FEDERAL TRADE COMMISSION

COMPETITION AND CONSUMER PROTECTION

IN THE 21ST CENTURY

Monday, March 25, 2019

9:00 a.m.

FTC Headquarters

600 Pennsylvania Avenue, NW

Washington, D.C.
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FEDERAL TRADE COMMISSION

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WELCOME AND INTRODUCTORY REMARKS

(8:58 a.m.)

MS. ASKIN: Good morning, everyone. I’m Molly Askin. I’m an attorney in the Office of International Affairs here at the FTC. I want to extend a warm thanks to all of you here in the room in person and also to all of you who are joining us via the webcast today.

Before we officially kick off, I just have a few announcements to make, in particular for those of us in the room. First, it's a reminder with that beep to silence cell phones and any other devices that could disrupt us today. Another reminder, as many of you have just experienced, the security at the first level, if you do choose to leave the building for lunch, you will have to go back through that process to reenter the building for the afternoon. Finally, restrooms are just out the door: men's room out the door to the left; women's room is past the elevators and also to the left.

If there happens to be an emergency while we're in the room today, please leave the building orderly and follow the instructions that you will hear. If we need to remain in the building during an emergency, there will be announcements over the public
announcement system in regards to what we should be doing. If we need to exit the building, for example if there's a fire, please use the stairs and proceed across the street to 7th and Constitution Avenue.

If you notice any suspicious activity when you’re in the building or around it today, please notify a security official. Any actions that are taken that attempt or actually do interfere with the conduct of this event or the audience's ability to observe the event, including attempts to speak with speakers while they are engaged in panels or giving remarks, will not be permitted. If you do engage in such behavior you, will be asked to leave. If you refuse to leave voluntarily, you may be escorted from the building.

Finally, FTC Commissioners and staff cannot accept documents during the event. While this event is the focus of public comments, those need to be submitted online and cannot be submitted in paper copy to FTC staff or Commissioners.

Also, as you’ve noticed and has already begun, the event is being webcast, recorded, and also there will be photographs taken throughout the day. By participating and remaining in the room, you agree that your image and anything you say can be posted.
indefinitely at FTC.gov, at regulations.gov, or on one
of the Commission’s publicly available social media
sites.

As you entered this room, you saw that
question cards were available during the panel
discussions today. Audience members are invited to
provide questions to the panelists. Those are to be
written on the comment cards and will be collected
before having handed to moderators and repeated by the
moderators to the panelists.

That is the end of these announcements, and
I'm very happy to introduce Randy Tritell for our
official opening remarks. Thank you.

MR. TRITELL: Good morning. I'm Randy
Tritell, Director of Federal Trade Commission’s Office
of International Affairs. Well, Molly's told you all
the important stuff, but I am delighted to welcome you
to the 11th of the FTC's hearings on Competition and
Consumer Protection in the 21st Century, this hearing,
cosponsored by the George Washington University Law
School.

Welcome to our audience here at the FTC, out
in webstream-land and to those who are watching the
recording or reading the transcript of the
proceedings. This session is a fitting heir to the
hearings on which Chairman Simons modeled this --
sorry, Chairman Pitofsky initiated -- modeled this
initiative. Twenty-four years ago, Chairman Pitofsky
anticipated the major role that globalization and
technological change would play in shaping the FTC's
priorities and enforcement agenda.

This hearing, dedicated to the international
aspects of the Commission’s missions, reflects the
important role that the international dimension of the
FTC's competition, consumer protection, and data
privacy work are to accomplishing our goals. It
wasn't too long ago that I might be asked why the FTC
even has an office dedicated to international affairs.

Well, I don't get asked those questions
anymore as our stakeholders can see how intertwined
the FTC's activities are with global developments.
They see how the FTC cooperates deeply with
international counterparts on cross-border merger and
conduct investigations to ensure consistent outcomes.
They see how we use our authority under the U.S. SAFE
WEB Act to work with consumer agencies, regulators,
and criminal authorities to shut down foreign-based
frauds and return money to victims. They see how we
engage in multilateral organizations to promote fair
investigations and sound enforcement.
We already have had significant international input into several of our hearings. So what are we seeking to accomplish over these two days? Well, we have in mind several objectives, one of which is simply to reflect the Commission’s keen interest in hearing from our colleagues around the world, but let me focus on two important goals.

One is to obtain focused international input on the main topics of these hearings. This hearing session is an opportunity for us to learn from countries and different regions, from different legal, economic, and political systems and stages of development on many of the digital economy and other issues that are the overall focus of these hearings.

Second, it’s an opportunity for the FTC to hear from the international community on how the Commission is doing its job, where it is succeeding, how it can be improved, and how we can best position the agency to anticipate and deal with future developments. Do we have the right tools? Are we focused on the right issues? Are we advocating our views effectively? Are our current structure and priorities well suited to deal with the issues that are likely to confront us?

In this sense, we are following in the
footsteps of the FTC 100 Project conducted by Bill Kovacic, our esteemed Former Commissioner and Chairman from whom you will hear very shortly. To address these issues, we are very fortunate to have with us a stellar faculty hailing from 17 nations on six continents. I look forward to hearing from all of our speakers, as well as from all of you and your colleagues, from whom we welcome written comments through May 31.

In my now 20 years back at the Commission, I have seen a continuing deep commitment to support the FTC's international work on the part of successive Chairs and Commissioners across administrations. That tradition continues today under the leadership of Joe Simons. Reflecting that commitment, Joe is with us now to share some opening thoughts with you.

Taking to heart the adage, who needs no introduction, it is now my pleasure and honor to turn the floor over to the Chairman of the Federal Trade Commission, Joe Simons.

(Applause.)
INTRODUCTORY REMARKS

CHAIRMAN SIMONS: Well, good morning, everyone. I think that I was actually one of those people that Randy was talking about early on who wondered why we needed to have an Office of International Affairs. In fact, when I was the Bureau Director, I think I probably said that to Randy expressly.

Anyway, good morning, and welcome to our two-day exploration of the FTC's role in a changing world. This is the 11th session in our hearings on Competition and Consumer Protection in the 21st Century. In previous sessions, we considered the effects of globalization on American consumers and the FTC's mission. Today and tomorrow, we will take a deeper look at how globalization and international developments affect the FTC's enforcement priorities and its policies.

The FTC's 1995 hearings, led by then-Chairman Robert Pitofsky, undertook a similar inquiry. Since then, we have seen significant changes to the international landscape. Many jurisdictions have either adopted or substantially updated their competition, consumer protection, and data privacy laws. The number of active enforcement agencies has
increased incredibly over this time period. We have seen huge growth in the number of international and regional organizations and networks in which policies are debated and best practices are shared.

Today, markets are more interconnected and consumers are more global and mobile. Our task at the FTC is to understand and respond to these changes, as we work to promote competition and protect American consumers. Right after I speak today, we have a real treat, and he's sitting right in the first row right there. Our esteemed Former Chairman, Bill Kovacic, will discuss the history of these international developments, and Bill is one of the world's top experts on this topic, having played a pivotal role in these developments himself, and I am absolutely confident you will enjoy hearing from him shortly.

But before we get to Bill, let me touch on two core areas of our international program: enforcement and policy cooperation. Starting today is international enforcement cooperation, today's session. In a quarter century, since the Pitofsky hearings, the FTC has been involved in an ever-increasing number of competition and consumer protection matters with an international dimension. We have often cooperated with enforcement agencies
outside the US, which has resulted in better outcomes
for competition and for consumers.

That's why, as Randy mentioned, the FTC
under successive chairs has focused on developing
strong relationships with our counterparts abroad and
expanding our cooperation tools. For example, in
2006, Congress enacted the US SAFE WEB Act. The Act
enables effective enforcement cooperation and consumer
protection cases by providing the FTC with cross-
border enforcement tools in four key areas --
information sharing, investigative assistance, cross-
border jurisdictional authority, and enforcement
relationships.

We have used this authority in a wide range
of cases, from internet pyramid schemes and
sweepstakes telemarketing schemes to complex
advertising and privacy investigations. The US SAFE
WEB Act has been an incredible success. Under the
Act, the FTC has responded to 130 information-sharing
requests from more than 30 foreign enforcement
agencies. We have issued more than 115 civil
investigative demands in over 50 investigations on
behalf of foreign agencies.

These efforts have advanced FTC enforcement
and often supported the actions of foreign
counterparts in ways that have protected US consumers. For example, in a matter announced this month, the FTC reached a $30 million settlement with the operators of a sweepstakes scam that targeted, to a significant degree, seniors. We received significant assistance from foreign counterparts, including Canada and the United Kingdom, using our SAFE WEB authority to share information.

The US SAFE WEB Act is due to sunset again in 2020, and we are urging Congress to reauthorize this important authority, but this time without a sunset provision. Bilateral and multilateral arrangements, including memoranda of understanding, also facilitate cooperation. Today, I am pleased to announce that we are signing such an MOU with the UK Competition and Markets Authority on consumer protection matters.

The MOU provides for enhanced information-sharing and enforcement cooperation. The MOU moves both agencies towards streamlined sharing of investigative and complaint data, simplifies requests for investigative assistance and makes it easier to engage in joint consumer protection investigations. At the same time, it provides strong, clear confidentiality and data safeguards for the
information that we exchange. I know that CMA Chair, Lord Tyrie, and his Executive Director Andrea Coscelli, join me in committing to work together under the MOU to provide benefits for consumers in both of our countries.

Turning to our competition enforcement cooperation, we are literally cooperating daily with our foreign counterparts on mergers and conduct cases under common review. For example, as part of our recent review of the Praxair-Linde merger, the FTC staff cooperated with the staff of 10 foreign competition agencies to analyze the proposed transaction and potential remedies. And we see continued opportunities for expanded antitrust enforcement cooperation going forward.

Across our missions, we work closely with foreign counterparts through agency-to-agency networks that facilitate enforcement cooperation and the development of best practices. Two key examples are the International Competition Network, the ICN, and the International Consumer Protection and Enforcement Network, ICPEN. The ICN provides 130-plus competition member agencies a specialized venue for maintaining regular contacts and addressing practical enforcement and policy issues.
For example, its framework for merger cooperation serves as the basis for many agencies to engage in enforcement cooperation. Similarly, ICPEN gives its 60 consumer protection agency members a forum for exchanging enforcement-related best practices and engaging in practical cooperation. ICPEN members can access econsumer.gov, an eight-language complaint website and information-sharing project, sponsored by more than 35 consumer agencies.

Today's session will focus on a wide range of tools -- statutory authority, best practices, MOUs, and international networks that we use to accomplish our enforcement cooperation. We will also examine cross-border enforcement and policy issues raised by emerging technologies such as artificial intelligence.

