrusive form of remedy for  
15 market participants.

16 So we do cooperate very deeply with our  
17 agency. And that, again, is based on a strong  
18 foundation of trust that has been built over 20 years  
19 of cooperating with the counterparts with whom we  
20 cooperate most frequently.

21 MS. COPPOLA: Thanks, Jeanne, very much.

22 I'm very sorry to have to ask Nick to add to  
23 that because I think you about covered the universe.  
24 But, Nick, what do you think that parties can expect  
25 from cooperation and thinking specifically about your

1 perspective from a shop that deals with conduct  
2 matters?

3 MR. BANASEVIC: I agree with everything so  
4 far. So not --

5 MS. COPPOLA: Okay. Can we be clear? You  
6 have to disagree at some point. This would be like  
7 dreadfully boring if you --

8 MR. BANASEVIC: In the post-panel, perhaps.  
9 No, but I think, as Jeanne said -- and  
10 perhaps -- and this is something I think we'll develop  
11 perhaps as a difference in terms of incentives in  
12 conduct in mergers. Most of what my experience, in  
13 terms of what parties have incentive-wise, is in  
14 conduct. I've worked on a few mergers where the  
15 incentives have been aligned. We've had issues with  
16 parties where sometimes they don't want to give  
17 waivers in conduct cases because they feel that that  
18 would somehow not be beneficial to them. That is, of  
19 course, their prerogative.

20 My personal view is that actually, you know  
21 if they've got a good story to tell, there's no issue  
22 with giving away, but because it's precisely those  
23 things that we can discuss openly with them and with  
24 our colleagues, our sister agencies. But I think  
25 exactly the kinds of things that -- whether or not

1 there is a waiver, because I think even without a  
2 waiver we're able to, from our perspective, in terms  
3 of what we can gain, talk about theories of harm in  
4 the abstract and general levels, test, test theories,  
5 test realities.

6 So I think if we're doing that anyway, there  
7 is an interest for parties to give us a waiver.  
8 Again, that's my personal view. But as I say, we've  
9 had some cases where we haven't had waivers.

10 To switch, in terms of what -- because I  
11 think we do have that responsibility ourselves to  
12 parties. And, again, maybe it's more in mergers that  
13 it happens that they have these incentives where  
14 they're aligned in terms of timing, coordination. In  
15 terms of what we can expect as an agency, just to  
16 develop a bit what I was saying at the beginning, I  
17 think, again, it's not that we must always dream of  
18 having the uniform solution worldwide. We all have  
19 different legal traditions, different systems. Having  
20 said that, I think where we can achieve at least a  
21 high level of convergence where possible, I think  
22 that's something that is desirable.

23 So I think we, in terms of both policy  
24 development -- and then when we're doing cases, I  
25 think it is invaluable and we each have a lot to gain

1 in terms of, again, coming back to some of the things  
2 I've said in terms of case specifics, theories of  
3 harm, making sure that we've got a reality check on  
4 whether something is correct or not, testing these  
5 theories with each other, and if appropriate, moving  
6 the cases forward in the same or similar direction.  
7 If not, at least understanding the background to where  
8 we're each coming from and why we may take a different  
9 approach. And I found that invaluable over the years  
10 in many cases, and I'll develop that a bit more a bit  
11 later.

12 MS. COPPOLA: Thanks. I think that the last  
13 point you mentioned, this idea that the effects of  
14 case cooperation are not just contained to the case  
15 itself, but to a longer-term story of deepening the  
16 understanding between agencies is really important.

17 Fiona?

18 MS. SCHAEFFER: Sure. Well, I think from  
19 the parties' perspective -- and my comments are  
20 primarily in the context of merger reviews -- the  
21 goals of what can realistically be achieved from  
22 cooperation include reducing duplicative effort,  
23 reducing the burdens of investigation, convincing the  
24 agency, through cooperation, that just because there  
25 is a hill there to climb doesn't mean that everyone



1 has to climb it. One can climb and report, assuming,  
2 of course, it is a similar hill.

3 We hope to have consistent, if not  
4 identical, outcomes and that includes, where possible,  
5 hopefully convincing an agency that they don't need to  
6 have the same remedy as everyone else just because  
7 someone else has a remedy. We don't have to have  
8 every jurisdiction reviewing, believing that it needs  
9 to have its pound of flesh in order to believe that  
10 it's conducted an effective review. And that, of  
11 course, involves some levels of trust between the  
12 different agencies as well, that the enforcement of a  
13 remedy in one jurisdiction is going to be sufficiently  
14 robust to protect others. And, you know, that may not  
15 always be the case and it may vary by jurisdiction.

16 We hope, also, that through cooperation we  
17 will, if not have a shorter overall timetable,  
18 certainly not a longer one. I think that is sometimes  
19 a concern that private parties feel is that a  
20 potential cost of cooperation is that you may be put  
21 on, in essence, the timeline of the slowest  
22 jurisdiction, rather than promoting efficiency  
23 throughout the process.

24 I guess a word on waivers just to Nick's  
25 point. In principle, I agree that knowledge is power

1 and I like everyone at the table to have a similar  
2 level of knowledge, if we have good substantive points  
3 and arguments and documents to share, or even if not  
4 so good. The agency can do a better job armed with  
5 that knowledge than if there is some game-playing and  
6 trying to orchestrate the process and manage who knows  
7 what.

8 I do think that that calculus is quite  
9 different in merger versus conduct cases. And it's  
10 not a question of giving different agencies the same  
11 level of knowledge, necessarily, although in some  
12 cases it can be. But I think for us there is a bigger  
13 concern in conduct cases that information provided to  
14 one regulator and then shared more broadly increases  
15 the risk of discovery obligations and private class  
16 action consequences that aren't so much of a practice  
17 concern in a merger context. So it's not the sharing  
18 within the agencies necessarily that is the biggest  
19 challenge there; it's what can be done with the  
20 information once it is within multiple agencies.

21 We know that we're dealing with  
22 jurisdictions that have very different levels of  
23 confidentiality protection, and in some instances, for  
24 example, are required to give third parties due  
25 process or other government agencies access. So I

1 think there's a greater feeling of concern about being  
2 able to manage the flow of that information in the  
3 conduct arena.

4 MS. COPPOLA: Thanks, Fiona. I think we'll  
5 come back to that point about information exchange in  
6 a moment. But I think, before that, I want to pick up  
7 on Marcus' point about keeping pace. I don't know  
8 that -- the 19th Century might be a bit of an  
9 exaggeration, but I think even 20th Century tools are  
10 not fit for purpose. Last night, I was watching All  
11 the President's Men with my 12-year-old son and they  
12 were trying to find the phone number for someone and  
13 they had a room full of phone books, and he just kind  
14 of said, what's that, what are they doing?

15 Anyhow, what types of things, what kind of  
16 -- what would a tool look like that was fit for the  
17 21st Century? Are these more in the realm of informal  
18 cooperation? What tools do you use? What tools do  
19 you wish you had? What can we learn from you?

20 MR. BEZZI: Would you like me to go first?

21 MS. COPPOLA: Yes. That's why I'm looking  
22 at you. I'm sorry.

23 (Laughter.)

24 MR. BEZZI: Well, where do I start. So  
25 informal -- I'll start on the informal. And, look, I

1 should say 95 percent of the cooperation that we're  
2 involved in -- probably more than 95 percent is  
3 informal and it's very effective and it involves  
4 engagement with the various agencies that we've got  
5 excellent relationships with. We have many  
6 counterpart agencies that we've got second generation  
7 cooperation agreements with or first generation  
8 cooperation agreements with. And they help to create  
9 a formal framework in which we can engage in informal  
10 cooperation.

11 And I should actually just go back a step.  
12 The formal arrangements really do enhance the  
13 informal. We have a very formal arrangement with the  
14 United States. We have a treaty with the US. I think  
15 we're the only country that has an antitrust  
16 cooperation treaty with the US. We rarely use it. I  
17 think the number of times it's been formally used you  
18 could probably count on probably less than two hands.  
19 But I believe that it promotes the use of waivers, it  
20 promotes the cooperation of witnesses, the cooperation  
21 of parties with our investigations, and it really  
22 facilitates and creates the atmosphere in which  
23 informal cooperation works very, very well.

24 So what does that actually mean? It means  
25 that we can have case teams that have regular phone

1 calls if we've got a common investigation or we're  
2 investigating common or related issues. We can talk  
3 about case theories. We can talk about practical  
4 things like when we're going to interview common  
5 witnesses. We can talk about lines of inquiry that  
6 have not been successful that have been a waste of our  
7 time and suggest to each other perhaps don't bother  
8 going there, it won't lead anywhere or, actually, look  
9 here, it's a better place to look. Those sorts of  
10 discussions happen between case teams and they are  
11 really valuable.

12 The exchange of information when we've got  
13 waivers -- confidential information when we've got  
14 waivers is very, very useful. I should emphasize that  
15 we very, very rarely -- in fact, I can't think of a  
16 single occasion that we've done it using a waiver, but  
17 we very rarely exchange evidence. I can think of two  
18 cases where we've done that using formal processes.  
19 If we want evidence, we will go to the source and get  
20 the evidence from the source if we possibly can. It's  
21 much more valuable to us that way, anyway.

22 So I think you said, what would be better?  
23 Well, some of the processes that exist under IOSCO  
24 where -- and, indeed, exist under the antitrust treaty  
25 that we have with the US -- where we can ask

1 counterpart agencies to compel testimony, we can ask  
2 counterpart agencies to compel the production of  
3 evidence or production of information and to do so in  
4 a very timely way, to put in a request that can be  
5 responded to in days or weeks rather than months or  
6 years. Those sorts of things are things that we  
7 aspire to.

8 We get a lot of it informally, I should  
9 emphasize that. I don't want to understate the  
10 importance of the informal. But having a more formal  
11 framework which would enable more of that -- and I  
12 think they have in IOSCO context -- would really be a  
13 facilitator of even greater informal cooperation.

14 MS. COPPOLA: I think we heard on the  
15 consumer protection and privacy panel that some of  
16 that investigative assistance is already happening on  
17 that side. So it's --

18 MR. BEZZI: Very much so, yes.

19 MS. COPPOLA: Since we're all -- many of us  
20 have it housed in the same agency, you would hope that  
21 we can have that transfer over to the competition  
22 side.

23 Jeanne, could you pick up a little bit on  
24 the informal cooperation point and tools?

25 MS. PRATT: Yeah, I'll try not to do --

1 MS. COPPOLA: So we can just --

2 MR. PRATT: I, again, agree with everything  
3 that Marcus said. And I think what I would say is it  
4 only works -- those informal cooperation tools, again,  
5 only work if you've got trust in the legitimacy, the  
6 competence, the candor and, frankly, the ethics of  
7 your counterparts in the other agency.

8 And you can't develop that necessarily in  
9 the context of just having a case discussion. You've  
10 got to take the time to have the conversations to  
11 understand different frameworks, to understand how  
12 they go about doing their work. And, frankly, that in  
13 our experience has led to us getting to learn some of  
14 the lessons from our colleagues so that we don't have  
15 to repeat the same mistakes and, hopefully, we have  
16 also shared some of those with our foreign  
17 counterparts.

18 So some of the mechanisms that we use  
19 outside of informal cooperation on a case to try and  
20 do that are the case team leader meetings that you  
21 heard Commissioner Boswell talk about this morning,  
22 which I find incredibly useful because it is our  
23 officers who are doing the work, that are leading  
24 those cases, that will take some time out to talk  
25 about how they do their work, what issues they are

1 facing. Sometimes it's talking about a particular  
2 case development or a lesson learned that they have  
3 from their jurisdiction. And that builds  
4 relationships amongst our staff, it builds trust, it  
5 builds confidence in our counterpart's abilities as  
6 economists and lawyers doing the same type of work.

7 Exchanges are another tool. And as was  
8 mentioned this morning, I am the very lucky candidate  
9 who got to go to the ACCC for a full year and see how  
10 they do their merger work, and I benefitted greatly as  
11 an individual. But I also I think benefitted the  
12 Bureau because we got to see not just how a particular  
13 case unfolds, but how you actually manage the  
14 organization, how you do your work, what tools you use  
15 and, frankly, seeing how something can be so different  
16 in some areas, but there's a lot of commonality in the  
17 analysis that we do in mergers.

18 MR. BEZZI: We loved having you, too,  
19 Jeanne. It was great having you.

20 MS. PRATT: It was a tough winter in Ottawa,  
21 I have to say.

22 The other thing that we have found valuable  
23 is taking some time out, maybe more publicly, to have  
24 workshops on particular issues. The FTC and the DOJ  
25 and the Competition Bureau in 2018 had a joint



1 workshop on competition in residential real estate  
2 brokerage. And, you know, we had eight years of  
3 litigation in the real estate industry surrounding the  
4 use and display of critical sales information through  
5 digital platforms that wasn't resolved until years  
6 after the US. But because we had taken so long, there  
7 had been a lot of evolution in the law and the  
8 economy. And so some of the lessons that we learned  
9 along the way were also informative to update since  
10 the fight in the US.

11 So the only other formal thing that I think  
12 I would I say, not the informal, is we have a gateway  
13 provision in the Canadian Competition Act, Section 29.  
14 So when we're doing mergers, we don't ask for waivers  
15 in Canada. As long as we're working on a case and we  
16 feel that that cooperation is necessary for  
17 enforcement of the Competition Act in Canada, we feel  
18 that that gives us the ability to have that  
19 conversation with our counterparts.

20 So if you -- and I think this would be  
21 particularly useful in the unilateral conduct side  
22 where you may be looking at different incentives. The  
23 merging parties may want to get through our process as  
24 quickly as possible. They, I think, have come to see  
25 more of the benefits of our cooperation to get them

1 where they need to get to with less conflict and  
2 quicker results. But, you know, that kind of a  
3 gateway provision could allow us to have discussions  
4 on the unilateral conduct side because the discussion  
5 is only as good as the two-way communication allows.

6 MS. COPPOLA: Thanks. The senior level  
7 exchange, I think, would be a big hit here if the  
8 destination was Australia. But I guess kidding aside,  
9 it's interesting because what you learn there, you're  
10 coming back and you're in charge so you can actually  
11 implement the changes. So that must have had a  
12 terrific effect.

13 Okay, Nick, just thinking a bit more about  
14 cooperation in conduct investigations. I almost said  
15 antitrust investigations because I was looking at you.  
16 What kind of practical experience tips do you have  
17 that you would like to share?

18 MR. BANASEVIC: So I'm going to go back in  
19 time a bit and give you a couple of examples of very  
20 intense cooperation with the FTC and the DOJ.  
21 Actually, let me first say, to go back a step even,  
22 for us, cooperation starts at home in the sense that  
23 we've got the European Competition Network, which in  
24 -- I don't know if "unique" is the word, but it's the  
25 network of us, the European Commission with all the

1 national member state competition authorities in the  
2 EEA, the European Economic Area, all applying European  
3 competition law.

4           And so we first need to cooperate at home in  
5 terms of both just allocating cases and, of course,  
6 generally the European Commission does the cases that  
7 are over a broader geographic scope, whereas the  
8 national agencies tend to focus on more national ones  
9 and in terms of substance coordination as well.