Tomorrow, we will turn to policy cooperation. As with enforcement cooperation, we have witnessed a significant expansion in the ways the FTC engages in policy discussions with our counterpart agencies. Our cooperation on policy matters has fostered trust-based relations, open communications between agencies, and served to facilitate effective and predictable enforcement cooperation as well.

In addition to regular bilateral discussions with our counterparts, the FTC is proud to play a
leading role in multilateral organizations such as the OECD, UNCTAD, and APEC. Through these organizations and the networks I mentioned earlier, the FTC has participated in developing important international best practices such as the ICN's recommended practices regarding merger notification and review and the OECD Council recommendation on consumer protection and e-commerce.

During tomorrow's hearings, we will turn a critical eye toward the FTC's work in these bodies and discuss the strengths and weaknesses of policy approaches based on soft law. We will also look at the impact of different legal regimes and cultures on policy and enforcement. Our panels will look at other effective ways for agencies to cooperate on policy.

Through our Technical Assistance Program, for example, the FTC engages with newer counterpart agencies, sharing our expertise and our experience. The FTC's International Fellows Program, authorized by the SAFE WEB Act, complements the agency's technical assistance. Over the past 12 years, the FTC has hosted 83 fellows from 34 jurisdictions around the world.

As part of these hearings, we intend to explore whether there is more the FTC could and should
be doing to promote sound consumer protection, privacy, and competition policy internationally. The final panel will focus on the FTC's international engagement in the changing global world, providing an opportunity for input on the most important enforcement international policy issues that the FTC faces today.

Before I conclude, I want to welcome the many agency heads and other representatives from our sister agencies and international organizations who are joining us for these hearings. I also want to thank, of course, our cosponsor, the George Washington University Competition Law Center. I also would like to recognize the efforts of the staff of the FTC, in particular the Office of International Affairs, the Office of Policy Planning, the Office of Public Affairs, and the Office of the Executive Director.

My fellow Commissioners and I are extremely grateful to all the people who have contributed to producing this impressive event, including especially our speakers. Thank you all for attending, and I hope you enjoy the show.

(Applause.)
SETTING THE INTERNATIONAL SCENE

MS. ASKIN: Thank you, Chairman Simons. I now have the pleasure to introduce Bill Kovacic, Director of the Competition Law Center at GW, Global Competition Law Professor at GW. In addition, he has enforcement experience. We heard Joe mention your time here at the FTC, both as Commissioner and Chairman. Bill also serves as a nonexecutive director at the UK's Competition and Markets Authority.

MR. KOVACIC: Thank you. Thank you very much, Molly. The GW Law School is enormously grateful to Chairman Simons for the opportunity to cochair this session, and we're profoundly grateful for the opportunity to begin the program today.

To get us started, I want to address three topics. I want to talk about the major ways in which the world competition policy, data protection, and consumer protection have changed since the mid 1990s when Bob Pitofsky convened his famous set of hearings. Second, I would like to talk about how the FTC has adapted to these changes and to describe its engagement with foreign institutions, including partner agencies around the world. And then, third, to think about some possible adjustments to the FTC's tools and practices that might enable it to better
address these adjustments going ahead.

My perspective today is based on really three activities: first, my work here as Molly and Chairman Simons mentioned at the FTC and in several earlier incarnations; second, my work with a number of new competition systems around the world; and, third, my experience with the Competition and Markets Authority in the United Kingdom, where I’ve served as and currently serve as a nonexecutive director. I don’t speak on behalf of the CMA today, but my experience there deeply informs the way in which foreign jurisdictions see the United States and perceive the work of the FTC and shapes my views about how the FTC’s role can be enhanced in the world going ahead.

Let’s start with the past and look back. Both Randy and Chairman Simons have done this already. I'll just underscore a couple of developments that are certainly extraordinary to anyone of my age but I think would be extraordinary upon reflection to anyone. First is the adjustment in the number of new systems, and we'll take competition law as an example. In 1995, there were roughly 70 jurisdictions with competition laws. This itself was a dramatic jump from 1989, when there were, depending on how you count.
them, about 30. Today we have more than 130. That's an extraordinary change in a short period of time. And for those of my age who would have predicted, say when they were finishing school a little while ago, that this would have happened during their lifetime, that would have been most improbable. A truly astonishing adjustment in the global scheme.

Some of the jurisdictions that we regard today as enormously significant because of their activity, their influence in the global framework, either had extremely weak systems in place in 1995 or they had none at all. Those with nascent or older frameworks that were getting underway include India, Brazil, Mexico, South Africa, South Korea. You can't have a conversation about global competition policy today without accounting for the extraordinary work that these institutions have done.

Others had no system at all, most notably China, but the extremely influential system in Asia, Singapore, had no competition law. And we've witnessed a dramatic increase in the number of cross-border alliances, international networks to promote the development and improvement of competition law to set international standards, to promote the conversation.
Simply to take Africa alone, the development of international enforcement bodies like COMESA, the development of soft law networks like the African Competition Forum, simply emblematic of what you see on continent by continent and the exceptional development of new institutions, both for enforcement but, as all our presenters have said so far today, for policy development.

The International Competition Network did not exist in 1995. ICPEN, which Chairman Simons has mentioned, was underway, but it was a very nascent organization, hadn't attained the level of prominence that it had now. All these things have taken place in the last 25 years.

Technological change, which was always present in the system, it's not new to our lives. It's a conceit of the modern age that these things have never happened before. You look at the first decade of the Federal Trade Commission and its dealing with upheaval from remarkable new transportation technologies like the automobile, the airplane, communications revolutions brought about by the telephone, the wireless -- no, that's a different wireless, but it was called the wireless at that time thanks to Mr. Marconi -- entertainment revolutions
called the moving picture and soon to be called the talking picture.

All of these things take place and you look at the agenda of the FTC in its first decade and it’s filled with difficult efforts to wrestle with these changes. Those changes were no less remarkable to the citizens of this country at that time than all the changes we see today are to us. But I think we can assert that the absolute and relative rate of technological change is greater now and that’s changed the mix of issues that have come to the top of the agenda.

The upheaval in information technology, for example, has lifted the prominence of privacy. A longstanding concern of policymaking in the low-tech days but now simply perhaps the preeminent regulatory issue of our time, most notably identified by the extraordinary regulatory developments we see around the world, significantly the European Union's adoption of the General Data Protection Regulation in the recent past.

Agencies have engaged in a remarkable process of innovation and adjustment in the face of all of these changes. We've seen major restructurings. The agency with which I'm a
nonexecutive director, the Competition and Markets Authority, is a good example. It took two predecessor institutions, combined them into one.

Country by country -- France, Spain, Portugal -- nation after nation have rethought the fundamental structure through which they offer policy and they have undertaken major upgrades in capabilities. And, quite significantly, I think a broad lesson we derive from international experience is that if you're not revisiting the adequacy of your framework every five years at a minimum, you're missing a good game and you're probably not doing your job properly because the array of changes in the world today dictate those changes.

If commercial institutions are going to be proficient at innovation and change, the public institutions entrusted with their oversight have to be no less inventive, no less dynamic, and we see in so many areas globally those changes taking place. We also see the adoption, quite important for the FTC, I think, of complex mandates for individual institutions.

If we take the 130-plus jurisdictions today that have competition laws, over half of them assign that institution something other than competition law.
It's a misnomer to describe them today as competition agency simpliciter. They actually are diversified policy conglomerates. And the most common adjunct to competition law in these jurisdictions is consumer protection.

And in the modern world, I think it is a decided advantage and obligation of jurisdictions like the FTC to consider the significance of this multidimensional role of a growing number of agencies and to consider perhaps as a priority how to work in particular with agencies with a similar configuration with the aim of exploiting the full value inherent in that multidimensional mandate and to use that as a basis for rolling out larger programs over time.

What's the significance of all of these changes? Well, the complexity of the framework has obviously grown -- many more institutions with mandates that make a difference around the world. And a growing number of jurisdictions which, through their individual initiative, have the capacity to set what amount to global standards. Any single nation in that framework has a keen interest in seeing those standards developed in a way that is good for citizens globally as well in our own parochial case for the citizens of the United States.
The complexity at one level might seem frightening, but it does have a striking advantage, to have so many jurisdictions and in so many instances exceedingly capable people working on trying to solve common problems provides a host of natural experiments from which we might derive conclusions about what might work better in the United States and, indeed, what the appropriate framework for global oversight might be. In short, a benefit of the complexity of activity, the bewildering activity that we see today, is a remarkable opportunity to measure and assess which kinds of practices might be well adopted on a global basis.

And you look at the experience of the US agencies, you notice how, in areas such as merger guidelines, the Department of Justice leniency program, the US agencies had no power to force anybody else to adopt these programs. They didn't. By persuasion, they gained broad adoption so that leniency and mandatory merger review with a vocabulary created in the DOJ 1982 guidelines, those are universal features of the way in which we work today, all by persuasion, all by adoption, by no element of compulsion.

So this is the framework that brings us to
the point, how's the FTC adapted to this? To a striking degree -- and I'm not a neutral observer here, I have pride in the way in which the agency has run and I'm a fond observer of so many initiatives that it's developed that you can count me as a faintly biased observer here, though always speaking the truth. So a bias that predisposes me to like what the FTC has done here but, of course, the truth seeker that I am, always completely accurate.

One thing that we identified that's extremely important here is the development of the Office of International Affairs. One of the most farsighted things that Debbie Majoras did during her tenure as chair is to foster the creation of that office, to assemble a number of different units within the agency and place them in a single place with Randy Tritell as its head.

I don't have, perhaps, a current accurate count, but my guess is that the total number of people dedicated to that office now exceeds 20 and perhaps 25, roughly in that neighborhood. Ponder that for a moment. In 1979, when I was a young person and I had my first exposure to the Federal Trade Commission as a case handler, the total amount of FTC effort dedicated to international liaison was one half of one work
That's basically one half of one person's time in 1979. In its place, you now have the extraordinary infrastructure. In a way, it's always made me nervous because I feared a legislative overseer or another might say why are we doing this? Well, Randy and the Chairman have described why we do this. This was a farsighted decision to build an infrastructure that would be indispensable over time to functioning in this new world of complexity. And in a farsighted way, Debbie Majoras and her successors gave support to that effort so that, at the moment, it's unsurpassed as an institution for doing work in this area.

There are a number of international offices that do superb work. I see one of them at the CMA, but when I think of the FTC, I think of the story that I saw in the newspaper during a visit to St. Petersburg where the curator of the Hermitage Museum is asked, do you have the best collection of art in the world? He hesitates and says, well, it's a hard question to answer, a lot of museums have a good collection. And then he pauses and says, I can assure you of one thing, we are not the second. And when you look at the FTC's OIA team, it is certainly not second.
Another key element that's developed over that time, and again, this is truly generated from the staff level up in a thoughtful way and supported by the agency, is SAFE WEB. SAFE WEB created an indispensable element of the infrastructure that supports international cooperation today, both for the purpose of information sharing and crucially its bilateral information sharing. It's the FTC saying help us abroad and we commit ourselves to help you here, too, and that promise has been fulfilled.

But I would underscore one other item that Chairman Simons mentioned, and that is the international fellows program. One of the best ways to educate others about what happens here and to build the human glue that holds together international relations are exchange programs. And in a remarkable way, the FTC has brought foreign visitors to the FTC, and with very few restrictions, has allowed them to see everything that takes place here -- attend meetings, go to case-handling meetings, watch the development of the individual case and the policy that goes along with it.

If you want to build an environment that has the trust that is indispensable to the deeper level of cooperation that will facilitate better work on cases,
better policy development, it starts, first and foremost, with human relationships, not simply protocols or other ways of doing work. It is the human relationships that cause people to trust each other.

This is a long-term growth. This is a decided investment in the future, but that investment in building those relationships through the fellows program, among others, is an act of faith and commitment in the future that creates the environment in which you ultimately get a better result and the basis for sharing information and cooperating more broadly.

Then there are the building of the bilateral relationships already referred to by Randy and Chairman Simons, the one-on-one engagement and discussion over time that, again, is essential if you're going to have a program that promotes the development of common approaches, understanding of where differences arise, and the gradual progress towards a common result.

The contributions to the networks -- the ICN, the OECD, UNCTAD, ICPEN -- were it not for the work of the individual agencies, including the FTC, this couldn't possibly have happened. The ICN may be
a virtual network, but the work is real. And the only way the work takes place is through human beings committing themselves to do it. I look at the work that Commissioner Boswell and his colleagues at the Bureau in Canada did. Had it not been for Canada providing a virtual secretary, there would be no ICN over time. And to look, and I'm aware of the dedication of effort at the FTC by its professional staff, by the Office of International Affairs, I will further add that if the Canadian Bureau is one pillar indispensable to the ICN, the FTC is a supporting buttress that was equally important to keeping the ICN working and successful. That was a real and farsighted commitment.

Technical assistance, to sum up the style, the concern, I think, when Americans go abroad is that they're loud, they're dogmatic, doctrinaire. They're occasionally right, but they're never in doubt --

(MR. KOVACIC: -- so that you worry about exactly what course they’re taking and what they have to say. The Technical Assistance Program I’ve seen going back to its origin, by contrast, thoughtful, sustaining. What’s been the role of advisors? Like the wait staff in the restaurant. We give you a menu.)
Here are the choices that we have here. Then comes the moment where someone asks, well, what's good? And then there's the opportunity to say what do you like? What do you want? I can describe for you what might be good, and then to give you a view of what happens, but the listening and the advisory process has been thoughtful and sustaining.

I look at the work, for example, done in the Baltics, which I visit on a regular basis to see the three members of the EU who have competition agencies there. And I'm struck by how people my age in those agencies come to me and ask me about how well FTC and DOJ staff people that they worked with are doing. I can't give you a rigorous proof for this, but I think a crucial force in the development of so many agencies around the world was the advice and guidance that FTC and DOJ officials provided. That was a farsighted effort.

In a modern example, that is the work that the FTC has done in conjunction with Canada, the European Union, Germany, OECD, and UNCTAD. Footnote, that's a remarkable constellation of common effort that has not always characterized technical assistance but it happened here. One reason that a first-rate management team and leadership group at the Ukraine
Antimonopoly Commission has a fighting chance to succeed in exceedingly difficult circumstances is that technical assistance over time. And it's not having someone bring their PowerPoint slides up and run through them, being cautious if they might be to take the name of the previous city which they gave them off the slide. I saw a presenter in Latin America give a slide that said welcome to Singapore, not a sort of stale, “blow the dust off your notes from the last to talk,” but hands-on guidance to case handlers about how you actually do the job.

And if you purport to talk about merger control and you've never worked on a merger, they should chase you out of the room and, instead, the habit has been in technical assistance to provide the right person to give the right advice at the right moment.

And, last, I think we've seen as part of the interaction, we've seen better disclosure, and there's been a decided process of learning from abroad. In matters such as Carnival Cruise Lines, I think the FTC through its engagement with the European Union came to see that when you close a significant matter, you ought to say why. When you issue a second request, when you issue a subpoena, when you use compulsory
process, you ought to explain why you decided not to
take further steps.

And the habit, not in every case to be sure,
but in a growing number of prominent matters to say
why the FTC had decided not to act takes root in this
period, and that's a process of very helpful learning.

Well, some thoughts about the future. I
want to put things in three baskets: what the FTC can
do on its own, what the FTC can do with the
cooperation of other institutions, and, last, how the
Congress has to help out.

First, what can the FTC do on its own? I
think a valuable part of these proceedings is the
opportunity for the FTC, in talking to other
institutions around the world, to take stock of its
own capabilities. It has a scalable mandate that is
unique among US institutions and, I would assert,
among institutions globally. It has three policy
domains, which increasingly become important in
resolving difficult problems -- antitrust, consumer
protection, and privacy. It has distinctive
information-gathering tools and, yes, is an
adjudication body as well.

Does the United States have a specialized
trade regulation court? The answer is it does, and
it's in this building. So how can this constellation of activities be applied in a way that offer better policy results? As a starting point, I’d sustain the existing level of commitment to the Office of International Affairs and things international. It's not just the work of OIA, but it's all of the FTC specialists that can draw in to support projects over time.

I would say there's room for better education abroad. I'm somewhat dispirited when I go to international meetings and engage in them to see the level of ignorance. I see about what the FTC does and how it operates and works. I think that a fuller effort in international fora to explain that -- the speeches, the papers through OECD, the engagement on working groups -- would be a way to make this story better known, to make clear, in other words, how the FTC functions and operates as a way of increasing understanding about how policy is made here.

So one recommendation is the fuller effort as an educator. I'm struck in discussions about privacy how a continuing refrain is the US doesn't have a privacy regime. Well, it does. It's not as complete and comprehensive, but it does, and in the places where it exists, it can bite you pretty hard if
you don't pay attention to it. I think that kind of education is an important focus of what the FTC might do in the future.

Second element, better disclosure, more closing statements. My dentist says at certain moments, this is going to hurt a little, this is going to hurt a little. Imagine where we would be in the public debate about dominant firm behavior if the FTC’s statement in Google, the closing statement, had been more elaborate and coherent, a fuller discussion about what happened and why. And with the inadvertent disclosure of the other memos, might it have been a good idea just to put the whole lot out there? Put them all out there, read them all the memos, see where the recommendations were. Yes, you extract what has to be extracted, but you put them out there. You have a much more intelligent debate about the choice and decision that the agency made in that instance. Release them.

Better disclosure of broader strategy, using every opportunity to make clear what the overall purpose of the program is and how it's been designed over time. So fuller disclosure.

Technical assistance, I would expand the FTC's efforts to focus even more on what I would call
the elements of administrative law. One of the most important ingredients of good policy development that I learned in my time at the agency is the critical quality of a good administrative process, a good general counsel's office that handles conflicts of interests, a good mechanism for teaching ethics, a good mechanism for organizing the flow of information through the system. There's not an institution on earth that does not need that infrastructure in order to succeed. And the FTC is an extraordinary reservoir of knowhow about how to do those things and do them well.

And to build a structure without building them in from the front is a source of failure and, yes, as these proceedings are doing, I would continue my process of evaluation, especially by talking to our foreign counterparts and asking them how are we doing. Is this working well? What could be better? And to do that on a regular basis, and I think there's the trust and understanding that exists that in the right setting, at the right time you can get informative observations from those individuals.

What things require cooperation with other institutions? For this audience and for my colleagues, I turn back to a theme very briefly that
1 concerns me a lot is coherence between the Department
2 of Justice and the FTC. There should be a routine
3 process by which no head of the institution gives a
4 speech without sharing a text with the other
5 institution.

6 I plead guilty in this respect. I didn't do
7 that when I was here. Tom Barnett, my dear colleague
8 from the Department of Justice, I don't think Tom ever
9 got a speech in advance from me. He certainly didn't
10 get PowerPoints, probably because those were being
11 prepared the night before at conference site. That’s
12 one reason. But even there, I didn't walk them over.
13 I didn’t say, Tom, let's have coffee, let me tell you
14 about what I'm going to say, good, bad or indifferent.
15 I didn't do that. How hard would that have been to
16 do? Because a view that I think that persists
17 internationally is who's speaking for the United
18 States?
19 What is this? Five members of the Federal
20 Trade Commission, three numbers, the head of the
21 antitrust division? What is this constellation of
22 participants, always starting with the caveat, I don't
23 speak for the United States. Well, but of course you
24 do, in some way. It's a basis for inferring what's
25 going on. Would it not be possible for there to be a
collective effort by the two institutions to formulate an approach to say what are our themes overseas and how are you going to drive them home?

Second element, international cooperation. I think there is a benefit to building on a model that works so well with Canada. And I think about Commissioner Boswell and colleagues, the extent to which the US-Canada relationship was a prototype through building an effective cross-border approach to consumer protection, all of the work that went in, meeting after meeting, simply first to learn what the other configuration looked like, to learn who did what, how many FTC people knew in advance what the Royal Canadian Mounted Police had to do with this process or local police or the Bureau.

That was a process of learning. But over years, it became a foundation for an exceedingly well-functioning process of cooperation. I would take, as a starting point, the institutions that have a similar configuration, mandate, similar responsibilities. My list, the ACCC in Australia, the CMA in the UK, and a step in that direction, further step taken today, as Joe Simons mentioned, Canada, New Zealand, and Singapore.

What do they have in common? Yes, these are
all English-speaking peoples. They all have a common program, in many respects, many common roots, though variations. I’d put it this way, if you can’t test and prototype programs with the Government of Canada, our beloved colleagues close by, if you can’t do it with the ACCC, with the CMA, with New Zealand, with Singapore, if you can’t build a common approach or understanding with those, and they all understand the special considerations that go into managing a multidimensional policy mandate, how are you going to do it with the rest of the world?

I’d devote a lot more effort to working with those to build prototypes that can be rolled out and developed more broadly elsewhere. I would work with my partners overseas in more detail on case reconstructions to look at commonly examined files and ask, after the fact, what happened? What evidence did we think was important? Why, if we did, did we come to different results?

For international organizations, for international cooperation, I’d think of the example that France and Germany had pioneered in data protection in the digital economy to doing studies together. Might the bureau in Canada and the FTC be engaged in that kind of common effort? Might the FTC
and the ACCC, the CMA, find projects that become useful, not simply for advancing the state of knowledge, but building the relationships that make cooperation more effective over time?