10           Beyond that, I think we have extensive  
11 international cooperation with all the major  
12 competition authorities around the world, including  
13 Canada and Australia. But to give the two examples  
14 that, for me, have been personally particularly  
15 instructive over the years, going back to the  
16 beginning of the century is first the Microsoft case  
17 with DOJ, where, as background, you remember that the  
18 D.C. Circuit Court of Appeals affirmed a monopoly  
19 maintenance finding here under Section 2. And that  
20 was while our case was still ongoing in Europe. We  
21 had an interoperability and a tying abuse, tying of  
22 Media Player.

23           And then there was a remedy implemented in  
24 the US that changed the way that some things were  
25 done. So it had a kind of factual impact on some of

1 the things that we were doing in our case while it was  
2 still ongoing. And the issues were also -- even  
3 though the liability case here was little bit  
4 different, through the remedy, there was an  
5 interoperability element as well. So the kinds of  
6 issues were very similar.

7 We met, I think, for a period of a few years  
8 twice a year. We would come here once a year and the  
9 DOJ would come to see us in Brussels. And it was  
10 invaluable just to exchange theories, to understand  
11 where each side was coming from, and to develop a  
12 trust and understanding over the years. So I think  
13 it's fair to say that even though the issues were  
14 different, there wasn't always perfect agreement, but  
15 it was a relationship that we valued and that really  
16 brought a lot in terms of understanding where we were  
17 coming from and in my view, at least, having a  
18 solution that was not necessarily exactly the same,  
19 didn't lead to an overt situation of conflict, which,  
20 again, in my view was greatly facilitated by these  
21 contacts.

22 The second example is the kind of policy and  
23 case area standard essential patterns. This goes back  
24 to even Rambus with the FTC where we had a similar  
25 case ourselves in Europe. But more generally and more

1 recently, or five, six years ago, I guess, this issue  
2 of injunctions based on standard essential patterns.  
3 The FTC -- I think it was 2013 you had the consent  
4 decree with Motorola and we had a prohibition decision  
5 against Motorola a year earlier on the same kind of  
6 issue.

7           And, again, take a step back or try and  
8 remember, this is a very -- I don't know if "novel" is  
9 the word, but it was a controversial area of law. And  
10 perhaps it still is. For us in Europe, at least, we  
11 adopted a prohibition decision, which said that  
12 injunctions against willing licensees, based on  
13 standard essential patterns where you've given a  
14 commitment to license on FRAND terms, are an abuse.  
15 That was confirmed by our Supreme Court, the European  
16 Court of Justice, in a separate case, but the  
17 principle was confirmed. But it was, and still is, a  
18 subject that attracts a great deal of attention and a  
19 great deal of controversy. There were many people --  
20 and that debate still goes on.

21           But there were many people saying, how can  
22 you possibly do this? There are some people saying  
23 that. But against that background of that -- again,  
24 I'm not sure if "novel" is the word, but a very  
25 complex, important issue, it was really invaluable to

1 have both the case coordination with the FTC on  
2 Motorola, where we had regular contact in terms of  
3 meetings and calls, and then on the policy level with  
4 both the FTC and the DOJ, where essentially we were on  
5 the same page in terms of developing this policy and  
6 this approach towards how we deal with the specific  
7 issue of injunctions based on standard essential  
8 patterns. I think particularly because it was an area  
9 that was so complex and controversial, my personal  
10 view is that we all mutually benefitted from being  
11 able to really share these experiences and insight.

12 So those are two examples and there are  
13 many more, but it's really, for me, a manifestation of  
14 just concrete case teams talking to each other  
15 regularly, being open, exchanging ideas, evidence if  
16 appropriate, if you have the waiver, and it's been a  
17 great benefit.

18 MS. COPPOLA: Yeah, I think interplay of the  
19 case level and the policy level is a really good point  
20 that really deepens greatly the discussion and  
21 understanding.

22 Fiona, we've heard kind of rah-rah-rah  
23 cooperation and lots of pluses on cooperation. You've  
24 talked about how cooperation doesn't mean getting to  
25 the finish line at the exact same time. What are some

1 of the practical limitations on cooperation from a  
2 private practitioner's perspective?

3 MS. SCHAEFFER: Well, I think we start out  
4 with very different procedural frameworks in different  
5 jurisdictions. We happen to have probably two of the  
6 closest jurisdictions here in Canada and the US, on  
7 process. But others look quite different in terms of  
8 the amount of prefiling work in a merger context that  
9 needs to be done, the time that that will take, the  
10 uncertainty around when you actually get on the clock  
11 in say Europe or China versus in the US. And all of  
12 that leads to, you know, in many cases, if not an  
13 impossibility, certainly, all of the stars would have  
14 to align for the timing to actually be the same.

15 So we are working with different processes,  
16 different timetables, and I think we have to accept  
17 that the timing is not going to be the same. The  
18 question is, can we make it sufficiently compatible  
19 that we can have substantive discussions at a similar  
20 time frame, particularly on remedies. That will, you  
21 know, minimize inefficiencies and maximize the ability  
22 to have a consistent compatible remedy.

23 And even when you've done all of those  
24 things and there's been I think an earnest, concerted  
25 goodwill effort to align those discussions, you're

1 inevitably going to have cases where, you know,  
2 something surprising happens like one jurisdiction  
3 decides, yes, we like the remedy package that everyone  
4 else has agreed to, but lo and behold, we think there  
5 ought to be a different purchaser in our jurisdiction,  
6 which shall remained unnamed, than in the rest of the  
7 world, which as you can imagine when you're dealing  
8 with products that are sold around the globe under one  
9 brand name can be pretty challenging.

10 I'm not sure that cooperation could have  
11 changed that result. But you're always going to have  
12 these unpredictable aspects of a multijurisdictional  
13 merger review that can occur right up until the end.

14 What can we do to enhance practical day-to-  
15 day cooperation, I think your earlier question. A lot  
16 of the time when we talk about cooperation, it's  
17 really in a bilateral context. You've got parties  
18 speaking with Agency A, parties speaking with Agency  
19 B, parties speaking with Agency C, and then similar  
20 conversations happening between those agencies who are  
21 essentially, you know, in some cases, playing Chinese  
22 whispers, but reporting on conversations they've had  
23 trying to find common approaches, common  
24 understandings. I wonder sometimes can we expedite --  
25 streamline those conversations to have fewer bilateral



1     conversations and more multilateral conversations in  
2     the same room.

3             Just as when we are faced with a conduct or  
4     a merger investigation ourselves, trying to understand  
5     better the facts, what's going on, where, we often  
6     have multijurisdictional, multicounsel calls. I don't  
7     see why we couldn't do more of that involving multiple  
8     agencies on the same video conference or the same  
9     phone call. There is a limit, of course, where you  
10    get these huge conversations that, you know, are  
11    impossible to schedule, and no one says anything  
12    because there's 100 people on the line. So yes, that  
13    level of cooperation can be unwieldy, but I think we  
14    can do more to explore having simultaneous  
15    conversations.

16            I think there's been a mindset probably  
17    maybe more in the minds of -- well, maybe equally in  
18    the minds of the companies and counsel, as well as  
19    agencies, that everyone needs to have their kind of  
20    process, everyone needs to have their separate  
21    meeting, everyone needs to have the merger explained  
22    to them, you know, Australian or in Canadian or in --

23                   (Laughter.)

24            MS. SCHAEFFER: But I don't think that  
25    that's necessarily the case, not for all meetings or

1 forms of cooperation. So that's something I think we  
2 could do more with.

3 MS. COPPOLA: That's a really interesting  
4 idea. I mean, we've heard earlier, and on this panel,  
5 that there's a lot of joint third party calls. I know  
6 at the FTC we have limited experience with joint party  
7 calls, but that's a really neat idea and it's  
8 certainly very 21st Century if it's video.

9 So thinking I guess -- so those are some of  
10 the practical limitations on the practitioner's side.  
11 Thinking about some of the practical limitations on  
12 the agency's side, it seems like the one that has  
13 appeared a few times in this discussion is  
14 confidentiality.

15 Nick has already talked a little bit about  
16 what we can exchange when we don't have waivers. So  
17 what falls within the realm of public or agency  
18 nonpublic information, so, as he said, theories of  
19 harm, market definition, kind of basic thinking on  
20 remedies. But, of course, those discussions are much  
21 more robust when we're saying because of evidence of  
22 X, Y, and Z.

23 Marcus, you had mentioned that you have an  
24 information gateway in Australia. What does that mean  
25 and what can the FTC learn from that?

1           MR. BEZZI: So an information gateway is a  
2 legislative provision that enables our Chairman to  
3 make a decision to release material that we've  
4 obtained through some confidential process either a  
5 compulsory power, exercise of a compulsory power,  
6 requiring compelled production of information, or  
7 otherwise, and it enables us to release that  
8 information without the consent of the party whose  
9 information it is.

10           So it's something we don't do lightly and  
11 it's something we don't do often. And it's something  
12 we'll only do if there are -- if we're really 100  
13 percent confident that people are going to comply  
14 with the conditions that are imposed on the release  
15 of the information. So if we're dealing with a  
16 trusted agency, and we are confident that they will  
17 maintain the confidentiality of the information that  
18 we disclose, then we have got the capacity to release  
19 it.

20           As I say, it doesn't happen very often.  
21 There will be more than just a set of conditions  
22 imposed. There's usually a fairly rigorous process  
23 that we put in place to ensure that the conditions are  
24 complied with. So there's reporting. And after the  
25 agency that's received the information has finished

1 with it, we'll require them to give the information  
2 back.

3 And I should say this is a very similar  
4 provision to a provision that the CMA has in the UK  
5 and that Canada has. And it, as I say can be -- it's  
6 more useful in being there than in being used, if I  
7 could put it that way.

8 MS. COPPOLA: Right, right. Thanks, Marcus.

9 I think, Jeanne, I'll have you answer next  
10 because he's just talked about your information  
11 gateway. Does this have an impact on kind of target  
12 parties, third parties' willingness to provide  
13 information, and what kind of notice do they get  
14 before you share the information? What are some of  
15 the consequences?

16 MS. PRATT: Yeah, I mean with great -- it's  
17 -- we have to take that very, very seriously. So when  
18 we're using our gateway provision, we have very  
19 transparent policies to stakeholders. It's written in  
20 a confidentiality bulletin what the conditions of  
21 sharing are. Every time we do a market contact, it is  
22 disclosed to that market contact that we do have the  
23 information gateway, that we may use it obviously in  
24 an international merger context, that we may share it  
25 with our counterpart agencies and discuss it where

1 they have waivers.

2 So I think the lesson for us is transparency  
3 is really important to maintain your reputation  
4 because without our reputation to maintain the  
5 confidential information, we won't be able to do our  
6 job and the effectiveness of our agency is diminished.  
7 It's fundamental, frankly, to how we do our job.

8 So in our confidentiality bulletin, we do  
9 set out the conditions quite clearly and we do say  
10 that we will seek to maintain the confidentiality of  
11 information through either formal international  
12 instruments or assurances from a foreign authority.  
13 And the Bureau also requires as a condition that  
14 the foreign authority's use of that information is  
15 limited to the specific purpose for which it was  
16 provided. So our information gateway provides that  
17 we can use it for enforcement of the Act, which, for  
18 us, means if we're working on a common case with an  
19 agency with whom we have a foreign -- or an instrument  
20 and we've got those certainties that that is when we  
21 will do so.

22 Where there is no bilateral-multilateral  
23 cooperation instrument in force, the Bureau does not  
24 communicate information protected by Section 29 unless  
25 we are fully satisfied with the assurances provided by

1 the foreign authority with respect to maintaining the  
2 confidentiality of the information and the uses to  
3 which it will be put. And this, again, is where trust  
4 becomes key for us, we're not going to put our  
5 reputation and our effectiveness on the line if we are  
6 not certain that those conditions will be satisfied.

7 In assessing whether to communicate the  
8 information and the circumstances, we do also consider  
9 the laws protecting confidentiality in the requesting  
10 country, the purpose of the request, and any  
11 agreements or arrangements with the country or the  
12 requesting authority. If we are not satisfied that it  
13 will remain protected, it is not shared. Likewise,  
14 when foreign authorities are typically communicating  
15 confidential information to the Bureau, they are doing  
16 so on the understanding that the information will be  
17 treated confidentiality and used for the purposes of  
18 administration and enforcement of the Act.

19 I should mention, too, we do have another  
20 provision in our Act which ensures that all inquiries  
21 conducted by the Competition Bureau are conducted in  
22 private and that provides some legislative certainty  
23 that it will be maintained in confidence on our end.

24 So I guess I would say the gateway for us,  
25 while similar to Australia, I think has been used a

1 little bit different and that mostly is a result of  
2 practice, our transparency, the market having a lot of  
3 faith in our practices and procedures, to maintain  
4 confidentiality. And without it, I don't think it  
5 would be as effective.

6 MS. COPPOLA: Thanks very much.

7 Nick, turning to the European Commission, I  
8 mean, you have sort of the highest level of  
9 information sharing and investigative assistance with  
10 the ECN and you also have things like the second  
11 generation agreement that you have with Switzerland.  
12 Do you want to share a little bit of your experience  
13 with those?

14 MR. BANASEVIC: Sure. Again, the ECN is --  
15 again, I don't want to say it's the highest level of  
16 cooperation, but everything is open there.

17 MS. COPPOLA: Right, right.

18 MR. BANASEVIC: There's automatic  
19 transmission of everything, there is -- I mean, that's  
20 a consequence of what the EU or the EEA is in a sense.  
21 So it's critical that we share up front information  
22 just about who's got what case so that we can allocate  
23 them most efficiently and to coordinate on issues of  
24 substance because we're all applying the same law.

25 In terms of outside the ECN and outside the

1 EEA, I -- as a general point, I think the main issues  
2 have been outlined in terms of maybe there being  
3 different incentives -- I'm talking outside  
4 Switzerland, which I'll mention briefly now in terms  
5 of different incentives maybe between mergers and  
6 conduct. I take Fiona's point about -- concern about  
7 disclosure in another jurisdiction. I understand  
8 that. I think the instances that I have referred to  
9 in some conduct cases have rather been a concern about  
10 not wanting agencies to discuss theories of harm even.  
11 So that's a different thing.

12 And in terms of Switzerland, actually, I  
13 think it resonated. I mean, we have a second  
14 generation agreement with Switzerland, which means in  
15 practice that we can transmit evidence between us  
16 without consent. Obviously, we're talking about where  
17 the same conduct has been investigated.

18 And what we found -- and this resonated when  
19 Marcus was talking about it -- is actually we haven't  
20 needed to use -- to invoke those provisions. And it's  
21 actually encouraged that that framework, and maybe the  
22 trust or the mechanics of how things work, have  
23 encouraged information provision without needing to  
24 use the formal provisions under the agreement. So I  
25 think that's an interesting point.