And last, domestic networks might be enhanced. A striking impression I have from my time abroad is how much different jurisdictions devote by way of effort and personnel to taking discrete elements of their framework and working together with them. The United Kingdom Competition Network, which joins up the CMA with a number of sectoral regulators; the European Competition Network, which the Europeans have used with great effect and success, and not just building a common understanding of what's happening but moving toward the direction of a common policy.

Is it not possible for the US to do something similar here on a way that provides more coherence and focus for what it does overseas?

Last, Congress, what must it do? It's got to renew SAFE WEB with no footnotes attached, unconditional, permanent renewal. New privacy law, comprehensive FTC mandate with no jurisdictional carveouts. It's impossible to engage effectively internationally if that change doesn't take place.

Foreign citizens, as FTC employees. I’d
reconsider the restriction. It's a global talent pool. And I say day in and day out in all my meetings at the CMA and elsewhere, it's an incredible global talent pool. To not be able to draw from it is simply ignoring an enormously valuable source of personnel.

And, last, I'd change the Sunshine Act so that the FTC Commissioners can consult and discuss in the same way that their counterparts do overseas, at least with respect to the formulation of strategy and policy over time.

To sum up, these hearings are a great opportunity for the FTC to assess its international strategy and, importantly, I think to reinforce the intuition that guided the formation of OIA and the building of the modern program. An agency has a choice every day to consumer invest. By consume, I mean you spend money on cases, you do regulations. Invest means you build the infrastructure that serves over time.

John Fingleton at our FTC at 100 hearings said the problem with this is that the investment and infrastructure does not generate ribbon-cutting opportunities; it does not create the headline -- oh, we worked on SAFE WEB, thanks! Where's your big tech case? Well, we built a better infrastructure with the
International Fellows Program. Yes, yes, yes, yes, yes. The decision to build the infrastructure is important.

At the hearings, John said, the investment is important, we probably have to do more of it, but the difficulty is we cannot show in a tangible and concrete way how it has made things better. But I think our experience, over time, is that it certainly makes things better over time. It's indispensable in this multipolar, complex world that we have.

During her campaign, Hillary Clinton had a speech in which she talked about planting trees. And she said, “The mark of good public administration is the willingness to plant the trees whose shade you will never enjoy.” And, in many respects, that's what the FTC has done. So good luck in taking care of the trees and in planting more seeds. Thank you.

(Appplause.)
BUILDING ENFORCEMENT COOPERATION FOR THE 21ST CENTURY

MS. ASKIN: Thank you, Bill.

I now have the pleasure of introducing our next speaker who we've heard mentioned many times today, Matt Boswell, who is Commissioner of Competition at the Competition Bureau Canada. We're especially looking forward to your remarks for a few reasons and hearing your perspectives.

One is similar to the FTC, your agency has a joint mission, a dual consumer protection and competition mission. You also have a fabulous amount of experience, if I can say so, with enforcement. So you've seen a variety of cases. You’ve seen the enforcement tools. And we transition now to lead-in to our first panel talking about enforcement cooperation tools. Your experiences with both consumer protection and competition enforcement matters I think will be excellent. Thank you.

MR. BOSWELL: Thank you very much, Molly, for that kind introduction. It's very difficult to follow Former Chairman Kovacic, and I've seen others do it around the world. He's an incredibly knowledgeable, engaging, thoughtful speaker. I actually just want to run out of here and go back to my office and start do some of the stuff he's
recommending, but I'll try and stay on track.

Thank you very much to the Federal Trade
Commission for inviting me to join today's important
discussion, and, of course, thanks to all of you for
joining us today to talk about competition and
consumer protection in the 21st Century.

So change, as we all know, is inevitable,
and it's upon us. The rise of the digital economy in
general and e-commerce in particular is a truly global
phenomenon. More and more, the conduct we investigate
is not constrained by borders, and when change
happens, the question is not how do we feel about it;
the question is how will we respond to it. Will we
rise to the challenge? Will we seize the
opportunities that come with it? These are questions
that governments around the world are facing, and how
we answer these questions will define our success
going forward.

We at the Canadian Competition Bureau have a
long history, as Former Chairman Kovacic pointed out,
of cooperation with the FTC, as well as many other
international competition authorities, but we must not
rest on that foundation. We must continue to build on
it and adapt to new realities.

During today's digital age, cooperation
between international competition authorities is more critical than ever before. We are in the midst of a transformative shift. For example, the giants of the taxi and accommodation industries don't actually own cars or property anymore. Instead, they are using technology to disrupt traditional business models and create digital platforms that connect users quickly and easily.

As the Canadian Minister of Innovation, Science and Economic Development has rightly pointed out, the digital economy is the economy. This is the backdrop of competition and consumer protection law enforcement in the 21st Century. Digital platforms are creating an economy built on collaboration, and if we want to keep pace, we'll need to continue to collaborate and find better ways to do so.

So today, I'd like to talk briefly about why international cooperation between authorities is so important. I'll discuss the benefits that it brings us and the tools we use to achieve it. I will end with some examples of cases where cooperation has been critical and we, in Canada, have benefitted tremendously. Plus, without preempting the panel, I will consider a few ways that we might improve in the future.
So to get us started, let's consider why it's so important that we cooperate. What are the drivers? The rise of the digital economy in general, and e-commerce in particular, as I've said, is a phenomenon globally. The number of digital buyers worldwide is expected to rise to over 2 billion by next year. That's approximately one-quarter of the world's population buying online. And there are a growing number of jurisdictions with competition laws and authorities and consumer protection laws, as Former Chairman Kovacic pointed out.

When the International Competition Network first launched in 2001, it only had members from 14 different jurisdictions. Today, it has 146 members. We have moved from theoretical discussions of enforcement cooperation to our current reality of regular cooperation between authorities. Now, not surprisingly, for us in Canada, collaboration and cooperation with the US authorities is particularly important. It developed naturally, given our shared border and our close economic and trade ties.

The signing of the Canada-United States-Mexico Free Trade Agreement, or CUSFTA, as we call it in Canada last year was very important, and once in force it will serve to further strengthen our
commercial relationship and the relationship between
the competition and consumer authorities.

So a coordinated approach to the challenges
the current digital age raises for competition and
consumer protection law is critical for enforcers, and
when we do cooperate, there are many benefits for us
to reap -- increased detection and deterrence of
anticompetitive conduct, efficiencies for both
agencies and the business community, the sharing of
best practices resulting in more effective
investigations and better protection for consumers,
and minimized risk and uncertainty for businesses and
agencies, because when agencies cooperate around the
world, outcomes are more consistent.

And at the Bureau, that vital cooperation
occurs on a broad spectrum, from extremely formal
cooperaion to informal avenues of working together.
Informally, we exchange public information, theories
of harm, and procedural information, such as the
timing of investigative steps, and we conduct meetings
and staff exchanges.

In contrast, formal cooperation can include
mutual legal assistance and the sharing of documents,
data, and confidential information. For instance,
competition policy principles are commonplace in
Canada’s free trade agreements that are being entered into in the modern day, like CUSMA I already referred to, and they ensure that the benefits of trade liberalization are not offset by anticompetitive conduct.

In criminal cases, mutual legal assistance treaties, or MLATs, are useful formal tools to gather evidence located in foreign jurisdictions. This formal cooperation allows enforcement agencies to share documents, affidavits, lend exhibits, and engage in search and seizure on one another’s behalf. The Bureau has used the MLAT process to conduct searches in Canada on behalf of the United States Department of Justice Antitrust Division and to obtain important evidence from the United States for the advancement of our cases.

Where confidential information is shared outside of MLATs, we often obtain waivers from the parties. But even without waivers, Section 29 of the Canadian Competition Act lets us share confidential information with other agencies for the administration or enforcement of the Competition Act, and, of course, where we have assurances of confidentiality.

The Canada-US Cooperation Agreement signed in 1995 has served as a high-level framework for our
positive cooperative relationship. It sets out how
the Bureau, the FTC, and the DOJ Antitrust Division
will work together. We also have our Canada-US
Positive Comity Agreement, allowing one country to
defer to another in cases where conduct in one country
creates anticompetitive effects in the other. And,
more recently, we established our best practices on
cooperation in merger investigations, which is a
public document that provides guidance to the business
and legal community. This was based on years of
merger review collaboration between the Bureau and the
US authorities.

We've put this best-practices document to
good use. Recently, we worked with the FTC and the
European Commission on the Linde-Praxair transaction,
where we obtained multiple remedies. We also worked
closely recently with the USDOJ on agricultural
transactions, such as Bayer-Monsanto and Dow-DuPont.

But one transaction that stands out in my
mind for cooperation and collaboration is the Staples-
Office Depot merger in 2016. It exemplifies the deep
and positive cooperation relationship that we have
with the FTC. In that case, there was extensive
sharing of data and evidence, including the FTC
sharing their second request with us. We also
seconded a Canadian Department of Justice lawyer to the FTC litigation team and had Bureau officials attend the FTC injunction hearing. As a result of this cooperation, the Bureau and the FTC were able to file simultaneous court challenges to the merger, and the parties ultimately abandoned the transaction. Going forward, I can assure you today that I will encourage Bureau merger staff to seize such opportunities for deep collaboration wherever possible.

On the abuse of dominance side, Google comes to mind as a great example of our cooperation as well. The Bureau launched an inquiry in 2013 under our abuse-of-dominance provisions to investigate Google's conduct related to online search and search advertising, as well as display advertising. During the course of our in-depth investigation, we worked with several international counterparts, including the FTC.

We concluded from a Canadian perspective that Google used anticompetitive clauses in its AdWords application programming interface terms and conditions. These clauses intend to exclude rivals and negatively affect advertisers. Google removed the clauses, as many of you will be familiar, and
committed to not reintroducing them or similar ones for a period of five years. These commitments were similar to those made here in the United States. Being able to readily review facts and evidence related to similar allegations against Google in the US context was of significant value to the Bureau's investigation. On the cartel side, we have our Nishikawa case, which resulted in Canada agreeing to have the United States Department of Justice proceed and take a guilty plea in the auto parts investigation, even though there was an impact in Canada. This demonstrated our commitment to positive comity between our two nations, and it showed how we can collaborate for efficient, effective outcomes.

Let me turn to the area of deceptive marketing. Our legal framework and ability to assist and share information with our foreign counterparts has improved significantly in Canada with the enactment of Canada's Anti-Spam Law, or CASL, as we refer to it. CASL brought into force new express provisions allowing the Bureau to use our investigative powers under the Competition Act or the Criminal Code of Canada to assist foreign partners without us having to be conducting our own
It grants these powers with the provision that information will only be used for that investigation or proceeding and will be kept confidential, similar to provisions in the US SAFE WEB Act. Although I am unable to get into the details, recently, in response to an FTC request, the Bureau shared information obtained through formal powers with the FTC to assist them in an investigation.

Similarly, the US SAFE WEB Act has been an incredibly valuable tool for gathering information in cross-border deceptive marketing cases. I know, and it's been mentioned several times this morning, the SAFE WEB Act is up for renewal soon, and I want to say unequivocally and on the record the Bureau supports that renewal, and we are pleased -- incredibly pleased -- with how we've been able to use this valuable tool.

The Bureau has used SAFE WEB requests to obtain information relevant to multiple Canadian investigations, as we did with the premium text messaging case, which was litigation against Canada's three largest wireless providers for conduct that was deceptive marketing practices. At our request, the FTC applied to the United States District Court for the District of Maryland for an order authorizing the
FTC to obtain oral and documentary discovery from a US company, Aegis Mobile. Subsequently, the US District Court ordered Aegis to hand over documents to the FTC, enabling them to then share those records with the Bureau. This was, as I understand it, the first time an American court granted authorization to the FTC to conduct discovery of an American company to assist the Bureau. These events, the tremendous efforts that the FTC went to on behalf of the Canadian Competition Bureau, were of incredible assistance to the Bureau in advancing our case, which we were then able to resolve by consent agreements with the three largest wireless providers. And it's one of the key reasons that we are so supportive of the renewal of the SAFE WEB Act.

The FTC and the Bureau are also involved in several cross-border regional partnerships related to combating mass marketing fraud, including the Toronto Strategic Partnership, the Alberta Partnership against Cross-Border Fraud, and the Pacific Partnership against Cross-Border Fraud. These working relationships, focused on sharing intelligence and cooperating in mass marketing fraud investigations, have frequently led to early collaboration between the Bureau and the FTC. However, communication on cross-
border enforcement outside of these partnerships could allow for even broader cooperation between the Bureau and the FTC. More cooperation at the working level and informal discussions on trends, intelligence, opportunities to coordinate investigations and dialogue early on in the investigative process could make formal information-sharing tools even more effective.

To that end, we have been participating in regular merger team leader meetings with our US partners since 2011. These team leader meetings were so successful that we've expanded them and have had similar meetings with team leaders on merger review with Brazil, Australia, China, the European Union, and the United Kingdom. We are looking forward to the first abuse of dominance or unilateral conduct team meetings with the FTC and DOJ this coming June.

Like the FTC, we also participate in international staff interchanges and host officials from countries around the world. We have had several successful outbound interchanges to the FTC over the years, and, of course, we would welcome the opportunity to host a member of the FTC at the Bureau going forward. We might suggest you don't come in the winter. It was actually snowing in Ottawa on Friday.
So this networking and the people-to-people linkages, such informal cooperation, builds rapport and eases international cooperation because relationships and trust really do matter. Cooperation among authorities is critical to finding common approaches to tackle global anticompetitive conduct, and through the various tools we have in place, we can continually reap the benefits of working together with our global partners, and “together” is the key word here.

As Henry Ford once said, if everyone is moving forward together, then success takes care of itself. That's true for us, too. Strong working relationships are a hallmark of a successful organization in our digital and globalized world, and competition and consumer protection authorities are no exception.

Now, let me end by once again thanking the FTC for hosting what I'm sure will be an interesting dialogue over the next two days, and I'm really looking forward to joining our panel discussion now. Thank you very much for your attention. Enjoy the hearings.

(Applause.)
BUILDING ENFORCEMENT COOPERATION
FOR THE 21ST CENTURY (PANEL)

MS. ASKIN: Thank you, Matt. We're happy to
now kick off the first panel discussion, again focused
on Building Enforcement Cooperation for the 21st
Century. I'm Molly Askin, an attorney in the Office
of International Affairs, and we're going to
comoderate today with my colleague, Laureen Kapin,
also from the Office of International Affairs.

One update to our programming, unfortunately
our planned speaker, Edith Ramirez, is not going to be
able to join us today.

MS. KAPIN: Silver lining, that means we are
going to absolutely be on time now that we have this
great cushion.

MS. ASKIN: That is true. So what I wanted
to mention to kick off this panel follows along so
many of the themes we've heard this morning. I think
in Matt's comments, especially about Praxair and
Staples, we heard about the depth of cooperation and
how we can use our cooperation enforcement tools to
work together and achieve consistent outcomes but also
use those tools to have knowledge transfer between
staff at different agencies that makes our enforcement
efforts more robust.
To give a little bit of light to the breadth of cooperation, while we do work with certain partners at the deep level, we also work, with -- on many cases -- with competition enforcement agencies from many jurisdictions. So just to give a few data points, in the last eight years, depending on the year, we’ve cooperated in between 21 and 48 enforcement matters. It's a little bit different each year depending on the cases and the investigations that we're seeing. And in those cases, we have cooperated with between 12 and 21 different competition agencies, and, again, those are just the competition cases.

So you can see that, in certain cases, like Praxair-Linde, we’ve cooperated with over 10 different competition enforcement agencies, and there's also a range. So as we've seen the number of agencies we’ve worked with increase, there are a number of sort of repeat players, but in each year we're typically seeing agencies that we're cooperating with for the first time, but again relying on many of the same tools that we're able to use to cooperate with people we work with on a regular basis.

So that's a little bit of an idea from the competition side. I think Laureen is now going to share some perspectives from the consumer protection
and privacy enforcement side.

MS. KAPIN: Yes. My name is Laureen Kapin, and I’m an attorney with the Office of International Affairs, where I focus on consumer protection matters. And for me, the theme of our panel today and indeed these hearings this week are we're stronger together. And I wanted to give one case example to illustrate that and also reinforce the concept that Bill Kovacic spoke about, with Canada really as a prototype for the robust relationship we can have with our international partners and how that relationship can really lead to a stronger enforcement result because of those relationships.

So the example is regarding our Expense Management of America case, and that was a really sleazy debt-reduction scam that arose out of the financial crisis in 2008 that really targeted vulnerable consumers by making offers to try and get them debt relief for their mortgages or a better interest rate, again, something that really focused on people who were most vulnerable, who could least afford to lose money.

And in that case, we were able to work with the RCMP, the Royal Canadian Mounted Police. We know who they are because they help us a lot, and the
Canada Competition Bureau, among others, to get at money that was in Canada. We were able to get $2 million that belonged to the bad guys and gals behind this scam that was actually seized by the RCMP, but they alerted us to the fact that they had this money from these bad guys and gals they knew we were looking at, and we had an asset freeze in our case on the US side, and we were able to work with the Canada courts to basically say, we have this order, Canada court, can you please keep this money on ice until our case is over and if we have a judgment, then ship it over to us so we can give it to the victims?

That's not easy to do without a lot of really good cooperation from your foreign partners, without a good cooperation relationship with the Department of Justice's Office of Foreign Litigation who handles our litigation abroad. All those relationships worked to make sure that that money stayed put until our case was over and we got a judgment against these defendants.

And, bottom line, we were able to get nearly $2 million refunded to victims on both sides of the border and in any other countries where the victims applied for redress in that matter. That's a result we could not have had but for the human glue -- I love
that phrase, and I will steal good phrases at any
opportunity -- the human glue that we had created
between the FTC and our international counterparts.
So I just wanted to give that as a framework because
it's a great example of how we're stronger together.
And with that, I think we're going to launch
into our panel discussions. And I have the privilege
of introducing Mr. Tom Barnett, who is a Partner at
Covington & Burling and before that served as the
Assistant Attorney General in charge of DOJ's
Antitrust Division. So I thought I would turn it over
to you for your remarks, and thank you for being here.

MR. BARNETT: Yeah. Thank you, Laureen and
Molly. I very much appreciate the opportunity to be
here. I will join in the commendation to have the FTC
for holding these hearings. I do think it's important
and one of the strengths of the agency that you all do
this.

The theme of international cooperation is
increasingly important. To, you know, borrow a few
cliches, the world is shrinking and it keeps getting
smaller, and, certainly, with the advent of the
digital age, that just underscores and accentuates the
importance of the various, I'll say, competition
agencies, but I guess I should say competition,
consumer protection, and other agencies around the
world from interacting in various ways.
I will start by saying that my good friend, Bill Kovacic, is still not sending me his speeches in advance.
(Laughter.)
MR. BARNETT: But, nonetheless, you’re going to hear a lot of what he said echoed and reflected in what I’m about to say. And I think -- and, indeed, in, you know, some of what Matt was saying, and you’ll probably hear a fair amount of repetition, which I think is not all bad. And I think that's because those of us who are involved in some of this are seeing and reacting to the same things.
And I will start by saying that there are different forms of cooperation. There’s formal cooperation, there’s been reference to various legal structures, organizations like the OECD, the ICN, UNCTAD, et cetera, et cetera, and then there is less formal coordination. I'm going to spend more of my time talking about the latter than the former. They each have their place.
I mean, formal cooperation -- and I'll use the OEC as an example, there is a benefit to having an organization that is a formal representative of each
government, and if that organization makes a statement, it carries particular weight. And while perhaps less relevant to the FTC, one of the things I remember is when the OECD adopted a resolution or a statement that says cartel enforcement should be a priority for competition agencies around the world, that carried weight. And there are a lot of things that led to many agencies around the world prioritizing cartel enforcement, but that was certainly one of them, and it helped reinforce the message.

On the other hand, formal cooperation has its costs and challenges. You know, the story about if we were trying to form -- and I say we, because I wasn't there at the time -- the International Competition Network, in a formal way, we might still be debating how big the table should be, what size the table should be. And you get some of those -- that reaction when people talk about, well, should we try and introduce competition into the whole WTO framework. I think that has its own set of complications that makes that kind of formal action very, very challenging.

And, you know, another sort of smaller example, when I was at the department there was a
discussion going on about -- not only with the FTC but our Canadian colleagues as well as some others, could we come up with a single form for a merger prenotification to try to reduce the burden to various parties, because there are lots of forms you have to file. After a lot of discussion, what we concluded was is what you would end up with is one form that had a different tab for each country that would essentially replicate each form.

The local requirements and information that are needed are local. I mean, there is some overlap, I get that. But as you probably would infer, we sort of dropped that effort and didn't continue going. And there is the risk when you are pursuing a more formal approach of what I would call the lowest common denominator, that, you know, various agencies, countries, have different situations. They may or may not be able to commit to a certain standard or action, and you end up having to, if you will, bring down the standard in order to get everyone on board.

On the other side of that, you have informal cooperation, and I'm a huge believer of it. You start with -- and I will echo what Bill said and I think some others have already said -- there is a value to that personal, human interaction that I think is hard
to overstate. You not only just knowing the person who's on the other end of the email or the phone call sort of can in some cases drop defensiveness, can increase understanding, can increase receptivity. And I believe that is true and valuable at both -- at the senior level and very much, as people have already alluded to, at the staff level.