1 MS. COPPOLA: Right, yeah, yeah.

2 Fiona, you've touched on this a tiny bit  
3 already, but what are -- can you bring out a little  
4 bit some of the concerns that agencies might have  
5 either about these types of agreements or about  
6 granting waivers in the nonmerger context? What are  
7 some of the red flags?

8 MS. SCHAEFFER: From a merging party's  
9 perspective or from an investigated party's  
10 perspective?

11 MS. COPPOLA: From both.

12 MS. SCHAEFFER: Yeah, I think there is --  
13 certainly in terms of the exchange of confidential  
14 information as opposed to permitting agencies to  
15 discuss case theories, I think there is an  
16 understandable sense that if an agency really needs  
17 that kind of information and has a right to obtain  
18 that kind of information domestically, then they  
19 should just ask the parties for it directly rather  
20 than get it -- you know, it sounds a bit pejorative --  
21 but through the back door.

22 I do think, on the merger side, the  
23 incentives are greater to provide it anyway. But I  
24 think, also, at the same time, the actual exchange of  
25 confidential information is relatively rare and I

1 think its use is overrated. I think the biggest  
2 benefit that I've seen from cooperation from a private  
3 party's perspective -- and I suspect the agencies  
4 might agree with this -- is just being able to discuss  
5 the case, the theories, the investigation, the legal  
6 analysis, the basic understanding of how the products  
7 work, what third party concerns are without, you know,  
8 revealing any confidential information.

9           And all of that dialogue I've found in all  
10 of the deals I've worked on, and maybe I've just been  
11 lucky, but I can't recall a single case where we  
12 facilitated cooperation and we suddenly found that  
13 Agency C, that had been going on its normal course of  
14 business and investigating without big concerns,  
15 suddenly had a new theory of the case that was going  
16 to put them into an extended review. I've always had  
17 the opposite. Namely, Agency C, when we have  
18 facilitated contact with Agency A and B, typically has  
19 been relieved to know that Agency A and B is  
20 investigating these particular various areas, that it  
21 doesn't necessarily have to cover all of the same  
22 ground. And I have found that it's expedited, not  
23 prolonged, the review or started new lines of attack  
24 that didn't exist before.

25           And I think that could also hold true,

1 although it's less tested in conduct cases where some  
2 of the theories of harm are just more wacky or  
3 radical. And I think agencies that have been at it  
4 for a longer period of time, in that investigation or  
5 generally, may be able to help other agencies  
6 understand what are the real issues here, what are  
7 some of the false paradigms or paths that, you know,  
8 we looked at five years ago but discovered really  
9 weren't productive.

10 MS. COPPOLA: Right, right. Sometimes that  
11 thinking can go the other way, too. The learning can  
12 go the other way.

13 I think I want to circle back on your point  
14 on forbearance. But before I do that, does anyone  
15 have any reactions to what Fiona was saying about  
16 information sharing and thinking of it as a backdoor  
17 way when it's done -- the confidential information  
18 between agencies?

19 MS. PRATT: Well, I think it's -- I guess  
20 from my perspective it would -- I've never seen that  
21 risk become realized. Because each of our agencies  
22 are very concerned about the confidential forecast  
23 that we have, that we want to minimize the risk of  
24 that because, otherwise, it would be a reputational  
25 risk for us doing our job.

1 I do think a lot of the value, unless you  
2 are doing a joint investigation where there is  
3 evidence that you need in another jurisdiction, most  
4 of the value of that cooperation can come from not  
5 providing confidential, competitively-sensitive third  
6 party information. So if you have waivers or you have  
7 a gateway provision, that facilitates that cooperation  
8 quite well.

9 MR. BEZZI: I agree with that. I mean,  
10 parties know -- if ever we are using an information  
11 gateway, and it happens rarely, but they know. It's  
12 not done secretly; it's done in their knowledge; it's  
13 done transparently.

14 MS. COPPOLA: Fiona, I may have  
15 misinterpreted you. When you were talking about  
16 backdoor, I think you meant even in the presence of  
17 waivers. You didn't mean out extralegally, right?

18 MS. SCHAEFFER: Yeah, I meant exchange of  
19 confidential information, where there are waivers, but  
20 the agency couldn't get the information directly.

21 MS. COPPOLA: Right, right.

22 Nick, do you have anything you wanted to add  
23 here?

24 MR. BANASEVIC: Nothing spectacular.

25 MS. COPPOLA: Okay. I have one question

1 from the audience, but before we -- and I encourage  
2 other questions. So now is the time to write them.

3 But before we get to that, I wanted to talk,  
4 I think because at the end of the day, the immediate  
5 goal in a particular case of cooperation is making  
6 sure that you don't have conflicting remedies, that  
7 you have remedies that are, if not identical, at least  
8 interoperable. And we've heard some discussion today  
9 that, you know, there's been a lot of agencies, more  
10 agencies looking at things than there used to be. And  
11 sort of the question about should we be giving more  
12 attention to cooperation, in the form of forbearance,  
13 than coordination.

14 And, Fiona, if you could start that  
15 discussion for us.

16 MS. SCHAEFFER: Sure. Well, we were having  
17 a discussion at lunch and Marcus mentioned the magic  
18 pudding story. I said to Marcus, will this audience  
19 understand the magic pudding story? And looking  
20 around the room, I see there are bemused faces.

21 Well, it's a story we all told our children  
22 growing up in Australia where, as a child, I really  
23 enjoyed it. The magic pudding just never stopped  
24 producing pudding until the entire town was flooded  
25 with porridge and pudding everywhere.

1           Well, no agency is a magic pudding.  
2           Agencies have limited resources. They can't just keep  
3           on producing. And I think from an agency perspective,  
4           as well as from the parties' perspective, one always  
5           ought to ask what are the incremental benefits of this  
6           additional investigation we're doing over -- you know,  
7           on top of what five other agencies are doing? What  
8           are the incremental benefits of a remedy that is the  
9           same or virtually identical to what another agency has  
10          obtained as opposed to taking our limited resources  
11          and using them for investigations and transactions  
12          that these other five agencies couldn't review?

13                 And it's been interesting to me just to look  
14          at how different agencies have been allocating their  
15          resources over time. Brazil is an agency that comes  
16          to mind. When I come to think about some of the  
17          cartel investigations, the merger investigations they  
18          focused on maybe ten years ago, my anecdotal  
19          perception is that there was a lot more of an  
20          international dimension to them than there is today.

21                 I think some of the larger Brazilian  
22          investigations have involved, in more recent times,  
23          transactions in the educational sector and the health  
24          care sector, in the domestic financial services  
25          sector. And their bang for their buck in those

1 investigations I think is significantly higher than it  
2 would be if they were another me-too in a global  
3 transaction.

4           Having said that, is it realistic to say if  
5 the US is looking at a deal or the EU is looking at a  
6 deal or Canada and they've got remedies, that everyone  
7 else should just back off? No, of course not. But I  
8 think at each stage of the investigation, it's useful  
9 for the agencies to ask themselves, what is the  
10 incremental value and what are the areas of this  
11 transaction that may be specific to our jurisdiction  
12 that the other people aren't covering? What are the  
13 holes that we need to fill potentially for our  
14 jurisdiction that the others aren't worrying about as  
15 opposed to retreading the same ground?

16           And as counsel to parties to transactions  
17 and conduct investigations, we ought to be asking  
18 ourselves those same questions about what are the  
19 specific impacts of this transaction or our conduct on  
20 this jurisdiction.

21           MS. COPPOLA: Mm-hmm, mm-hmm. That's very  
22 interesting. Thank you, Fiona.

23           Marcus, what did you say to the magic  
24 pudding discussion and what are your thoughts on the  
25 topic more generally?

1           MR. BEZZI: Well, exactly, we are not a  
2 magic pudding. We have limited resources. We've got  
3 to use them intelligently. So we've got to focus on  
4 the things that are most important within our  
5 jurisdiction.

6           Fiona raised the cartel issue and  
7 international cartels. We could all spend all of our  
8 time doing international cartels and nothing else.  
9 But -- and they're important, don't get me wrong.  
10 Many international cartels have a big impact in  
11 Australia. But we've explicitly said in our  
12 enforcement and compliance policy, which sets out our  
13 priorities for enforcement and is adjusted each year,  
14 that we will focus on international cartels that have  
15 an impact on Australians and Australian consumers.  
16 It's the detriment in Australia that is the focus. If  
17 there's no detriment in Australia, then we'll let  
18 other agencies deal with those cartels.

19           Similarly, in mergers, we will focus on the  
20 detriment in Australia. We'll focus on a remedy that  
21 can fix the problems we have identified in Australia,  
22 and if it happens that that remedy has already been  
23 devised somewhere else and the remedy somewhere else  
24 will completely fix the problem in Australia, then  
25 what we can do is accept what's called an enforceable



1 undertaking, which is essentially a statutory promise,  
2 which requires the parties to give effect to whatever  
3 the commitment that's being given outside Australia  
4 is, give them -- they are required to give that  
5 commitment to us in Australia, and that essentially is  
6 -- deals with the problem that we've got jurisdiction  
7 to deal with.

8 MS. COPPOLA: Right. That allows you to  
9 have something that you can enforce of there is a --

10 MR. BEZZI: We've got something that we can  
11 enforce.

12 MS. COPPOLA: Right.

13 MR. BEZZI: And we're recognizing that our  
14 resources will be managed in a better way.

15 MS. COPPOLA: Better focused. Right, right.  
16 Jeanne?

17 MS. PRATT: Well, I guess speaking -- the  
18 Canadian approach in mergers in particular, we  
19 actually have accepted and gone probably one step  
20 further than what Marcus was saying and not even put a  
21 consent agreement in place in Canada because we have  
22 been satisfied that the remedy mostly in the United  
23 States addresses our concern.

24 The only way we get there, though, is,  
25 again, to have really close cooperation. We need to

1 understand the scope of the issues, we need to  
2 understand the scope of the remedy, and, frankly, we  
3 also need to have trust in the agency that they are  
4 going to enforce that remedy at the end of the day,  
5 which we have full faith in the US Department of  
6 Justice and the US Federal Trade Commission to do  
7 that.

8           One of the primary reasons that we do use  
9 comity and forbearance is because we think it allows a  
10 more effective and streamline remedy that's least  
11 intrusive to business, avoids conflict, and  
12 simultaneously allows us, as a very small agency north  
13 of the 49th Parallel, to focus our scarce enforcement  
14 resources.

15           So two examples I would give, we had one  
16 where we accepted the US FTC's remedy in the  
17 GSK/Novartis merger in 2015. So we were satisfied  
18 there. We didn't even need a me-too registered  
19 consent agreement. We were fully satisfied that the  
20 scope of the remedy addressed our concerns and would  
21 address the anticompetitive effects on the Canadian  
22 market.

23           The second one, which is more recent, was a  
24 case we cooperated on with the US Department of  
25 Justice, UTC/Rockwell last year, which was an

1 aerospace systems review, and in that case just to  
2 underscore the importance of the cooperation to get us  
3 to the comity, we cooperated closely with the US DOJ  
4 and the DG Comp throughout the review.

5           There were waivers in place in both those  
6 jurisdictions by all the parties. We shared  
7 information and conducted some joint market calls. We  
8 discussed issues of market definition, presence of  
9 global effective remaining competition and remedies.  
10 And we determined that there were likely a substantial  
11 lessening of competition in two product markets for  
12 pneumatic ice protection system and trimmable  
13 horizontal stabilizers actuators, THSAs.

14           And Rockwell's relevant business -- they  
15 were located primarily in the US and Mexico and these  
16 products were distributed on a global basis. So we  
17 got to a place where we didn't have any assets  
18 relevant to the remedy in our jurisdiction and we were  
19 fully satisfied that the remedy addressed our  
20 concerns.

21           The other side of comity, which, you know,  
22 I'm not sure the parties appreciated at the time,  
23 Commissioner Boswell talked about our simultaneous  
24 filing of litigation in the Staples/Office Depot  
25 merger a couple of years ago. Part of that was we did

1 not see the need to file an injunction the same day  
2 because we knew that there would be an injunction  
3 proceeding by the FTC. So the parties did actually  
4 benefit because they didn't have to face an injunction  
5 proceeding north of the border as well as south of the  
6 border. We benefitted greatly from cooperation in  
7 that case.

8           Again, we had one of our Department of  
9 Justice lawyers come and was seconded and was actually  
10 part of the FTC counsel team to see how the injunctive  
11 process worked, to see the evidence go in, and at the  
12 end of the day, the injunction in the United States  
13 took care of the issues in Canada. So they still  
14 benefitted. They probably didn't like it because it  
15 was in the form of litigation, but it could have been  
16 worse.

17           MS. COPPOLA: You know, in GSK/Novartis,  
18 it's interesting, we did a lot of trilateral calls in  
19 that case with the EC, Canada, and the US. And that's  
20 not obvious in a pharmaceutical case where you expect  
21 the markets to be very different. But, certainly, in  
22 trying to understand the markets, I think the third  
23 parties were very happy to have one call and not  
24 three. So that's an interesting case.

25           Nick, we haven't heard from you yet on

1 remedies coordination or forbearance. Is there  
2 anything you want to add?

3 MR. BANASEVIC: The first thing I want to  
4 say is I'm going to look up, after this panel, what a  
5 trimmable horizontal actuator is.

6 (Laughter.)

7 MS. SCHAEFFER: I was going to say, that's  
8 what you need cooperation for. It takes three  
9 agencies to understand that.

10 MS. COPPOLA: Right.

11 MR. BANASEVIC: And there was another  
12 adjective there as well. But, anyway, for us, I mean,  
13 if you look at mergers and conduct, of course, we have  
14 an obligatory notification system in mergers, once you  
15 reach certain thresholds. I mean, you have to reason  
16 every decision whether it's a clearance of remedies or  
17 a prohibition. So there's no discretion as such in  
18 that sense. But, of course, there's great benefit in  
19 the cases that we're looking at more closely and we've  
20 got many examples that have been mentioned in terms of  
21 coordinating on the substance, on the timing, and, if  
22 appropriate, the remedies and the potential impact and  
23 how that might read across.

24 Where we have the discretion in terms of  
25 choosing which cases we do and which cases we don't,

1 with scarce resources that any public body has by  
2 definition, is a number of things, but not least the  
3 impact -- the potential impact in our market, in our  
4 jurisdiction. We're responsible for a jurisdiction of  
5 500 million people.

6 So I think it's likely if we believe that  
7 there is an issue in that market that we are going to  
8 want to look at it more closely, even if there are  
9 similar investigations going on or not around the  
10 world. So I think that's the first thing to say.

11 That being said, I think I understand as  
12 well the argument, particularly in the sector for  
13 which I'm responsible, the high-tech sector, companies  
14 operate globally, so the issue is raised, well, could  
15 you have different solutions in different  
16 jurisdictions? I actually think this risk of  
17 diversion is somehow overblown in terms of just  
18 perception. It's not that this is going around willy-  
19 nilly in every case in every sector. I think that's  
20 slightly a perception issue and, actually, more  
21 generally illustrates my core point in the benefits of  
22 really having up front, preemptively with partner  
23 agencies, discussions about the approach to be taken.

24 Again, it's not that one can or need  
25 guarantee precisely the same outcome, given the

1 differences possibly in even conduct. I mean, some of  
2 our markets are national for some of the products even  
3 if the companies are operating globally. But I think  
4 there is a great benefit in this up-front shaping,  
5 sharing thoughts to, to the extent possible, minimize  
6 the risk of divergences.

7 MS. COPPOLA: We have a question from the  
8 audience about the ongoing investigations of the tech  
9 platforms. The EC, the Japan Fair Trade Commission,  
10 are already investigating these firms. What's  
11 important to effectively investigate, including  
12 cooperation? Another question, what you can expect  
13 from the FTC, but as I'm not a speaker, but a  
14 moderator, I think I will punt that to what can you  
15 expect from the investigating agencies.

16 And, Nick, according to this week's  
17 Economist, you guys are the determinators. So I'm  
18 going to let you answer that question.

19 MR. BANASEVIC: Is that a type of actuator?  
20 A determinator?

21 MS. COPPOLA: There's these like big guns  
22 and, yeah, sledgehammers.

23 MR. BANASEVIC: I'm not allowed to say  
24 anything about ongoing cases, so --

25 MS. COPPOLA: Right.

1 MR. BANASEVIC: So what was the --

2 MS. COPPOLA: The question was, how can -- I  
3 think the question is, how can those agencies  
4 effectively investigate? What kind of joint --

5 MR. BANASEVIC: I think I have to go back to  
6 my examples from the past. I think that's the most  
7 instructive thing. I mentioned two. There have been  
8 others where in the US and in the -- particularly the  
9 same cases or the same issues have been looked at. In  
10 some, we've had waivers; in others, we haven't. I  
11 don't want to monopolize the last 2 minutes and 30  
12 seconds.

13 MS. COPPOLA: Right.

14 MR. BANASEVIC: It's really been of  
15 tremendous use. And it's my opening statement, it's  
16 not an add-on. It can really -- for these big cases  
17 where they're very important, sensitive, and you want  
18 to get it right, there's just a great benefit in  
19 sharing experiences, knowledge, with colleagues who  
20 have the same -- who want to get it right as well and  
21 get the best result. So it's a very good thing that  
22 we shouldn't have just as just a bolt-on.

23 MS. SCHAEFFER: Can I just add on to that?  
24 Maybe the Cooperation 2.0 for digital platform  
25 investigations is not necessarily between antitrust



1 agencies, but between antitrust agencies, consumer  
2 protection, and privacy agencies. Because -- and I  
3 think the term "forbearance" might come in there as  
4 well, in that not everything involving a digital  
5 platform is necessarily an antitrust issue.

6 And we certainly have a lot of intermeling  
7 of privacy and consumer protection concerns, as we see  
8 with the Australian ACCC report. And how do we  
9 jointly investigate those issues or maybe have  
10 antitrust not be the primary investigation and  
11 enforcement mechanism there?

12 MS. COPPOLA: We are very close to the end  
13 of the session. So I guess, Marcus and Jeanne,  
14 starting with you, and if there's time, we'll move on  
15 to Fiona and Nick. What are your last words of advice  
16 for the FTC in the area of enforcement cooperation?

17 MS. PRATT: I'm not sure I have advice. I  
18 think, as you've heard, I have found or we have found  
19 that gateway provision in our legislation to be  
20 particularly useful and, you know, it might be  
21 interesting to consider that in your context and  
22 whether it's appropriate.

23 And I would just want to lastly say thank  
24 you very much for having us here. I know the FTC can  
25 continue to rely on the Canadian Competition Bureau's

1 commitment to continuing to build upon the solid  
2 cooperation foundation that we have and in  
3 particularly dynamic fast-moving markets that we have  
4 today. I think the business case for cooperation is  
5 only getting stronger and will only get better from  
6 here.

7 MR. BEZZI: So I won't advise the FTC, but  
8 the advice that I'll give to the ACCC is that we need  
9 21st Cooperation and mutual assistance frameworks.

10 MS. COPPOLA: Thanks.

11 Nick, Fiona, anything to add?

12 MR. BANASEVIC; I've said it all, I don't  
13 want to repeat. I think it's don't underestimate it,  
14 use it, and benefit from the interactions and the  
15 knowledge you can have with colleagues.

16 MS. COPPOLA: Well, thank you all very much  
17 for your insights. These have been tremendous.  
18 Coming into the panel, I wasn't sure I would learn  
19 anything since I spend most of my day engaged in  
20 enforcement cooperation. But I did. So bravo.  
21 Thanks so much for participating. I think we'll move  
22 on to the next panel now.

23 (Applause.)

24 (Brief break.)

25

1       INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES:  
2                   ARTIFICIAL INTELLIGENCE CASE STUDY

3                   MS. WOODS BELL: Hello, everyone. Welcome  
4 back from break. I'm Deon Woods Bell. I'm a lawyer  
5 in the Office of International Affairs at the Federal  
6 Trade Commission. I'm so excited to be here today.

7                   It is my extreme pleasure to introduce Julie  
8 Brill. Julie is Corporate Vice President and Deputy  
9 General Counsel for Global Privacy and Regulatory  
10 Affairs at Microsoft. Of course, everybody in the  
11 building knows her as a former Commissioner and friend  
12 of the Federal Trade Commission. She's widely  
13 recognized for her work on internet privacy and data  
14 security issues related to advertising and financial  
15 fraud.

16                   She's received so many awards we could not  
17 list them all in her bio, nor could I enumerate them  
18 here today. One of my favorite is the Top 50  
19 Influencers on Big Data in 2015. And one of my  
20 favorite memories is working together with her in  
21 Brussels on these same issues.

22                   Thank you, and please welcome Julie.  
23                   (Applause.)

24                   MS. BRILL: Thank you, Deon. I remember  
25 that event, too, and it was great to work with you

1 there. And it's really an honor to be here today to  
2 contribute to today's important discussions on the  
3 FTC's international role in a world transformed by  
4 digital technology.

5 I am particularly excited to begin this  
6 session today that focuses on artificial intelligence.  
7 We have a truly distinguished panel, some of whom are  
8 -- here they come -- of experts from around the world,  
9 who will explore the implications of artificial  
10 intelligence at a time when innovative technology  
11 calls for innovative thinking about policy and  
12 regulation.

13 Today's discussion comes at a critical  
14 moment. During the past few years, how people work,  
15 play, and learn about the world has been transformed.  
16 Industries have been reinvented. New ways to treat  
17 diseases emerge almost every day. Driving all this  
18 change are groundbreaking technologies like cloud  
19 computing that enable us to collect and analyze data  
20 scale that has never before been possible. But what  
21 we have experienced so far is just the beginning.

22 Rapid progress in the field of artificial  
23 intelligence has delivered us to the threshold of a  
24 new era of computing that will transform every field  
25 of human endeavor. Already, almost without us

1 noticing, AI has become an essential part of our day-  
2 to-day lives. It powers the apps that help us get  
3 from place to place, predict what we might want to  
4 buy, and protects our systems from malware and  
5 viruses.

6           This is just a hint of what's possible.  
7 Artificial intelligence has the potential to improve  
8 productivity, drive economic growth, and help us  
9 address some of the most pressing challenges in  
10 accessibility, health care, sustainability, poverty,  
11 and much more. Yet, history teaches us that change of  
12 this magnitude has always come with deep doubts and  
13 uncertainty.

14           I believe that if we are to realize the  
15 promise of artificial intelligence, we must  
16 acknowledge these doubts and work to build trust,  
17 trust that technology companies are working not just  
18 to maximize profits, but to improve people's lives;  
19 trust that we use the personal data we collect safely,  
20 responsibly, and respectfully. But as we are learning  
21 the hard way, in the technology industry, trust is  
22 fragile.

23           In the wake of the Cambridge Analytica  
24 scandal and the spectacle of tech industry experts  
25 being hauled before Congress to answer for their

1 business practices, people wonder if technology and  
2 technology companies can be trusted. The truth is  
3 that technology is neither inherently good nor bad.  
4 Cloud computing and artificial intelligence are just  
5 tools that people can use to be more productive and  
6 effective, basically the equivalent of the first  
7 Industrial Revolution's steam engine. But it is also  
8 true that because technology has never been more  
9 powerful, the potential impact, both positive and  
10 negative, has never been greater.

11 So where does trust come from? It begins  
12 when companies like Microsoft, that are at the  
13 forefront of the digital revolution, acknowledge that  
14 in this time of sweeping change, we must consider the  
15 impact of our work on individuals, businesses, and  
16 societies. Today, we must ask ourselves not just what  
17 computers can do, but what they should do. This means  
18 there may be times when we have to be willing to  
19 decide that there are things that they should not do  
20 as well.

21 To guide us as we weigh these decisions at  
22 Microsoft, we have adopted six ethical principles for  
23 our work on artificial intelligence. It starts with  
24 transparency and accountability. We know that trust  
25 requires clear information about how AI systems work,

1 coupled with accountability for the people and  
2 companies who develop them. We believe strongly in  
3 the principles of fairness which means AI must treat  
4 everyone with dignity and respect and without bias.

5 Our fourth principle encompasses reliability  
6 and safety, particularly when AI makes decisions that  
7 affect people. We also are strongly committed to the  
8 principles of privacy and security, for people's  
9 personal information. And we believe that AI  
10 solutions should be built using inclusive design  
11 practices that affect the full range of experiences of  
12 all who might use them.

13 Now, while these principles are at the  
14 center of every decision we made about artificial  
15 intelligence research and development, we also know  
16 that the issues at stake are simply too large and too  
17 important to be left solely to the private sector.  
18 Trust also requires a new foundation of laws.

19 Here in the United States, right now, one  
20 area of the law demands our attention above all  
21 others. That area is privacy. Because so much of who  
22 we are is expressed digitally and so much of how we  
23 interact with each other and the world is captured and  
24 stored in digital form, how people think about privacy  
25 has changed. For more than a century, our

1 understanding of this most fundamental human right has  
2 been shaped by the definition set forth by the great  
3 American legal thinker and fathers of the FTC, Louis  
4 Brandeis, who defined privacy as the right to be let  
5 alone. That right will always be important. But, by  
6 itself, it is no longer sufficient.

7 Now, modern privacy law must embrace two  
8 essential realities of life in the digital age. The  
9 first is that people expect to use digital tools and  
10 technologies to engage freely and safely with each  
11 other and with the world.

12 The second is that people expect to be  
13 empowered to control how their personal information is  
14 used. Whether we protect these two things is one of  
15 the critical challenges of our time. What we need is  
16 a new generation of privacy policies that embrace  
17 engagement and control without sacrificing  
18 interoperability or stifling innovation.

19 This is why we were the first company to  
20 extend the rights that are at the heart of the  
21 European general protection regulation, and we  
22 extended those to our customers around the world,  
23 including the right to know what data is collected, to  
24 correct that data, and to delete it or take it  
25 somewhere else. And over the last year, we've seen



1 the rise of a global movement to adopt frameworks that  
2 enhance consumer control mechanisms modeled on those  
3 required by Europe's GDPR.

4 With participants here from India, Kenya and  
5 Brazil, this panel of distinguished guests is a  
6 perfect illustration of this important trend.  
7 Brazil's general data protection law, which goes into  
8 effect a year from now, includes provisions that  
9 extend new privacy rights to individuals and mandates  
10 new requirements for notification, transparency, and  
11 governance for organizations. All of these  
12 requirements that will be new in Brazil are tightly  
13 aligned with GDPR.

14 In India and Kenya, new privacy laws modeled  
15 on GDPR are also currently moving through the  
16 legislative process.

17 Here in the United States, the California  
18 Consumer Privacy Act includes provisions that give  
19 people more control over their data. And Washington  
20 State is considering legislation based on consumer  
21 rights protected by GDPR as well.

22 As part of Microsoft's commitment to  
23 privacy, we offer a dashboard where people can manage  
24 their privacy settings. Since May of last year, more  
25 than 10 million people around the world have used this

1 tool, with the number growing every day. I think it  
2 is telling that while millions of people around the  
3 world are using our tool, our data demonstrates that  
4 US citizens are the most active in controlling their  
5 data. All of this should serve as a wakeup call for  
6 US companies and the US Government.

7           At Microsoft, we believe it is time for  
8 United States to adopt a new legal framework for  
9 access and use of data that reflects our new  
10 understanding of the right to privacy. To achieve  
11 this, I believe a strong US framework -- frankly, a  
12 strong privacy framework anywhere in the world --  
13 should incorporate four core elements, transparency  
14 through robust standards that include and appropriate  
15 privacy statements within user experiences, individual  
16 empowerment that grants people meaningful control of  
17 their data and privacy preferences, corporate  
18 responsibility that is built on rigorous assessments  
19 that weigh the benefits of processing data against the  
20 risk to individuals whose data may be processed, and  
21 strong enforcement and rule-making. And, here, that  
22 means in the United States that should be all embedded  
23 at the US Federal Trade Commission.

24           While updated privacy laws are essential to  
25 building trust, new uses for artificial intelligence

1 are emerging that will require special consideration  
2 for their own specific regulations. Facial  
3 recognition is a prime example. This technology has  
4 shown that it can provide new and positive benefits  
5 when used to identify missing children or diagnose  
6 diseases. But there is a real risk that -- there is a  
7 real risk which includes the danger that it will  
8 reinforce social bias and be used as a surveillance  
9 tool that encroaches individual freedom.

10 This is why Microsoft has called on the US  
11 Government to regulate facial recognition with a focus  
12 on preventing bias, preserving privacy, and  
13 prohibiting government surveillance in public places  
14 without a court order. It is also one of the reasons  
15 we have testified in support of the Washington State  
16 privacy bill, which includes provisions that address  
17 many of these important concerns about facial  
18 recognition technology.

19 We need laws that place appropriate  
20 guardrails to ensure that companies don't take unfair  
21 advantage of individuals or violate people's  
22 fundamental rights. That is the essence of trust. We  
23 believe that guardrails can be designed in ways that  
24 facilitate global interoperability and promote  
25 innovation so we can all work together to continue to

1 harness the potential of the digital revolution to  
2 improve people's lives and drive economic growth.

3 This will require a commitment from all of  
4 us to engage in ongoing discussions and consultations  
5 that span governments and sectors. This means it's  
6 essential for the US Government and its agencies,  
7 including the FTC, to engage in a broad range of  
8 discussions with other governments on digital issues  
9 like we are doing with the honored guests here today.

10 Just as important are gatherings like this  
11 that will bring people together from around the world  
12 to explore policy approaches to new emerging  
13 technologies like artificial intelligence. More than  
14 100 years ago, when Brandeis defined the right to be  
15 let alone in his famous Law Review article, *The Right*  
16 *to Privacy*, he described, with great eloquence, the  
17 ongoing process by which rights evolve as humanity  
18 progresses and how the law adopts and adapts in  
19 response.

20 "Political, social, and economic changes  
21 entail the recognition of new rights," Brandeis wrote,  
22 "and the law in its eternal youth grows to meet  
23 demands of society." Brandeis was moved to write this  
24 article because of the impact of photography,  
25 mechanical printing presses, and other disruptive new

1 technologies of his time.