I've said before, I will say it again, I think one of the biggest benefits of the International Competition Network, because it’s broader than OECD, is you get senior people from various competition agencies around the world, particularly at the annual meeting. They interact at different times during the year, but they actually meet each other face to face. And that benefit alone, to me -- the ICN has done a lot of things well beyond that, but that benefit alone, I think, would justify most of the efforts that go into it.

And I can tell you, at least from my time when I was at the department, when specific issues came up, it actually did provide a contact stand, facilitated cooperation on some specific enforcement matters that might have been challenging if those relationships didn't exist. But I do want to reinforce what has already been said. I think it is
hard to overvalue the benefit of staff level exchanges, not only just the normal dialogue that goes on but the idea of secondments.

And Bill did a great job of describing, you know, when the FTC has had people come in. They’re here, they see exactly what goes on -- the good, the bad, and the ugly, right? Mostly good, I have no doubt. But it is -- how do I want to say this? A couple of things. Just to see the nuts and bolts. I mean, how do you discover information? How do you make phone calls to industry participants? When do you use compulsory process? When you get comments from a particular industry participant, what filter do you use as you listen to that? Very basic things for people who have been doing it for 15 years. But for people who may not have been doing it for 15 years, there’s a lot to be learned.

And, and I want to emphasize this, and I will give Bill Kovacic credit, because he’s somebody who started impressing this upon me from the very first time I met him. I’m not just saying that people outside the United States should come to the United States and see how well the FTC does things. There are a lot of things you can learn from somebody here in the United States by going over, sitting in the
chair of somebody in an office, whether it's in Africa, Canada, Australia, or wherever.
And that facilitates things, because down the road, you have, I'm just giving you a general example -- oh, wow, time is up? I thought I had eight minutes. Did I use eight minutes?
MS. KAPIN: No, we're probably a little askew because of the missed speaker.
MR. BARNETT: Well, I'm very -- I want to be fair to everyone. I can finish up quickly if you want.
MS. KAPIN: Sure, that would be great.
MR. BARNETT: Okay. Well, then, what I will briefly mention, and maybe we'll get into this in the discussion is, I also underscore cooperation, discussion with the DOJ is very important. But Bill's covered that. There are a lot of practical issues. You have timing issues, you have agencies with two levels of decision-making, you can cooperate at one level, but then the decision-makers are at another level. That introduces complexity.
What the FTC is particularly strong about is, I think the investment in Randy’s OIA shop, and I give Debbie a lot of credit for helping to set that up and for her successors in supporting it, but you have
people who serve longer terms, you have overlap, so
that those relationships, the knowledge can build up
over time. I think that's -- and I'll even say this,
that's a relative challenge for the DOJ at the senior
level, but the FTC has done very well with that.

I was going to flag the potential for mixed
messages, different Commissioners saying different
things, the DOJ saying something different from the
FTC. That can create problems internationally, and I
fully endorse efforts to try to get everyone on the
same page. And so I will leave it at that, as my
message is to focus very much on the informal
cooperation, try to -- I think you all are doing a
great job. Try to build on that, reinforce that. I
think that lays the groundwork for formal cooperation
as consensus develops on various issues, but with that
I will pause.

MS. KAPIN: Okay, thank you.

MS. ASKIN: So as we move on I'm going to
introduce our next speaker, Mr. Chilufya Sampa, he
comes from the Competition and Consumer Protection
Commission in Zambia. He's also currently serving as
President of ICPEN. Over to you.

MR. SAMPA: All right. Thank you very much,
Molly and Laureen. First and foremost, I would like
to thank the FTC for inviting me to these hearings, which, as the other previous speakers have said, are very important tools to actually get to know where you are. As a way of looking at the formal cooperation or enforcement cooperation, too, that have been there, I thought that maybe we look at the perspective from the African side, and basically to state that Africa is made of quite a number of countries with very small economies, and so you may not necessarily see engagement with the FTC directly because of the nature of the economies that you find on the African continent.

However, there has been a trend over the past maybe 10 to 15 years where you see a lot of countries coming up into regional block, regional trading blocks. And these become now quite significant trading partners globally, making the transactions or even with the USA quite significant, and, therefore, bring up the possibility of seeing that the FTC can actually engage with the trading block. So we have one in the southern part of the African continent called SADC, COMESA, and the East African Community. So when you look at that, you have close to 30 countries altogether and making it quite significant.
Now when you look at the tools that the FTC has used generally over the years, for example, I’ll pick on the SAFE WEB Act, which, to me, brought out the combination of the Livingstone principles where 20 countries, African countries, together with the FTC, agreed to communicate, collaborate, investigate in appropriate cases, different cases that may affect not just the US citizens but the African citizens as well.

And with this encouraged -- with this type of communication, the Livingstone principles, I would not say that we have as Africa seen the -- been able to actually engage with the FTC, but we have used these same principles to engage with other cooperating or other agencies within Africa and at times outside of Africa. And with -- for example, I’ll give a situation where we had a case of secondhand motor vehicles with Japan and the UK, and we did use the Livingstone principles in trying to engage with them and share, and try and enforce -- come up with an enforcement.

MS. KAPIN: Can you just, for those who don’t know, tell us what the Livingstone principles are, just the short version?

MR. SAMPA: The Livingstone principles basically talk -- well, it's quite a long list of
clauses, but it's basically a willingness by these
countries to work together in enforcement, work
together in investigation, and work together in
sharing of information. In summary, I can say that
that is what it is based on, yes.

MS. KAPIN: Perfect.

MR. SAMPA: And, of course, even the
fellowship of -- the FTC fellowship that has been
offered over the years, that has been -- is also part
of the Livingstone principles. And we have used that
to have the informal communication or even the formal
communication with Ethiopia, Sudan, Rwanda, the
Seychelles, Namibia, and Botswana, and based on that,
and we see that that, too, would not have been
possible without the tools of the FTC.

One of the cases I think that became quite
apparent is the Western Union case where there was a
refund to many consumers, and I, for one, was once
approached by one of the consumers in Zambia who had
been a victim of the scam. And she had made an
application to the FTC to actually receive her
refund. And what we did was, when we heard that the
FTC had actually made that decision, we publicized it
to our -- within our jurisdiction. I'm not sure how
many other people came through, but I was aware of
this particular one person who approached us.

As I say, also aware of the cases where we were dealing with secondhand vehicles and we tried to apply the Livingstone principles, and unfortunately, maybe because the United Kingdom and Japan, because those are the two countries that we were trying to have cooperation with, did not -- we did not have the same level of cooperation or agreements. So that didn't work very well with that.

There is also another enforcement that we had, again based on that, the Livingstone principles as I keep on saying is the Fastjet on misrepresentation that took place within the region. This affected Tanzania, Zambia, Zimbabwe, and Malawi, and we were able to get enforcement by cooperation between the various agencies that I've just mentioned.

Another tool that I think the FTC has been instrumental to and have really, really helped is the ICN working group -- major working group cooperation firm work. We have used this again to share nonconfidential information, share information on transactions that are similar in nature, share theories of harm, definition of relevant markets, just depending on the type of case that has come up.

Again, the structure of the African
countries is very highly concentrated. You would not necessarily maybe find two merging firms operating in one particular market, but when you look at it on a regional level, you will find that that becomes a possibility. And so coming from my area of remarks, that as we see the region integrating, with the possibility of better cooperation with the FTC, because it becomes possible for a major transaction to actually affect both regions, so to speak.

In a number of cases, there was a merger case where Walmart, which is, of course, a US company, was taking over mass discount stores of South Africa, and there were a number of issues that we shared with the South African Competition Authority, the Namibian Authority, as well as the Botswana Competition Authority. And basically this was on the remedies, especially that some of the laws within these countries do have public interest issues that are raised. And we shared with the other authorities to see how we could work together and come up with similar remedies and ensure that we have similar type of enforcement procedures.

There is also the Toyota-Tsusho takeover of CFAO. That's a French company, and both these companies had presence in the region. We had
cooperation with Kenyan authority, Tanzanian authority, Malawian authority, and this merger looked like it had the potential to raise the concentration of the market, and we were able to share the theories of harm with the other cooperating agencies.

The more recent case was a merger between BSA and Aspen Pharma, and with this, the Botswana Competition Authority and ourselves shared on theories of harm in the relevant market.

So we can say that the cooperation has been going on and it has been successful, but as I say, I think the FTC tools have really benefitted from -- benefitted us in engaging with other African competition authorities, and we have been able to engage with that.

When you look at maybe where there’s room for improvement, we see, I think, a situation where the tools have not really been fully appreciated. I think one that Professor Kovacic mentioned is that there is need for probably FTC to go out more and explain what they do and what their role is. And I think that is what most African countries, especially, and I may speak for Zambia here, may not fully understand and appreciate what the role is that they do, but not to say that these tools are extremely
important. I can close for now.

MS. ASKIN: Okay, thank you.

MS. KAPIN: Thanks so much. So now I have the pleasure to introduce Jean-François Fortin, who is the Executive Director of Enforcement of the Autorité des Marchés Financiers in Quebec, that is the agency in charge of Quebec's financial sector. So I hand it over to you.

MR. FORTIN: Thank you. Thank you so much.

Good morning, everybody. Thank you, Molly and Laureen for the invitation. As it was said, I am Executive Director of Enforcement within the AMF, and I think the reason why I am here today is also because I am chair of a committee for IOSCO and also the screening group of IOSCO, and I will just tell you what it is. IOSCO, as probably some of you know, is the Organization of Securities Commissions. And it's an international body that brings together the world's securities regulators. Here in US, obviously, the US SEC and the CFTC are two very important members of this organization. And it represents between 90 and 95 percent of the world's securities market.

As you all know, the securities commissions are responsible for market efficiency but also for consumer protection and enforcement is a very
important part of our mandate. So committee for --
under IOSCO umbrella is the group composed of
enforcement people and also discussing standards, but
how we can share information together and also how we
can work in -- I mean, there’s a lot of cross-border
activities. I think it's also true in the competition
world, but nowadays, the globe -- the markets --
financial markets are global. And the need for
cooperation in the international context is really
important.

We have a MMOU, a multilateral memorandum of
understanding, that was adopted in 2002. It was borne
further to the event of September 11 where there were
a few investigations going on everywhere, and there
was a need after those investigations to see how
multiple regulators could really work together and
cooprate in the context of investigations that had
crossed borders remit.

There was, at the time, few bilateral MMOUs,
and I know some of the previous speakers talked about
existing bilateral MMOUs in their competition context.
At IOSCO, we realized that there was a need for a
multilateral MMOU that would be a more efficient way.
You don't have to renegotiate bilateral MMOUs from
time to time, and the goal was to create a document
which would be at the same time strong in its wording
but also flexible to accommodate the different
systems, legal systems in the world.