2 Today, we stand at the beginning of a new  
3 era of disruption and change, a time of technology-  
4 driven transformation that will require the  
5 recognition of new rights and the development of new  
6 laws to meet the demands of our societies. It's a  
7 task that will ask us to convene in hearings like this  
8 one and in forums, meetings and conferences around the  
9 world to grapple openly and honestly with a host of  
10 issues that will touch on virtually every aspect of  
11 our lives and our businesses.

12 We, at Microsoft, look forward to being a  
13 part of these conversations and to working in close  
14 partnership with all of you to make sure that  
15 technology moves forward within a framework of respect  
16 for human dignity and with the goal of serving the  
17 greater good. Thank you.

18 (Applause.)

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1 INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES:

2 ARTIFICIAL INTELLIGENCE CASE STUDY (PANEL)

3 MS. WOODS BELL: Thank you. Thank you very  
4 much, Julie, for those remarks. You outlined very  
5 well the tremendous potential of AI and that's one of  
6 the reasons why we're here today, to discuss them even  
7 further.

8 Well, I'm still Deon Woods Bell. And my co-  
9 moderator here is Ellen Connelly, an Attorney Adviser  
10 in the Office of Policy and Planning. And, together,  
11 we want to welcome you to our panel on international  
12 engagement and emerging technologies focusing on  
13 artificial intelligence.

14 You're in for a treat. As Julie described,  
15 we have quite a panel assembled for you here today.  
16 This session is a follow-on to the hearings in  
17 November, which focus on the same topic. And  
18 following the November meetings, colleagues here at  
19 the FTC -- and a lot of influence from Ellen here --  
20 said we should go deeper, we should focus on  
21 international issues. So today, we're thrilled to  
22 have this impressive group of international officials,  
23 practitioners, and academics here and on the line from  
24 Harvard.

25 During this panel, we'll touch upon a

1 variety of issues and we'll go deeper and let you see  
2 what these colleagues have to offer. We won't go into  
3 great detail on their bios, but we couldn't resist  
4 showing off a little bit for you and letting you know  
5 who they are.

6 On the line from Harvard is Chinmayi Arun.  
7 She's a fellow at the Harvard Berkman Klein Center for  
8 Internet & Society, and she's the Assistant Professor  
9 of Law at the National Law University in Delhi. Her  
10 chair is there and her picture will soon be on the  
11 line as she can hear us right now.

12 Next, we have, again, he's still James  
13 Dipple-Johnstone. You saw him earlier. He's a Deputy  
14 Commissioner from the UK's ICO, and prior to the ICO,  
15 he was in the Solicitor's Regulatory Authority where  
16 he had been Director of Investigation and Supervision,  
17 and he's not from the ministry of no.

18 (Laughter.)

19 MS. WOODS BELL: Next, Francis Kariuki,  
20 Director General of the Competition Authority of  
21 Kenya. Mr. Kariuki is the founding member and the  
22 current Chairman of the African Competition Forum.  
23 He's also an expert in FinTech.

24 Next over to Marcela. She's a partner at  
25 VMCA Advogados in Brazil focusing on data protection

1 and antitrust. She's served as Advisor and Chief of  
2 Staff for the President of Brazil's famous CADE.

3 Over to Isabelle. She's President and  
4 Member of the Board Autorité de la Concurrence, as she  
5 was previously the President of the Sixth Chamber of  
6 the Conseil d'État, the French Supreme Administrative  
7 Court, and other governmental capacities.

8 And last but not least, we have Omer Tene.  
9 Omer is a Vice President and Chief Knowledge Officer  
10 at the International Association of Privacy  
11 Professionals. He wears so many hats, we couldn't  
12 list them either. He's an Affiliate Scholar at  
13 Stanford and Senior Fellow at the Future of Privacy  
14 Forum.

15 So, before we get started, we want you to be  
16 open to looking to questions. We have our colleagues  
17 here. We're going to have short introductory comments  
18 from each colleague, and then after this, we'll have a  
19 moderated panel discussion, and we hope that you  
20 enjoy.

21 MS. CONNELLY: Great. So I will start us  
22 off by giving each of our panelists a chance to make a  
23 brief introductory statement to describe for us the  
24 key competition, consumer protection and privacy  
25 issues that they see emerging around the artificial



1 intelligence field. We will start with Chinmayi.

2 MS. ARUN: Thank you for having me. It's  
3 such an honor to be a part of this panel, and I'm  
4 happy to see that the FTC is listening to voices from  
5 around the world.

6 If I were to give you the three or four big  
7 highlights of how I would think about AI and the right  
8 to privacy in data sets in India, it would be -- the  
9 first would be in terms of global companies, usually  
10 American companies, operating in India versus Indian  
11 companies operating both in India, as well as  
12 elsewhere in places like Kenya.

13 The second would be in terms of data  
14 because, as you know, it's a very big country and it  
15 provides large and rich data sets that can be  
16 complicated in ways that I'm going to describe to you  
17 shortly.

18 The third is that perhaps some of you have  
19 heard that there has been a rich and, again,  
20 contentious conversation about the right to privacy in  
21 India in the context of state surveillance, but also  
22 in the context of state protection. So we've had a  
23 major case on the right to privacy, and we've also got  
24 a data protection bill, which is very interesting, so  
25 I'm going to describe the highlights of that for you.

1           And the final -- because we're discussing  
2 this in such an international context is this sort of  
3 almost a clash of jurisdictions that arises from the  
4 Indians, for example, floating proposals of data  
5 localization in certain contexts, but also the ways in  
6 which India is coping with norms that are emerging  
7 from the US and from Europe.

8           So the first is very simple, which is that  
9 as you know the major technology platforms, like  
10 Facebook and WhatsApp and Google, are used extensively  
11 in India and they have huge user bases in India, but  
12 there are also many Indian citizens that access them  
13 and have their data on them. Although I will focus a  
14 little bit more on the information platforms, it's  
15 good to know that Airbnb, Uber, and other technology  
16 platform companies are also offering services in  
17 India.

18           So our legislation, our new privacy act, our  
19 proposed amendment to our information technology act  
20 are all coping now with the very real idea that there  
21 are many Indian citizens whose lives are affected by  
22 these technologies that are designed elsewhere based  
23 on rules from elsewhere. At the same time, they're  
24 also trying to keep Indian companies competitive  
25 because there are Indian companies offering similar

1 services in India.

2 Our NITI Aayog, which is sort of our version  
3 of the planning commission, has described India as the  
4 AI garage for 40 percent of the world, and they've got  
5 a strategy paper on AI. As you know, the big data set  
6 question, it's complicated because, again, India is  
7 looking at it as a way towards machine learning, but  
8 there are also concerns of data protection and privacy  
9 that arise in that context.

10 And the big tension really is that, on one  
11 hand, the policymakers want to leverage this and have  
12 this data and sort of learn from it and, on the other,  
13 of course, there's the question of the privacy rights  
14 of Indian citizens and especially of marginalized  
15 citizens, people who are not able to assert their  
16 rights in the consumer forum.

17 And the final -- so none of this is law yet,  
18 but both in the proposed privacy legislation and in  
19 the proposed IT amendment act, the question has arisen  
20 of whether foreign companies with a sizable user base  
21 in India should be asked to localize data in India.  
22 So both these proposed legislations have suggested  
23 that these companies might be made to host their data  
24 sets in India, and I think that that also is cause for  
25 concern if they're thinking about it from a privacy

1 and data protection point of view.

2 I'm going to stop here. I just wanted to  
3 flag all of this in case anyone has questions later.  
4 Thank you so much.

5 MS. CONNELLY: Thank you very much for those  
6 really interesting comments.

7 We'll move down the line and next up is  
8 James.

9 MR. DIPPLE-JOHNSTONE: Thank you very much  
10 and thank you. It's an honor to be here on this panel  
11 with you today.

12 So I've got four issues. And I think the  
13 first, which has already been very ably covered, which  
14 is that about public trust and the risk of losing  
15 public trust in the rollout of AI systems and the role  
16 of regulators needing to work together both within  
17 country, but also internationally, which is my second  
18 theme.

19 This is an emerging area, one where I don't  
20 think we still have a clear picture of what AI's  
21 impact on our societies will be. And with that in  
22 mind, it's important that regulators keep themselves  
23 up to date, keep relevant and work together with  
24 others. And that's very much the approach we've taken  
25 in the UK. The ICO has a remit in some of the

1 technology, but actually, we work very closely with,  
2 for example, colleagues at the Competition and Market  
3 Authority, the Financial Conduct Authority, the Center  
4 for Data Ethics and Innovation and the Alan Turing  
5 Institute to look at the common issues that face us  
6 all and how we can improve our regulation.

7           An important third issue is to look at not  
8 only whether the data's held -- and when we talk about  
9 big data sets, we sometimes think of the big tech  
10 companies, but in the UK context, the state has large  
11 and valuable data sets, too. The UK National Health  
12 Service and the UK Education Service have very  
13 comprehensive data sets with millions of data points,  
14 which would be of value to a number of organizations  
15 around the world.

16           And we are seeing increasing use of AI in  
17 the public sector as a model of efficiency and to help  
18 us all strive to meet our budget considerations. AI  
19 is being looked at for use to decide whether UK  
20 citizens are likely to commit crimes, which crimes  
21 should be investigated, who's likely to reoffend,  
22 who's likely to pay their rent on time. And that is  
23 beginning to introduce issues of fairness,  
24 accountability, and transparency.

25           And so that's why, as a regulator, we are

1 really keen to keep abreast of developments. So we  
2 are putting a lot of effort into doing that. We are  
3 recruiting post-doctoral researchers to help us look  
4 at how to regulate AI. We've taken new powers to  
5 examine AI's use and look at AI systems in practice  
6 and in operation and we've reconfigured the office to  
7 set up an entire part of the office that will just  
8 focus on innovation and technology.

9 I said it this morning; I'll keep saying it.  
10 We're not the ministry of no, but we think the GDPR  
11 provisions around data protection impact assessments  
12 and our work around, for example, regulatory sand  
13 boxes and innovation hubs with other regulators.  
14 We're trying to encourage early dialogue to tease  
15 through some of these issues together, because I'm not  
16 sure any one of us has the perfect answer for all the  
17 scenarios.

18 MS. CONNELLY: Thank you.

19 Francis?

20 MR. KARIUKI: Thank you, Ellen and Deon.

21 It's a pleasure for me to be here and to share my  
22 thoughts in regard to AI.

23 And my view is as a competition and consumer  
24 protection regulator, what am I worried about? And I  
25 have about four issues, and these are transparency and

1 information asymmetries. What I would like to say is  
2 that AI has both created positive and external --  
3 externalities. And in terms of competition and  
4 consumer protection, there's an argument which has  
5 been found that they bring more efficiency in terms of  
6 prices and greater transparency compared to the  
7 traditional retail sales channels, and this is an  
8 inquiry which has been conducted in Europe and it has  
9 shown that. And, also, they provide additional  
10 benefits on these platforms. For example, AI  
11 [indiscernible], such platforms could improve choice  
12 and value for consumers.

13           However, the other challenge of -- an  
14 encountered challenge in regard to we don't appreciate  
15 the criteria behind the decisions of AI, they are only  
16 known to the designer of these systems, and,  
17 therefore, the merchant or the consumer may not be  
18 aware of how the system has been created and it's  
19 allocating the prices. So there's the risk of  
20 intentional design of the systems in favor of certain  
21 participants in the market.

22           And this could be quite catastrophic in the  
23 continent I come from where there's a lot of market  
24 concentration, and, therefore, the companies which are  
25 in Africa then can expand their space by being biased

1 against the consumers in Africa.

2 The other areas that's also barriers or  
3 pathways to entry are, in Kenya, I've seen some  
4 positive externalities especially AI has enabled new  
5 innovations, where in Kenya we have seen recent  
6 expansion of financial services for people who are not  
7 included in the financial services. And, therefore,  
8 companies have been enabled to expand financial  
9 services through lending positions for previously  
10 people who were not captured in the financial services  
11 and also in the insurance sector.

12 The challenge I see also from the AI is the  
13 line between open and proprietary data. AI often  
14 creates what is called, in fair data, an individual  
15 that is not perhaps -- not factual but opinion based,  
16 and, therefore, we may not get an optimal position for  
17 the product which is being offered or the prices which  
18 are being offered in the market. And, therefore, the  
19 challenge going forward is how do we determine data  
20 which is a product and which data is an input, and  
21 this choice of where the line is will have significant  
22 competitive implications as we move.

23 Besides information asymmetry, I've seen AI  
24 can also be used in consumer protection issues,  
25 discrimination based on other social issues like the



1 region where people come from or even race, as I had  
2 mentioned earlier, and these are some of the things  
3 where we need, as regulators, both competition and  
4 consumer, to look before we fly, because right now is  
5 that we are flying blindly and we might be flying into  
6 a storm.

7 MS. CONNELLY: Thank you.

8 Marcela?

9 MS. MATTIUZZO: So first of all, thank you,  
10 Deon and Ellen, for the invitation for the FTC, to you  
11 both for inviting me personally, but also Brazil to be  
12 a part of this discussion.

13 A lot of the points that have been raised  
14 here focus on procedural challenges of AI. What I  
15 would like to also mention is perhaps the difficulty  
16 in both attaining international convergence in these  
17 topics, not necessarily laws that are exactly the  
18 same, but that point in the same direction, and also  
19 convergence within the many fields of law that are  
20 connected to AI.

21 So here, at the FTC, we're naturally  
22 discussing antitrust, consumer protection, and  
23 privacy. And even when we're speaking only of these  
24 three areas of law, we can already see that sometimes  
25 the objectives of these policies are not always

1 totally convergent.

2           So, what I would like to -- just to give an  
3 example, I guess, that is comparing privacy and  
4 antitrust that to me is very clear. What technology  
5 has enabled today is for many companies to  
6 unilaterally access information and AI has also  
7 allowed that information, this data, to be combined  
8 and used efficiently for many purposes. So now we can  
9 know who bought something, how that person bought it,  
10 and so forth, and create, for example, consumer  
11 profiles.

12           Perhaps from an antitrust point of view, one  
13 of the solutions to a potential problem of unilateral  
14 abuse of this information would be to share the  
15 databases with other companies. So we would have many  
16 companies that have the access to the same set of data  
17 and, therefore, of course, we can have problems of  
18 collusion. But leaving that aside, we would have a  
19 level playing field.

20           If, however, we look from the consumer or  
21 data protection side of the discussion, we may come to  
22 a very different conclusion. And we may come to  
23 realize that, perhaps, consumers don't want their data  
24 shared across different platforms and shared across  
25 many companies. So, naturally, both objectives

1 pursued by either antitrust or privacy and consumer  
2 protection agencies, in the case of Brazil  
3 specifically as I hope to make clear throughout my  
4 interventions, we are at very different development  
5 stages. When it comes to antitrust and consumer  
6 protection, we are much more developed and, as you may  
7 be aware and former Commissioner Julie Brill already  
8 mentioned, in regards to data protection legislation,  
9 our specific legislation was approved just last  
10 August, August 2018, and has not yet come into force.