So I think the success of the MMOU is really
-- it has become recognized internationally. It’s now
the benchmark recognized by the AMF, the World Bank
and FATF, where they would consider if a jurisdiction
is signatory to MMOU. As of today, out of 149
eligible members, there are 121 signatories to the
MMOU. And just to give you an example of the level of
the use of the MMOU, in 2003, there were 56 requests
for information, and last year in 2017, there was
4,803 requests for information.

One of the main reasons I think why the
MMOU is so successful is because of the screening
process that is really robust. You don't -- you
cannot become a signatory just because you express a
willingness to become signatory to it. You have to
demonstrate that you have the legal capacity to
cooperate and to share information with your foreign
counterparts. For that, there is a screening group,
composed of a few people even in this room today, that
of 35 member jurisdictions that we’ll screen every
applicant to become a signatory.

Briefly, key elements of the MMOU, the first
one, I’ll get to the second one in a few minutes, it’s an nonbinding agreement but sets out specific requirements for what kind of information that can be exchanged and how it is to be exchanged; show that you have the legal capacity to compel information and what types of information you can compel. For example, in our world, it would be the tradings, the transactions, beneficial ownership, the kind of things that you have to be able to demonstrate that you can obtain in your market and afterwards you can share with the requesting authority that you have the capacity to share, and also some specifics about the permissible use of the information for the receiving authority.

Other specific requirements regarding the confidentiality, every request has to be treated confidentially by both the requesting and the requested authority and also that no “domesting” or blocking laws prevent the securities regulator to share the information with the requesting authority.

The first MMOU was adopted in 2002. In 2016, there was a new agreement that was agreed between the parties. We call it the enhanced MMOU, EMMOU. The reason for that, I mean, the first MOU is a really useful tool, but we thought concerning, I think, some of the reasons that were expressed this
morning regarding globalization of the market but also
the use of technology, there was a need for
modernization of the MMOU. And we also wanted to
“higher” the standard in terms of what were going to
be the minimum standards to become signatory to this
enhanced MMOU.

Key additional minimum powers that were
added in the context of this agreement: capacity to
obtain audit working papers from issuers; compel
physical attendance for testimony; and the capacity to
sanction if the person doesn't show up. Capacity to
freeze the assets, there was a big debate on that, but
since it was very difficult to have everybody on board
to have the capacity to freeze on behalf of another
regulator, if you cannot freeze on behalf of another
regulator, at least you will help the other regulator
to tell them how you can freeze assets in your
jurisdiction. And the last two new powers are the
capacity to obtain internet service providers’ records
and also the telephone records from your market
participants in your jurisdiction.

One very important aspect of both MMOUs is
the principle of fullest assistance permissible. It
means that a regulator must assist one another to the
extent it can legally do, even though it’s not in the
MMOU. I give you one example. In Quebec, prior to
the adoption of this new EMMOU, the freezing of assets
was not part of the MMOU, but in Quebec, we have the
capacity to freeze on behalf of another jurisdiction.
So in the past, we actually froze assets on behalf of
foreign regulators, even though it was not in the
MMOU, but under these principles of full assistance
permissible, we did it anyway.

So in conclusion, I think the MMOU and now
the EMMOU, we only have 10 signatories so far but it
was adopted recently, it’s a really efficient tool.
I'm not that familiar with the MLATs of the world but
I hear that it’s really complicated, can be really
long. Requests for assistance between regulators is
really efficient. Obviously if you have to go and
compel information and testimony and documents can
take some time, but if you have the information,
literally, requests for information can be answered
within weeks, if not days, and in urgent matters, it
happens in a few hours.

And on that I will just say a word on
Matthew and also Tom about the informal value of the
process is really important. I think by formalizing
the relationship with a formal document within the
MMOU, we help the informal process. And it’s true
that when you know the people and you can pick up the
phone and talk to someone, it facilitates. You have
an instrument that provides you with how you can share
information, but getting to know people, build trust
between organizations and with individuals, and I can
speak for Quebec and with the US SEC, within urgent
matters, we have ICOs investigations nowadays, we talk
over the phone, we collaborate, we coordinate our
efforts. It's really, really important.

And I can get back on any questions you
have, but the MMOU has proven to be a very efficient
tool for us and for every regulator across the globe.

MS. ASKIN: All right, thank you. As you've
noticed, my colleague, Nicole, is walking around with
comment cards. If anyone in the audience has
questions for our panelists, now is a good time to
start jotting those down so we can ask them toward the
end of the session.

And, Matt, I will turn it back to you.

Thank you.

MR. BOSWELL: Thanks, Molly. I guess I went
over time in the introductory remarks, so I'll try and
keep this short to get us back on track. So
cooperating is obviously how we get our job done,
collaborating around the world. Amazing to hear what
IOSCO does. I used to work in that world briefly, and I know firsthand the incredible cooperation in that organization.

But in my comments here I just want to talk about sort of gaps and trends of international cooperation, consider how we might respond to those going forward. And I also want to touch on the intersection between data privacy and international cooperation, which is more and more an area of significant concern. So we have to explore ways to enhance our relationships at the investigative level. There’s no doubt about that. We always have to be looking to improve. But how exactly do we do that?

Some commentators in Canada have called for maybe the creation of a new supernational body with greater powers in this area. I think it’s fair to say that at least from my perspective it’s theoretically interesting but it’s not really a practical solution for today. Some have also suggested that at least from a Canadian perspective we establish joint investigative teams, but the reality is certainly with respect to Canadian law and disclosure in proceedings, there are substantial barriers to doing this, to doing it in any way that is smooth across borders.

However, one untapped area, and I agree with
Jean-François that they can be a bit heavy, but mutual legal assistance in civil competition matters, we have some good tools on the consumer protection side that you've all heard about this morning in terms of SAFE WEB and other tools, but for abuse of dominance and mergers, civil MLATs might assist in moving information -- confidential information across borders.

Now, Canada and the United States have legislation in place allowing for mutual legal assistance in civil cases, but we don't -- we need to have a treaty in order to implement that. And it's something that, you know, we really should look to, certainly in the Canada-US relationship, to be able to share more as it would be really a powerful tool to crack down on anticompetitive civil conduct across the border.

Another issue that sort of comes up around the world is communication of confidential information, the exchange of confidential information. So when we're cooperating with the United States, whether it's the FTC or the DOJ on civil matters, and, in fact, on cartel matters, in order for us to receive confidential information in Canada, the parties have to provide a waiver in order for FTC to share that
And there have been -- more often than not, the parties do provide those waivers, particularly in merger cases, but there have been instances where they haven't, and it causes an impediment for us. It doesn't actually, in our view, make sense in terms of efficient merger review, but it does happen.

Now, the flip side is in Canada, we have something we refer to as an information gateway provision in our act, and I’ve referred to it already in Section 29 of our Competition Act, allows us to share with foreign enforcers for the administration and enforcement of our act. So if sharing with the FTC assists us in advancing the case in Canada, then we're able to do so. And it allows us to rapidly and effectively cooperate with other jurisdictions.

We have -- first of all, the OECD encourages the adoption of information gateway provisions similar to our Section 29. We obviously see great value in it. It allows us to be agile in working with partners, so we also encourage the adoption around the world. We're also seeing, of course, a trend towards multilateral instruments, not as amazing as what Jean-François has just described, but I think there is a trend in the competition and consumer protection world
to think about this more frequently.

And we have seen as sort of an early example of that in the US DOJ and the FTC pushing forward what's called the multilateral framework on procedures, which is designed to bring many jurisdictions on board to make a commitment to issues related to procedural fairness. And procedural fairness and transparency and those issues have been certainly on the agenda at the ICN and the OECD, but the MFP that the United States Department of Justice has advanced, has been lead on, has really assisted, at least in Canada's view, in getting much more traction around the world for this multilateral type agreement. And perhaps it's the beginning of a movement towards something like the MMOU or the EMMOU that IOSCO has.

So let me return to the issue of privacy. As we all know, discussions are increasingly focused on the intersections between privacy, consumer protection, and competition. We're seeing -- we are thankfully seeing collaborative efforts within the international regulator forums in an attempt to better understand and map out where the cross-sections are between privacy, consumer protection, and competition.

A great example of this is the global
privacy enforcement network now has observer status with ICPEN, which leads to more dialogue, more relationships, and I will echo the comments of all my fellow panelists on the importance of these relationships to advance collaboration.

Now, the question is to what extent is privacy interacting or hindering our ability to share amongst ourselves, and we’re seeing examples of that and, in fact, unfortunately, we in Canada have encountered situations where we wanted to share information but privacy laws have prevented us from achieving that objective, to get information -- important information with respect to consumer protection to others in the global community.

So the opportunity for greater collaboration between agencies or examining the area where data protection and competition law intersect are incredibly important and something that these conversations over the next two days, I think, will tackle. And I look forward to our further discussion and question-and-answer period.

MS. KAPIN: Thank you. Thanks to all our panelists. So we have a couple of quick follow-ups before we go to some questions from the audience.

Matt, you had just pointed out that
sometimes, you weren't able to share information the way you wanted to because of privacy laws, and I'm wondering what the experience of our other panelists has been in terms of the impact of privacy laws on your ability to share information, particularly with your international partners. Maybe two minutes each if you have a view.

MR. FORTIN: The one thing I may add very quickly is that with the adoption of the GDPI in Europe had potential great impact on our European colleagues to share, continue to use the MMOU, and share information with non-EU authorities. We tried to convince them that they should rely -- continue to rely on public interest jurisdiction. The European authorities on data protection believed that it’s true that we can rely on it, but it was not sufficient enough, so we needed to provide them with some more safeguards so that non-EU members can demonstrate that they can, you know, protect the information provided to them.

So a few weeks ago, IOSCO and ESMA, which is the European Securities Market Authority, confirmed that they reached an agreement with the GDPR in Europe, whereby a non-EU authority can get into an agreement which we call an administrative arrangement...
whereby the signatory to a non-EU authority would provide some safeguards so that EU authorities can continue to use the MMOU, rely on public interest jurisdiction and share because, I mean, most of the information that we need in the context of an investigation contain, you know, personal data. So we need to continue to share that kind of information.

MS. KAPIN: So just a brief follow-up. So basically you’ve worked out a separate protocol of safeguards in order for you to be able to share with -- in order for EU authorities to be able to share with you, a non-EU authority. And I'm just curious, how long did that take? And was it an elaborate process?, or was it a fairly --

MR. FORTIN: Yeah, it was very long. I mean, there’s a board of IOSCO, there is a board of directors, so there was a board subgroup that was mandated to negotiate with ESMA and GDPR, and it took, from memory, at least a year and a half and maybe two years to negotiate.