11 So building policy that brings all of these  
12 areas of law together in a coherent fashion to address  
13 AI challenges seems to me to be a particularly  
14 important goal and a particularly important topic for  
15 us to focus on.

16 MS. CONNELLY: Thank you, Marcela.  
17 Isabelle?

18 MS. DE SILVA: Thanks a lot to the FTC for  
19 the invitation. I'm really glad to be here.

20 I would like to say that, for me, the main  
21 point is that we think data, artificial intelligence,  
22 algorithm, are really key to the competitive process  
23 and that is why we must look at it closely. Of  
24 course, those processes affect also the way the state  
25 is being run. They also affect and they change

1 society, but for us, the main issue is how do they  
2 affect the competitive process and the way companies  
3 do business?

4 So what we see is that we really need to  
5 invest a lot more than before in understanding what is  
6 going on in the market, in the companies, and also to  
7 use all our different tools, legal tools, to gain a  
8 better understanding and also to give better vision to  
9 the market, and I will try to illustrate this with  
10 some examples.

11 So first of all, we use sector inquiries.  
12 That is a tool that is common among agencies. But how  
13 do we use it? We really take a lot of time to  
14 understand a specific market that we deem to be  
15 interesting or a process. So that's what we did with  
16 online advertising last year, and, of course, we had  
17 very interesting dialogue and followup with Australia,  
18 who has finished a very interesting report on online  
19 advertising.

20 And in this way, we get a lot of information  
21 from companies. They are sometimes reluctant to give  
22 information, but we have the legal framework that  
23 enable us to get a lot of information. And also we  
24 give information back to the market. I think this is  
25 really something interesting because some sectors are

1 moving so fast that even the companies engaging in the  
2 sector don't always have the big picture, and that is  
3 something that has been deemed very useful in the  
4 field of what we did about programmatic advertising  
5 and the way it's being run because it's a very complex  
6 and new ecosystem.

7 Another type of tool we are using very much  
8 is the joint studies with other agencies. That's what  
9 we did with the CMA about closed ecosystem in 2014,  
10 what we did with the German agency in 2016 about big  
11 data, and what we are doing right now about algorithm  
12 still with the German agency.

13 So what is the interest of this? It's  
14 really to show the impact we see that algorithms have  
15 on the competitive process and maybe I will tell about  
16 a little bit more about this later. This is really  
17 something where we draw about, of course, what the  
18 experts have written about algorithm, but also in a  
19 very practical manner how do companies use algorithm  
20 and how does it change the way they do business in the  
21 market?

22 And, finally, another tool that we use is  
23 the conference or hearings like you have today at the  
24 FTC, but really focusing on what is new, for example,  
25 in the field of algorithm. Last year, we had lots of

1 meetings with scientists, sociology experts about what  
2 is new about algorithm and also about companies. For  
3 example, we had meetings with Google and Facebook to  
4 know how they use algorithm in a very precise and  
5 detailed matter to help us to understand how it's  
6 being used.

7           And what we are setting up as of this year  
8 is a new program with those new issues that we want to  
9 know more about and the first meeting will be in April  
10 about blockchain, all those new concepts where we  
11 really want to know what is the deal and is it  
12 something new for us to know.

13           And maybe on a final note, I completely  
14 agree with what has been said about the fact that  
15 competition has a lot of points of contact with other  
16 fields of the law, for example, privacy law or  
17 consumer protection. And that is why we have set up a  
18 special program of acting as a platform between the  
19 different regulatory agencies. So we have set up a  
20 process where we meet regularly with the chair of the  
21 privacy regulator, the telecommunication regulator,  
22 the media regulator, and we set up for the first time  
23 a joint program about, for example, data or home  
24 assistant and to give a global view from the point of  
25 view from competition, privacy and media and

1 telecommunications. So this enables us to interact  
2 better also with the government that is thinking about  
3 changing the law.

4 And, of course, on the final note, I  
5 completely agree that on those topics, we have lots of  
6 international discussions within the European  
7 Competition Network that has set up a new digital  
8 working group within the OECD, within [indiscernible],  
9 within ICN. So obviously, the different meetings that  
10 we have about algorithm, big data, they also give us  
11 input.

12 And maybe the final note is, how does those  
13 algorithm artificial intelligence change enforcement?  
14 This is something that is still, I think, to be  
15 complete because I'm not sure that today artificial  
16 intelligence plays such a big role in the way  
17 enforcers do their job, but maybe tomorrow it will and  
18 we will also have some new tools to use. Thank you.

19 MS. CONNELLY: Thank you.

20 But last, but definitely not least, Omer.

21 MR. TENE: So I want to try to highlight two  
22 issues that I think are significant challenges, novel  
23 challenges, with regulating AI. The first that comes  
24 to mind is the challenge of governing technology that  
25 even its creators can't fully explain. So it's the

1 black box issue, the explainability, transparency  
2 problem.

3           Some regulatory frameworks answered this by  
4 requiring to insert humans into the decision-making  
5 process. So, if you look at GDPR Article 22, it does  
6 just that and, in fact, it continues from the data  
7 protection directive that had a similar provision in  
8 this respect.

9           However, I think the human machine interface  
10 issue is more nuanced and complicated than that. And  
11 I hate to use a harrowing example, but the recent  
12 accidents with the Boeing 737 Max planes, at least  
13 according to what was revealed in the press, in the  
14 media, implied that it was a human-machine interface  
15 problem. So the pilots tried to wrest control from  
16 the auto pilot, the machine, and there was a problem  
17 with that transition. And the result, of course, was  
18 catastrophic.

19           Now, these cases involved one plane. With  
20 AI, we think of entire cities that will be ecosystems  
21 that are governed by AIs or you can think of  
22 militaries that use AI. And then, of course, the  
23 implications can be profound. I read somewhere just  
24 this past week that some of the auto makers are  
25 actually struggling with this issue and they're



1 considering skipping semi-autonomous vehicles and just  
2 going to fully autonomous vehicles. I can tell -- you  
3 know, attest to this myself that when I use auto pilot  
4 assist and adaptive cruise control, you tend to be  
5 more passive. Your foot moves away from the brake  
6 and, you know, it's not good.

7           So I think this challenge can have  
8 disturbing implications when you think of criminal  
9 sentencing software, medical applications. When do  
10 you insert humans and how do you manage that  
11 interface?

12           The second issue I wanted to highlight is  
13 privacy. Julie mentioned Warren and Brandeis' article  
14 back in 1890 was a response to the handheld camera,  
15 and we know many times frameworks were actually  
16 crafted as a response to a technological development.  
17 Allen Weston was a response to databases. I think we  
18 need to ensure that privacy law actually responds to  
19 the new challenges of big data and AI.

20           And it's interesting that just in this  
21 panel, just the last few speakers represent laws from,  
22 I think, 1978 in France and 2018 in Brazil. So 40  
23 years apart, but the framework is still very similar.  
24 It's very individualized. It's based on individual  
25 control. It's still the Allen Weston principles and

1 individual choice and even the concept of  
2 identifiability, which is very central to the data  
3 protection frameworks currently in the world. But  
4 with data mining and different AI models, it's  
5 oftentimes not -- no longer about you and your privacy  
6 and the individual and the identity, but about people  
7 like you and lessons that are drawn from groups and  
8 then applied with particular rised implications for  
9 individuals.

10 So I think we need to start thinking about  
11 group privacy and not necessarily individual privacy.  
12 And there the concepts of individual choice and  
13 consent and even the identification no longer  
14 necessarily protects us.

15 One example is the recent Stanford study of  
16 identifying sexual orientation based on facial  
17 recognition technologies. Even if you don't belong to  
18 the group that was assessed for the model, the model  
19 can have implications for you. Thank you.

20 MS. CONNELLY: Thank you.

21 I just want to make a brief programming  
22 note. We had some trouble with the phone line. And  
23 so, unfortunately, Chinmayi had to leave the  
24 conversation. But we're hopeful we will still be able  
25 to get her thoughts on some of these important issues

1 through some other mechanism.

2 Thank you to all of my panelists for those  
3 very interesting introductory comments. Deon and I  
4 will drill down into some of the points that you have  
5 made. But before we do that, I just wanted to check  
6 in and see if anyone wants to take a minute or two to  
7 respond to anything that's been said or to sort of ask  
8 a question of your copanelists. If you do, raise your  
9 hand.

10 MS. WOODS BELL: Don't be shy.

11 MS. CONNELLY: Okay. Seeing no raised  
12 hands, we'll move on to the rest of the Q&A.

13 MS. WOODS BELL: Well, I mean, we have an  
14 opportunity throughout our conversation to try to  
15 weave in some of your thoughts. You've put so much on  
16 the table. You talked about public trust, fairness,  
17 accountability, and transparency. Permeating through  
18 all of these conversations, or at least two of them,  
19 were analogies to planes. So we want to make sure  
20 that we soar and not crash. We want to try to get  
21 this so that we can get our arms around it.

22 I think it was really interesting to hear  
23 from Isabelle, and she outlined the responsibility of  
24 the regulators to do research and then to give it back  
25 to the public. And I think that's provocative. So

1 we'll go to the question that's next on the table,  
2 which is, indeed, about research.

3           Isabelle, since you put that so eloquently,  
4 maybe you want to come back to the algorithm study,  
5 and then we'll go next to another colleague to talk  
6 about more research because there's so much going on.

7           MS. DE SILVA: Thank you so much. Maybe to  
8 comment on why we decided to launch this project,  
9 there was some debate because I remember one member of  
10 the team of economists was saying, well, you already  
11 have so many academics writing about algorithm. Will  
12 it add anything if the agency does something about  
13 algorithm? And I answered, well, this would be the  
14 point of view of the agencies. So it's not the same  
15 point of an academic and, of course, we will rely a  
16 lot on all the academic writing, but still this will  
17 be the vision of the French agency and the German  
18 agency.

19           So I would like to give you maybe some  
20 points that we will be dealing with in the study that  
21 hopefully will be released around summer. First, we  
22 will try to make a picture of the different types of  
23 algorithm that are being used today in the field of  
24 the economy and, of course, I think the fact that the  
25 state is using them a lot is incredibly important and

1 this is something that must be kept into mind.

2 In France, there was a huge debate about a  
3 very famous algorithm that is being used to decide the  
4 university you'll be able to join. So there is one  
5 big algorithm all over the country. So you cannot pay  
6 anybody to further the result.

7 (Laughter.)

8 MS. WOODS BELL: Oh, that's a low blow,  
9 Isabelle. That's a really low blow.

10 (Laughter.)

11 MS. DE SILVA: Or you have to be very clever  
12 in doing it.

13 (Laughter.)

14 MS. DE SILVA: And so it's real interesting  
15 because this algorithm is known in all the different  
16 families in France because so much depends on this  
17 algorithm. So only a side note about how incredibly  
18 important algorithm can be for the decision that are  
19 being done today.

20 And so, first, we will try to define what an  
21 algorithm is and what are the main types of algorithm  
22 that are interesting from a competition point of view.  
23 So we will, of course, deal with the issue of  
24 collusion. Why is collusion being linked  
25 so much to algorithm? And we will try to show in a

1 very practical manner the different scenarios where  
2 you can have a anticompetitive practice linked with  
3 algorithm.

4           So in some ways you have very traditional  
5 anticompetitive practices in which algorithm are only  
6 facilitating. For example, the agreement about  
7 setting a price. Then you have new types of collusion  
8 that are being driven by algorithm and that may  
9 involve third parties. So this is something that is  
10 quite new. And, finally, the thing that is the most  
11 new is the fact where you can have some form of tacit  
12 collusion that is being driven by the algorithm  
13 without any type of formal decision by the humans  
14 around the algorithm.

15           After that, we will deal about the new  
16 practical challenge that we face. How do we detect  
17 the algorithm that are problematic? The new legal  
18 challenges. How do you condemn an algorithm? Do we  
19 need to change, for example, the burden of proof?  
20 There was this phrase that I liked that Margrethe  
21 Vestager used about conformity by design. So for  
22 example, will we be able to ask companies to prove  
23 that their algorithm complies with competition law?

24           And in that framework, I think that the  
25 Google shopping decision is really an extremely

1 important one because you can see that, in this case,  
2 the European Commission really used an effects-based  
3 approach. In the decision, you don't have pages and  
4 pages of analysis of the algorithm that was used by  
5 Google, but you have a very detailed analysis of the  
6 effects that the new algorithm that had been used by  
7 Google in the Google shopping service, how did it  
8 affect the result pages? So the analysis is very  
9 concrete. Of course, the Commission had to analyze a  
10 lot of data. But this is an interesting example for  
11 me that is one of the key decision when you have an  
12 interest on the algorithm.

13 So I will stop there. I hope you will be  
14 reading the report with a lot of interest when it is  
15 finally done.

16 MS. WOODS BELL: Thank you. Thank you very  
17 much. Why don't we go over to Marcela because she  
18 also has interesting research to explore with us.

19 MS. MATTIUZZO: Yes. So as I mentioned  
20 earlier, Brazil is in a different stage regarding data  
21 protection. So we don't have yet an agency that is  
22 doing any research on this topic. However, both our  
23 antitrust and our consumer protection legislation are  
24 much more developed. And CADE is currently, for  
25 example, engaged in a specific study about the digital

1 economy, which is not focused on AI, but it's focused  
2 on the digital economy all together and also working  
3 together with the BRICs. The BRICs are conducting a  
4 study on the digital economy. So, that's something to  
5 look forward to that will hopefully shed some light on  
6 this topic.

7           What, however, I believe should be said,  
8 given that Brazil is a developing country, and  
9 Isabelle mentioned this impact on consumers,  
10 specifically when we speak of state use of algorithms,  
11 is that, in regards to any public use of algorithms  
12 for decisions that affect public utilities in Brazil,  
13 which is something that is coming, though it's not so  
14 widespread right now, the impact on the consumers will  
15 be severe. And because our data protection alleges  
16 legislation is so new, it's very important for that  
17 aspect to be highly considered in how these mechanisms  
18 are designed. A lot of the discussion about credit  
19 scoring that is happening in Brazil right now, though  
20 credit scoring in Brazil is largely private, has this  
21 in mind.

22           So Brazilian Congress last week approved a  
23 change in our credit scoring legislation. The  
24 Brazilian system before was known as the opt-in model.  
25 So you had to specifically say, okay, I want to be



1 added to this database in order to be part of it. And  
2 now, the big change was -- one of the big changes was,  
3 it's an opt-out model. You will be included from the  
4 outset. And some research has started to see what the  
5 effects of this change will be for the database. Just  
6 so you have an idea, currently, there are around 11  
7 million people in the database, which for a country  
8 that has over 200 million people is a very small  
9 number. So that number should increase and,  
10 therefore, the impact on the population as well,  
11 access to credit, and so forth.

12 So some research has already been conducted.  
13 There is an English version of the [indiscernible] ITS  
14 Rio study on credit scoring in Brazil already  
15 available. And an update should be in the works for  
16 this coming year, given this modification that I just  
17 mentioned in the credit scoring legislation. So I  
18 think these are some of the most important  
19 developments so far. And in Brazil, certainly, the  
20 big impact of big data mergings, as it's called by  
21 some researchers, should be important for research in  
22 the coming years.

23 MS. WOODS BELL: Thank you. That's  
24 certainly impressive and also very much of relevance  
25 to the work we do at the FTC and our work in the

1 credit space.

2 James, you mentioned something about you  
3 transforming your agency based on some of your  
4 research. So we hope you'll be kind enough to share  
5 some nuggets of wisdom.

6 MR. DIPPLE-JOHNSTONE: Sure, sure. You can  
7 judge whether they're wisdom or --

8 (Laughter.)

9 MS. WOODS BELL: I really am hoping they're  
10 wisdom. I'm confident they're wisdom.

11 MR. DIPPLE-JOHNSTONE: In terms of this  
12 space in research, our viewpoint is that we see that  
13 it's a key role of an authority like ours to help  
14 inform and educate. We work with organizations to  
15 achieve compliance rather than followup and enforce.

16 So our research really sort of falls into  
17 three broad categories. The first is what we describe  
18 within the office as lifting the curtains. So a good  
19 example of that was our investigation into the  
20 political use of data and data analytics where we're  
21 explaining to our citizens how these data sets are  
22 used, how they're combined, what the practical  
23 implications of those might be. And, similarly, we're  
24 looking at the role of data brokers at the moment.

25 The second is sort of establishing as if it

1 were the state of art. So what is the nature of the  
2 technology? How is it being deployed? What are the  
3 issues that are coming up? And a good example that  
4 we've told -- you know, made public in terms of our  
5 investigation is looking at the issue of use of facial  
6 recognition technology by police forces in the UK.

7           We have 43 police forces in the UK. I know  
8 that's a lot less than you have in the United States.  
9 But the risk is we have 43 different approaches, 43  
10 different uses of technology, 43 different governance  
11 rules that go with that technology. And the forces  
12 themselves are saying to us, help us understand what  
13 works and what doesn't work here. So we've been  
14 supervising some of the police deployments of facial  
15 recognition.

16           And the third is developing the regulatory  
17 tools, and this is where we have colleagues who have  
18 joined us from Oxford University, Reuben Binns, to  
19 help us understand how a good regulator would audit an  
20 AI system, this sort of how do you hold the machine to  
21 account? How do you examine the machine? How do you  
22 deal with the black box issue in terms of  
23 explainability?

24           And as part of that, as well as bringing  
25 people in, we also have an ongoing research and grant

1 program. And as I mentioned where we're working with  
2 a range of other regulators who are also grappling  
3 with these issues because we think it's probably a  
4 common solution rather than something that we'll dream  
5 up ourselves.

6 MS. WOODS BELL: Thank you. You covered a  
7 lot of terrain there.

8 Because you mentioned the research in the  
9 universities, I wonder if we might pivot to Omer.  
10 He's done a lot of research both with university and  
11 outside. Maybe you can come in there and then we'll  
12 round out with Francis after you give us your input.

13 MR. TENE: Yeah, thanks. So some research  
14 that I was involved in that's relevant here is there's  
15 recognition, I think, that just complying with laws  
16 isn't enough when we're dealing with technologies that  
17 push the envelope and innovate and create new  
18 realities really. And Julie mentioned in her talk  
19 that we need to think of not just what is possible,  
20 but what should be done and what's ethical.

21 So we've looked at trying to transform the  
22 institution of IRBs, institutional review boards, that  
23 exist in academic universities and research  
24 institutions to assess ethics of human subject  
25 research, trying to convert them to data review boards

1 that look at new innovative data uses or projects or  
2 products under ethical principles as opposed to just  
3 the law.

4 I think this raises two main questions.  
5 First of all, which ethical principles? So if you  
6 look at traditional IRBs, they operate in this country  
7 under what's called a common rule, the Belmont  
8 principles. But do those principles also fit the  
9 different context of data-based research? And then  
10 which structures? What is the structure of this new  
11 data review board? Should it be internal to the  
12 organization or external? What stakeholders should be  
13 at the table and how should decisions be reached? So  
14 I've published a couple of papers on this with my  
15 colleague, Jules Polonetsky, and we continue to look  
16 into this topic.

17 MS. WOODS BELL: Thank you. Most excellent.  
18 I'll turn it over to Ellen. She has a lot  
19 of questions too.

20 (Laughter.)

21 MS. CONNELLY: Thank you, Deon.

22 So a couple of you have touched on some  
23 specific examples of cases or specific uses of the  
24 technology. Francis, I know that you, as Deon  
25 mentioned in the introduction, have expertise in

1 FinTech issues. I'd like to maybe start with you and  
2 give you a chance to discuss any interesting AI  
3 government or private sector use cases that you've  
4 experienced or had experience with in your work.

5 MR. KARIUKI: I think Deon read the wrong  
6 CV --

7 (Laughter.)

8 MS. WOODS BELL: He's very modest. He's  
9 very modest.

10 (Laughter.)

11 MR. KARIUKI: But getting the cue in regard  
12 to the research, at the Kenyan Government level, the  
13 national government level, the Government has set a  
14 task force which is looking at the official  
15 intelligence systems, but that is work in progress.  
16 But, obviously, as the regulator, we have not been  
17 waiting for the report of this task force. We have to  
18 move forward since this is something which is really  
19 affecting markets at the moment.

20 What has happened is that -- and I'm happy  
21 Isabelle highlighted also that is what is happening in  
22 France -- is that we have increased the  
23 [indiscernible] location in terms of research.  
24 There's an area where it's very expensive to do  
25 research. I think people like Omer, they're very

1 happy now, because the market is there for them to  
2 conduct their --

3 (Laughter.)

4 MR. KARIUKI: -- their research. And it's  
5 very worrying for the part I come from in Africa in  
6 terms of the resources. It's affecting us, but in  
7 terms of resources, we don't have that kind of  
8 resources. But we have to locate an extra budget  
9 towards that.

10 Having said that, it is that one of the most  
11 promising areas of academic research is use live  
12 experimentation to understand the behavior of the AI  
13 systems and their impact on consumers. I'll give the  
14 example of -- right now, it's more of an analog  
15 example, the one we did in regard to financial  
16 services in Kenya, where we have seen in Kenya cases  
17 and other cases where mobile communication channels  
18 like USSD are blocked by a channel provider for  
19 competing firms. And this can be done by creating  
20 excessive down time or field sessions in USSD.

21 Researchers in another country, just our  
22 neighbor, learning from what we did is, that they have  
23 gone ahead and they have tracked field sessions occur  
24 and their frequency is high and it is usually the  
25 provider who sets the frequency to be high. And this

1 research documented that these failures are on the  
2 side of the channel provider and occur at higher rates  
3 for competitors. This has provided evidence that  
4 markets to enforce equal channels.

5 I'd like to see similar testing of what  
6 results AI tools provide in search or when consumers  
7 search for products to measure if they are biased to  
8 what certain website interests provide us our  
9 products. There's an area where it's quite live for  
10 research, and I challenge Omer to do that.

11 (Laughter.)

12 MR. TENE: Challenge accepted.

13 (Laughter.)

14 MR. KARIUKI: The other area is in regard to  
15 privacy. Again, I see value in live testing of  
16 products. In this case, at the product acquisition  
17 stage to map out how data is collected and how it will  
18 be used. I know there has been such research in  
19 India. It's unfortunate Chinmayi is not here to share  
20 the research with us, but we need more search audits  
21 if we are going to understand where the abilities lie  
22 in these new digital services.

23 In consumer protection, we shouldn't forget  
24 the voice of the consumer -- I always say that -- and  
25 the utility of complaints data. I know FTC has used



1 consumer complaints data to address crimes in their  
2 digital economy. In my country, Kenya, researchers  
3 have recently used social media text analysis to  
4 measure risk for consumers in banking. We should be  
5 developing new models of complaints receipt and  
6 analysis, and that's a challenge I would like to pose  
7 to myself and also regulators that can quickly  
8 categorize and flag concerns related to data privacy  
9 and artificial intelligence. These are the areas I  
10 may push forward for further research.

11 MS. CONNELLY: Thank you.

12 MR. TENE: Can I jump in here?

13 MS. CONNELLY: Yes, of course.

14 MR. TENE: Because --

15 MS. WOODS BELL: Now, you're ready to jump  
16 in. Look at this. This is working well.

17 MR. TENE: Actually, we've already gotten  
18 some of the research the Commissioner highlighted now.  
19 And I want to just mention work that IAPP has done on  
20 data philanthropy, together with the UN Global Pulse.  
21 So Global Pulse is the big data innovation arm of the  
22 UN. And what they're trying to do is to use data from  
23 various resources, some that you've just highlighted  
24 right now, so social media, mobile phones, financial  
25 transactions, satellite imagery, in order to support

1 the UN's sustainable development goals.

2           So for example, you can think of tracking  
3 clusters of an infectious disease according to the  
4 movement of people or to their social media posts and,  
5 thereafter, aiding in the allocation of medicine or  
6 medical personnel or health centers.

7           So the IAPP convened a group of experts  
8 together with UN Global Pulse. Some came from the  
9 humanitarian and development organizations, the World  
10 Food Program, the UN Development Program, the High  
11 Commissioner for Refugees, the Children's Fund,  
12 UNICEF, and International Committee of the Red Cross.  
13 Together with some NGOs like ourselves -- the IAPP is  
14 a nonprofit -- industry representatives, so there were  
15 people from Mastercard, Nielsen, IBM and other  
16 companies, and some data protection regulators from  
17 Europe and Africa actually.

18           We looked at models of trying to govern data  
19 uses. So data can be used for these beneficial goals,  
20 while not imposing privacy costs or other risks on  
21 individuals. And in that context, we looked at  
22 models, like IRBs that I mentioned earlier, data  
23 review boards or internal committees in companies.  
24 Who should head them? Should it be the privacy  
25 officer? Should it be someone else?

1           We looked at some external review  
2 committees. So the health care industry, for example,  
3 has already instituted some external review boards to  
4 try to test the ethics of different products. Cities,  
5 so, for example, Seattle created what it calls the  
6 CTAB, the Community Technology Advisory Board, to  
7 assess innovative data projects.

8           I want to mention the partnership in AI,  
9 which is a partnership that some of the large tech  
10 companies founded for this purpose. And another model  
11 we looked at are the Administrative Data Research  
12 Facilities, ADRF is the acronym. This is a warehouse  
13 of data usually hosted by an academic institution.  
14 University of Chicago has one for retail data.  
15 Georgetown actually has one where researchers can  
16 access the data in a way that protects individuals'  
17 privacy. Thank you.

18           MS. CONNELLY Thank you. I would like to  
19 see if Marcela or James would like to weigh in?

20           MR. DIPPLE-JOHNSTONE: Well, I think in  
21 terms of sharing sort of experience, I mean, our work  
22 around the Royal Free/Google DeepMind case is probably  
23 instructive of some of the issues that Omer was  
24 mentioning before in terms of not so much a challenge  
25 to the use of the AI, but it was the framework that

1 went around that. In this particular case, it was an  
2 NHS hospital, the Royal Free hospital, that developed  
3 with DeepMind a tool that improved diagnosis of a  
4 certain condition. So the tool itself was clinically  
5 effective.

6 And I think there was a lot of surprise when  
7 our office decided to enter into an undertaking with  
8 the organizations to put the system right rather than  
9 reaching for the big enforcement fines. Our view has  
10 always been it's innovation with privacy, not  
11 innovation versus privacy. But there was some  
12 surprise that we didn't look at the high-level fining  
13 arrangements because actually we could see there was a  
14 public benefit. There was a wider public benefit in  
15 the use of the technology.

16 And it was the governance arrangements that  
17 went around that's sort of equivalent of the human-  
18 machine interaction. It was the interaction between  
19 the health data set and the use of the technology that  
20 caused us concern. And that was being put right. And  
21 we could see that that was being put right. The  
22 organizations were engaging with us as a regulator and  
23 were doing the right thing. MS. CONNELLY:  
24 Thank you. Marcela?

25 MS. MATTIUZZO: Yeah, just quickly to

1 comment a little bit more on credit scoring, which is,  
2 as I mentioned earlier, something that in Brazil was  
3 much more developed earlier.

4 This research that I mentioned from  
5 [indiscernible] found that basically none of the  
6 principles that are today in our recently approved  
7 data protection legislation were basically complied  
8 with by companies. So there was no transparency from  
9 the criteria that were used to reach scores. There  
10 was in -- largely consumers were not aware of what was  
11 happening and even how these scores were used by  
12 companies, whom they were sold to, and so forth.

13 What is interesting to note, however, is a  
14 that some of that, in my opinion, informed the  
15 modifications in the current legislation that happened  
16 last week. So one provision that was inserted into  
17 the legislation that I believe the inspiration was  
18 German law is that there is no more -- whenever a  
19 consumer asks to know her credit score, that  
20 information cannot be used against her in reaching  
21 another score. So that was a modification in the  
22 credit scoring legislation in Brazil that happened  
23 last week that was aligned with data protection that  
24 didn't exist before.

25 There's also a new provision that sensitive

1 information cannot be used to reach credit scores,  
2 that means gender, ethnic origin, and so forth,  
3 political views and stuff like that. And also  
4 information that is not truly related to credit and  
5 information that is truly not related to that person,  
6 because all of that in Brazil was used to reach your  
7 credit score. So children, how many children you have  
8 or information about how those children -- are they  
9 good credit payers or not, all of that was used.

10 And I believe it's a good example of how  
11 research perhaps helped really improve legislation  
12 concretely.

13 MS. CONNELLY: Thank you. Any other  
14 comments on this point?

15 I'll turn to --

16 MR. KARIUKI: I think --

17 MS. CONNELLY: Yes?

18 MR. KARIUKI: I think what is coming out and  
19 what I would like to see is that there's a lot of  
20 potential for research, but it's expensive. And from  
21 the African continent is that that is why we have --  
22 we are cooperating under the African Competition Forum  
23 to harness the resources we have in terms of the  
24 budget and also in terms of the human skill so at  
25 least we can be able to conduct more research.

1           Also at issue is more cooperation is needed  
2 between north and south, because whatever is happening  
3 in the north now, it's really affecting what is  
4 happening in the south. And as we indicated, we don't  
5 really appreciate the AI systems, and we need each  
6 other to move forward.

7           MS. WOODS BELL: Well, Ellen and I have been  
8 going back and forth. Should we go next to GDPR?  
9 Should we go to cooperation? You guys have made us go  
10 schizophrenic here.

11           (Laughter.)

12           MS. WOODS BELL: I don't know which way to  
13 go. But since Marcela mentioned the Brazilian law,  
14 maybe we should take advantage of that opportunity to  
15 reinforce what Julie Brill opened with in talking  
16 about these new data privacy frameworks.

17           So why don't we go over to -- let's see.  
18 Shall we go to the ministry of no? No, not no. We  
19 should go to the UK ICO to a little bit about the data  
20 privacy framework. And we'll do this in rapid fire  
21 because we are running out of time.

22           MR. DIPPLE-JOHNSTONE: Sure. I'm mindful of  
23 time so from the ministry of no or the ministry of  
24 yes, as I think we want to be --

25           (Laughter.)

1           MR. DIPPLE-JOHNSTONE: -- the GDPR takes us  
2 a way forward, but it's the wider framework that goes  
3 around that. It's the thinking that is set out in the  
4 GDPR. The GDPR helps move the law in the right place,  
5 but there are still lots of derogations between  
6 individual member states, and it's how those  
7 derogations are used to combine innovation with  
8 privacy to recognize that companies will want to  
9 develop these systems as will governments to help them  
10 make efficient use of their data sets and their  
11 technologies. But it's how that's done responsibly  
12 with accountability and transparency.

13           And the GDPR, I think, is a really good  
14 starting point. But we mustn't rest on our laurels  
15 and we must think about those broader concepts to make  
16 sure that our citizens can have confidence in the  
17 rollout of AI, because if there isn't confidence, I  
18 think there's where we're going to have challenges.

19           MS. WOODS BELLS: Thank you very much.

20           Francis, do you want to us go back over to  
21 you?

22           MR. KARIUKI: Okay. The GDPR law is a work  
23 in progress and Julie mentioned about it. It's a  
24 draft bill, which is undergoing legislative process.  
25 And I've looked a the bill and it creates the Office



1 of the -- of Dipple James here, the Office of --

2 (Laughter.)

3 MR. KARIUKI: And what is the areas that it  
4 is much -- it has borrowed heavily from the European  
5 law. And looking at it, it has created -- it has  
6 addressed the issue of AI technologies, defining what  
7 is profiling very clearly, that it's a form of  
8 automated processing of personal data, and also it has  
9 gone ahead to set a rule specific to automated digital  
10 -- or automated decision-making. So it is addressing  
11 the AI.

12 But in terms of data portability, the  
13 provisions are somehow creating some competition  
14 issues, because in terms of the person with the data,  
15 if you request for the information, that person is  
16 supposed to take even up to 30 days to transfer that  
17 data. And, obviously, 30 days, you wonder, and it's  
18 an issue of technology. Why 30 -- why people are  
19 taking 30 days to transfer data? So that can create  
20 some market concentration for the people who have  
21 data. But since it's a bill which is ongoing, it's  
22 for further discussion. And this is in the right  
23 direction if I may say so.

24 MS. WOODS BELL: Thank you. You mentioned  
25 something which Chinmayi put on the record. And even

1     though she's not here, she just sent a note. She said  
2     she is going to put comments on the record. So I'll  
3     just channel a little bit of Chinmayi.

4                 She mentioned the privacy law and data  
5     breach notification concerns, transparency and  
6     disclosure requirements that, in particular, impact  
7     those with small businesses and how complicated it is  
8     to comply with GDPR-type frameworks in a country like  
9     India. She talked about developing norms and ethics,  
10    some of which Omer will address, but from a different  
11    vantage point. So I just want to put that on the  
12    record and note that even though she's not here, she  
13    has engaged with us intensively and she'll put  
14    something on the record.

15                Isabelle, explore with us, if you will, your  
16    perspectives on AI and privacy.

17                MS. DE SILVA: Thank you. I will start with  
18    the example of the sector inquiry we did on online  
19    advertising because I think that really it's an  
20    excellent example of a sector driven by data. If you  
21    don't have data, you don't have programmatic  
22    advertising. So a few remarks on this sector and how  
23    GDPR or the privacy issues are related to this  
24    specific sector.

25                First, you see a sector that has moved

1     incredibly fast. Last year for the first time, online  
2     advertising was a bigger turnover than classical  
3     advertising on TV channel, movie, the press, the  
4     radio. So online advertising was a bigger budget.  
5     And what we saw was that the level of growth was huge,  
6     but two actors were taking all that economic growth  
7     for themselves, Google and Facebook in the case of the  
8     French market.

9             And we tried to understand why and the  
10     answer that we found is that those two companies were  
11     having huge data sets, very high-quality data sets  
12     about what Facebook users are doing on the platform.  
13     Of course, the data set by Google about the Google  
14     search engine. And so it was interesting to see that  
15     they had excellent data and they had excellent  
16     inventory, so the advertising spaces.

17             Another thing that was really striking for  
18     us was the level of use of data that was going on. We  
19     really felt -- and this was a strong message of this  
20     inquiry -- that the citizen was completely unaware of  
21     the fact that their data was being used in third-party  
22     website. I'm sure that 90 percent or 95 percent of  
23     the customers are completely unaware that cookies are  
24     being followed on all the different website. It's  
25     really interesting because the Facebook case in

1 Germany is really about this issue that has been used  
2 by Facebook on different website.

3 And so we also saw in this market that the  
4 way legislation is designed -- and there was this  
5 project of GDPR on e-privacy -- this was having a  
6 direct impact. So to explain, there was a debate  
7 about the fact that you should approve the cookie use  
8 through the -- I don't know the word --

9 MR. TENE: Banner.

10 MS. DE SILVA: Banner, thank you. And we  
11 said, well, this may be a good choice, but we have to  
12 say that this might affect negatively some companies  
13 and benefit others. So this was really a strong  
14 message for the government that was negotiating in  
15 Brussels and this really had an impact on the way that  
16 France was doing this negotiation on privacy that  
17 maybe there was a competitive issue, maybe privacy is  
18 good and be protected, but beware of the way you do  
19 it. You don't want maybe to favor some users and  
20 disfavor others. And, of course, like you said, GDPR  
21 is a very big deal for companies in France, small  
22 companies are finding it complex to be compliant to  
23 GDPR.

24 And maybe to finish, already in France,  
25 there is a debate that GDPR may not be enough. There

1 is the debate about should we go even further. For  
2 example, the fact that the default mode would be you  
3 don't use data by the users. Users must specifically  
4 approve a big use of their data and maybe have  
5 something for this data so that's use -- GDPR's only  
6 been in place a few months and already you have some  
7 demands for something more.

8           And maybe another example of how this issue  
9 of data is really driving the debate, this online  
10 advertising sector inquiry was directly used in the  
11 product that the French Government has put into place  
12 of the GAFA tax, so-called tax on online advertising  
13 platform, and the rationale was that those companies  
14 have such advantage on the way they use data and they  
15 create value because of the data, and this new French  
16 tax is directly linked to the way they use data.  
17 So it's interesting to see that the specifics of the  
18 sector have led to the choice of a specific instrument  
19 through a tax.

20           But I think that those privacy issues will  
21 really remain at the core of competition work,  
22 consumer protection work and also, of course, data  
23 privacy because we had the first fine based on GDPR in  
24 France against Google Android about the way they were  
25 using data. And this fine was in relation with the

1 GDPR.

2 MR. TENE: I think if I can just comment on  
3 this. It's interesting especially coming from a  
4 competition authority. You mentioned the hegemony of  
5 the two big data companies and the effect on the ad  
6 tech market in the same context of GDPR, and maybe you  
7 were hinting at the e-privacy regulation or the  
8 current directive. I think a lot of critics would  
9 argue that GDPR and even more so the e-privacy  
10 regulation and also some of the laws that are debated  
11 now in the US like the CCPA actually reinforce the big  
12 incumbents and the powerful first parties that have  
13 the customer relationship. They have the user and,  
14 therefore, will obtain the most explicit consent  
15 through a banner or some other -- really any way you  
16 can think of at that account of the more nimble, the  
17 smaller competitors who are playing in this ad tech  
18 market. So arguably, these laws have an  
19 anticompetitive effect.

20 MS. DE SILVA: For customers that are what  
21 we call logged in -- and you can see also with Amazon  
22 -- when you already have all your data on Amazon, it's  
23 easier to buy and you don't have to put your data. So  
24 of course, the way the legislation is framed is really  
25 important if you don't want to have that effect. But

1 it's difficult to avoid.

2 MS. WOODS BELL: Perfect. I was nodding my  
3 head because Omer jumped right in and no need to make  
4 the request anymore. This is dynamic and exciting --

5 (Laughter.)

6 MS. WOODS BELL: -- and that's the way it  
7 should be.

8 Ellen, take it away.

9 MS. CONNELLY: I'll use that to plug our  
10 April 9th and 10th hearings on privacy, so please tune  
11 in.

12 I think we only have about eight minutes  
13 left. So I'm going to ask just one last kind of wrap-  
14 up question, and that has to do with cooperation,  
15 which has been mentioned by a number of you. It was  
16 also mentioned in our November sessions on algorithms,  
17 predictive analytics and artificial intelligence,  
18 which were really great. And I encourage you all to  
19 watch them. They're on the web.

20 We heard at the November sessions that  
21 cooperation, in terms of steps for regulators looking  
22 at how to handle the potential challenges and  
23 opportunities brought by AI, is a very important  
24 thing. But at the same time, many people at the  
25 November sessions pointed out that cooperation would

1 be very difficult to achieve, and in particular,  
2 convergence of regulations and approaches would be  
3 very difficult to achieve.

4           So since we have people here on the panel  
5 with very diverse and interesting experiences, I would  
6 like to hear your thoughts on cooperation,  
7 convergence. To what extent is it important? Which I  
8 think a number of you have said it is. And to what  
9 extent is it going to be difficult? What are the  
10 major barriers that you see to cooperation and  
11 convergence? How can they be overcome?

12           We'll just go down the line.

13           MR. DIPPLE-JOHNSTONE: So, yes, it's not  
14 easy. I think it is the direction of travel. I think  
15 some early tentative steps are being taken in that  
16 direction. If we look at the work of the  
17 International Conference of Data Protection and  
18 Privacy Commissioners, their declaration on ethics and  
19 data protection in AI earlier in 2018 begins to set  
20 the pathway down that direction of travel.

21           Cooperation, again, is challenging. But I  
22 think there's a lot of goodwill particularly around  
23 the community. And it's not just privacy cooperation.  
24 It's got to be cross-sector cooperation, and it's as  
25 important to look at the cooperation mechanisms within



1 our respective countries as it is internationally,  
2 because it's not just one sector or one regulation  
3 that needs to be addressed.

4 MS. CONNELLY: Francis?

5 MR. KARIUKI: Cooperation is essential, and  
6 from where I stand, it's possible in the sense that we  
7 have a convergence in the problems which are facing  
8 us. And I can collapse those key priorities area  
9 where we have convergence. And that is there's the  
10 issue of discrimination, there's the issue of access  
11 to markets, there's the issue of information asymmetry  
12 for both consumers and competing firms, data privacy,  
13 and data portability. And this is affecting both the  
14 developed countries and the developing countries.

15 And taking into account that also the  
16 players in the developed countries, they are facing  
17 the same issues with Facebook, WhatsApp and also the  
18 ride hailing companies, the players are the same, the  
19 problems are the same and, therefore, there is  
20 motivation to cooperate and it's good that we  
21 cooperate.

22 The challenge would be in terms of  
23 resources, which I indicated, that some have more  
24 resources, some can afford better research. But from  
25 where I stand is that research conducted in Europe now

1 can be used in Africa because the platforms are the  
2 same, and that is the best thing. It's not like the  
3 competition regulation where we have some different  
4 industrial policies and other consumer protection  
5 laws. There's convergence in terms of the problems we  
6 are facing.

7 MS. CONNELLY: Thank you.

8 Marcela?

9 MS. MATTIUZZO: So very briefly, I come from  
10 the world of antitrust and competition as well. So I  
11 believe that what competition has reached may be a  
12 good way forward here, and I mean that even though in  
13 antitrust matters sometimes we disagree on substantive  
14 issues, we have reached convergence on many procedural  
15 issues. And because procedural issues in AI are so  
16 important, we have a lot of discussions in tech due  
17 process and so forth, perhaps that is a place to  
18 start.

19 So if we have black boxes of some sort, what  
20 are the procedures that we can agree on that are  
21 needed? And I think some of what was discussed here  
22 today goes in that direction today. So I believe  
23 that, if we focus perhaps on procedure, it may be  
24 easier to find common ground.

25 And another important topic that perhaps

1 will help this difficulty in finding legislation that  
2 is the same everywhere is that many uses of technology  
3 are global. So if you have higher standards on one  
4 place and the company's global and it has to adapt to  
5 that one place, that place can lead legislation  
6 elsewhere and can lead market practices elsewhere. So  
7 I think that perhaps by using those two tools, we  
8 could help bring convergence.

9 MS. CONNELLY: Isabelle?

10 MS. DE SILVA: Yes, I'm very hopeful about  
11 what cooperation can bring us, and I really think that  
12 this is an input that we use a lot. I would say that  
13 you have different cooperation on setting the rules,  
14 applying the rules, for example, like within the ECN.  
15 You have cooperation between the US and the  
16 Commission. I think that without this cooperation  
17 maybe we wouldn't have the Google shopping case and  
18 that the FTC was also instrumental in helping the  
19 Commission have elements for the case.

20 And I really think that one of the most  
21 useful cooperation is the sharing of concrete cases of  
22 details, sector inquiries, because it gives us really  
23 the material in which we can think about enforcing.  
24 Of course, there is this other issue of global  
25 convergence on the rules. Will the US adopt a form of

1 GDPR? I see that some companies like Microsoft have  
2 already decided to do it on their own. I think it's  
3 maybe something that we haven't mentioned enough, the  
4 reaction of the business community.

5 This is really a message that I gave to the  
6 online advertising community. You must be careful.  
7 You must react before you have new rules because if  
8 you don't respond to this issue of the trust, of the  
9 fact that the public is worried about the way the data  
10 is being used, if you don't create some internal  
11 rules, voluntary rules, you may have a worst case  
12 scenario for you with new rules that will be too  
13 strict. So we mustn't forget the companies have a lot  
14 to do on their own and they're also a big part of this  
15 landscape.

16 MR. TENE: Yeah [indiscernible] Microsoft  
17 accepted and adopted GDPR globally. It adopted some  
18 of the rights that GDPR grants, and I think part of  
19 the reason might be that just adopting any specific  
20 standard might actually violate standards that are set  
21 in other jurisdictions or countries. And I think  
22 therein lies the problem for businesses today with the  
23 multiplication of efforts. It's, of course, a good  
24 thing, but businesses really seek uniform standard  
25 rather than really being concerned where the standard

1 -- the bar is positioned. Because at the end of the  
2 day, different standards might require businesses to  
3 actually architecture different systems and frameworks  
4 and products and, you know, break the internet into a  
5 splinternet.

6 My organization argues that regardless of  
7 the policy choices, it's clear that everyone agrees, I  
8 think, that we need duly trained and qualified  
9 individuals, a workforce to implement the policy  
10 choices on the ground. And this is through doing  
11 things like mapping data flows and doing risk  
12 assessments and imposing accountability requirements  
13 and data governance, including the application of  
14 technologies, not only to infringe on but also to  
15 protect privacy.

16 MS. CONNELLY: Thank you very much. And  
17 with that, we are just about out of time. I want to  
18 thank all of our panelists for this very interesting  
19 and useful discussion.

20 And I want to encourage you all to tune in  
21 tomorrow to Day 2 of the international part of the FTC  
22 hearings. Thank you.

23 (Applause.)

24 (End of hearing.)

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