MS. KAPIN: Oh, my goodness. Okay, thank you.

Chilufya.

MR. SAMPA: Yes. We've also had similar experiences where privacy laws have hampered the
sharing of confidential information. And it is quite
difficult, therefore, to maybe investigate a case that
you may be looking at without that type of
information, especially where maybe the -- as the case
usually is, a lot of transactions will happen out of
South Africa and then have an effect on the Zambian
market, and, therefore, you would want to actually get
the information that is residing in South Africa, but
because of the privacy laws that becomes a bit
problematic.

However, there is -- what the two
governments have done is come up with a separate
arrangement. It’s called the Joint Permanent
Commission, and within that, we had to sign an MOU
with the South African agencies, and that is how we
intend to go around it. We haven't done it yet, but
it’s something that is in the offing at the moment.

MS. KAPIN: Thank you.

Tom.

MR. BARNETT: I will just mention that in
the private sector this actually introduces another
element. For example, if you’re responding to a
second request in a merger review and some of that
information is located abroad, it may -- and given the
scope of what you're collecting, you may well be
collecting information that's protected. Moving it from one jurisdiction to another obviously creates issues or can create issues.

So I'm not -- at least in my experience, we've managed to work through all of that, but I can tell you, that's a whole 'nother work stream that gets created these days that you have to pay attention to.

MS. KAPIN: Thank you. So what I'm hearing is that these privacy laws have required some creativity in coming up with approaches to meet these challenges, probably ranging from the year and a half of complex negotiations to what I'm intuiting may be a little more of an abbreviated timeline for your private practice situations.

MS. ASKIN: And one other question. So we've heard the importance of both the relationships and tools, and we've also heard from each of you a variety of tools mentioned, whether it's the ICN framework, OECD recommendations, the Livingstone principles, as well as MLATs, MOUs, the expanded MMOU and EMMOU.

So in particular for Tom and Chilufya, I'd just be interested in your perspectives considering both competition and consumer protection and data protection cases. Are new tools similar to MMOUs or
EMMOUs that we heard about something that would be beneficial? Are they needed, or are other new tools needed?

MR. SAMPA: You go first.

MR. BARNETT: With the initial caveat that I will say is I'm not a consumer protection lawyer, and for areas that are focused on that, I'm not really in a position to have a position, if you will. But focusing more on a competition perspective, I don't actually feel that some major new tools are needed. I agree that you need a framework, as Jean-François was saying, to enable dialogue and communication. I think there's a lot that is going on and a lot that can be done under the existing framework, so I'm not sure that any particular new tool jumps out at me, so...

MR. SAMPA: I would tend to agree. That's why I asked you to go first.

(Laughter)

MR. BARNETT: I've been reassured.

MR. SAMPA: I would tend to agree that, personally, I think coming from Africa, we don't think we've fully utilized the tools that have been at our disposal. And we see ourselves, I think, as looking at the tools and looking at what they represent. And we see that it actually covers a lot, a lot of areas
where the formal cooperation or informal cooperation can actually achieve what you want to achieve in the long run. However, maybe it's a question of making -- popularizing them -- popularizing them, maybe making them more simplified, and that is the route we would suggest, that if we did that, then we'd have a full impact of the tools that have -- that are present now.

MS. ASKIN: Okay, thank you.

And we also have a question from the audience that’s a little bit related. But, Matt, this question for you. And that question is you mentioned the importance of information sharing in merger reviews, but in thinking of civil MLATs and examples, how do you think that idea might fit in in consumer protection and data privacy cases?

MR. BOSWELL: Well, in terms of consumer protection, I don't actually think we need it in consumer protection because of the SAFE WEB Act and the reciprocal CASL provisions in Canada, which as Laureen knows all too well, we are using to the greatest extent we can based on both of our resources. So it's really to be better able to obtain specific information with respect to abuse of dominance cases, as an example, or merger cases if the need arose where there wasn't a waiver where the parties weren't
willing to allow for sharing.

MR. BARNETT: And I do not have a tremendous amount of experience with MLATs. My experience that I have had is that they are very slow. And what I remember is I received -- there was an MLAT request that went out, I won't say to who, years before I got to the department, I mean, literally years. It was not my immediate predecessor who had sent it out or the one before him. And it came back and the response was, could you clarify your question, please?

Literally.

(Laughter)

MR. BARNETT: SO I know that's an anecdote but I will say I don't know that -- I'm not sure that -- one ought to think about improving the efficiency of that process if one were going to go down that road. And I'm not faulting anyone. It's a complicated process.

MR. BOSWELL: No, I completely agree with you, and we've had -- on the criminal side, we've had examples similar to yours, and certainly within Canada, there's been lots of talk of we need to make this faster and we need to make this more efficient. And all the more so in a fast-moving, digital economy, you don't have time to be looking at something two or
three years later. The world has moved on, and if you
don't act, you've become irrelevant. So I totally
agree with you.

MR. BARNETT: Yes.

MS. KAPIN: Yes?

MR. FORTIN: Can I add a word on the
previous discussion about the need for an MMOU?

MS. KAPIN: Of course.

MR. FORTIN: I just want to say a word on
the fact that at IOSCO there were -- there are a lot
of members that were not able to sign the MMOU at the
beginning. And there was a desire to bring them in
the club, meaning that we want, on underregulator
jurisdiction or uncooperative jurisdictions, to be
part of the club, and that meant for them to adopt new
legislation.

So we kind of raised the bar on a global
basis, whereby 20 years ago, many jurisdictions were
not able to share and cooperate. Maybe they didn't
have the willingness, but being part of IOSCO and the
meaning and the value of being able to say that you
are a signatory to the MMOU and when you're under
evaluation by the IMF or FATF, it's been a great
consideration.

So that's why at one point in time we were
able to maybe start with 20, 30 signatories to the
level we are right now with 120 signatories to the
MMO. It's not only the biggest and the most developed
jurisdictions that have that. So if we have an
investigation in other part in the world, we know that
they have the obligation to cooperate with us.

MS. KAPIN: And that includes the US Securities regulator, does it not?

MS. FORTIN: Yes.

MS. KAPIN: Yeah, we had a question from the audience, and I just wanted you to underscore that.

MS. FORTIN: And the CFTC as well.

MS. KAPIN: Perfect.

MR. BOSWELL: If I can just comment, it's an interesting -- I mean, it really does work very well, but it’s an interesting -- it would represent an interesting culture shift at least in terms of the ICN and ICPEN in terms of how we go about achieving what we are trying to achieve. It’s sort of suasion, consensus building, but if I understand correctly, there was a significant push by IOSCO to incentivize people to join, to really push them to get on board, which is a complete sort of culture shift from what we have now in the international competition and consumer protection community. So it's interesting.
MS. ASKIN: That is true. The tools we do have through those organizations tend to be voluntary frameworks, principles, recommendations.

MS. KAPIN: So shifting topics a little bit, I'm wondering -- and this is for everyone to the extent there's an experience or analogous experience. How has technical assistance or informal exchanges in educational programs from foreign counterparts assisted you in your enforcement efforts? We're curious about that. I know people at the table may have very -- a different range of experiences there. Matt you're nodding your head --

MR. BOSWELL: You want me to go first?

MS. KAPIN: -- so I'm going to take that as an invitation.

MR. BOSWELL: I guess at a high level we've done it extensively in Canada, both outbound and inbound. And I think it's -- across the board, it's benefitted us tremendously. For example, last year, we had Jean Pratt, who is here today, our Senior Deputy Commissioner responsible for mergers go to Australia, and I can't remember the title she had in Australia, but she was running the mergers branch at the ACCC, and we had the benefit of Rami Griess coming to Canada. Now, Rami was a mergers guy, but he came
into our Cartels and Deceptive Marketing and brought new perspectives, brought the ACCC’s approach to various things, which made us reconsider various approaches, and I’m sure that happened at the other end.

We have Bryan Cowell who is about to or subject to visa and passport issues about to start a fellowship here at the FTC to glean as much knowledge as he can and bring it back to the Bureau. So we’ve had very positive experiences with it. And every time, I think as Tom said, every time you see how other people operate, you pick up good pieces of that and bring it home to enhance your functioning as an enforcement agency.

MR. SAMPA: May I add one thing?

MS. KAPIN: Chilufya, yes, please.

MR. SAMPA: We’ve had -- also received quite a number of technical assistance. And I’ll also just maybe speak generally on the African front. I know like South Africa, when this started up, there was a resident advisor that was sent from the FTC, who was stationed in South Africa for I think, if I’m not mistaken, two years. And that has really helped them develop the processes and carry out major reviews to the extent that they are one of the world's best, I
suppose, in terms of competition analysis. Ourselves, Zambia, we had Bryan, who came and was attached to the FTC. We have had two other members who were attached to the ACCC for about a year and so on. So all these experiences have developed Zambia to what it is, and even assumed the leadership of the ICPEN being a young agency. That is something that we can only say we've benefitted because of the experiences we've had from the various technical assistance.

MR. BARNETT: I don't know if it's technical assistance or cooperation, but two quick examples, one when I was at the DOJ in a merger situation where there was a divestiture that was going to be required that had different impacts in different countries. And in the particular case I'm thinking about, we were able to engage with the other agencies and work out something. I mean, it was basically one buyer was good for us; another client was better for another country. And we managed to work out something that worked for everybody and was very effective.

The other thing that comes up sometimes, and this actually goes to personal relationships, it was a cartel investigation, it was covert. The question is when do you go overt? We were not ready; somebody
else was ready. I made a phone call to somebody who
they were very anxious to move forward for good reason
and basically prevailed upon them to wait. And they
did, it all worked out, and everything went fine. But
I go back to had I not had that relationship, it would
have been a much more difficult phone call, and I
don't know what the result would have been.

MR. FORTIN: Yes, and no personal
involvement but I know IOSCO has a technical
assistance program. There are many jurisdictions
training for a specific area on insider trading, on
market manipulation. But I know also that they can
have individual jurisdiction training. I think the US
SEC is providing technical assistance, UK and France
in some instances, and also some of them offer some
secondment in that area as well.

MS. KAPIN: And then to wrap it up, what
would you each say, and you're probably only going to
have a minute, biggest challenges to international
enforcement cooperation for your agency or your
practice, and if there are any practical and efficient
ways to overcome that challenge. So the headlines,
one minute each.

MR. BARNETT: Sure, I’ll jump in.

MS. KAPIN: Great.
MR. BARNETT: I will say just sort of referencing generally in the digital age that there are a lot of issues that are common across agencies that are driven by similar forces that agencies are dealing with sometimes separately. One thing that hasn't come up is -- well, Bill Kovacic alluded to it -- competition amongst agencies. There is a bias towards action, right? In order to -- you know, if you brought a strong enforcement action, you get credit for it. If you just built the infrastructure, you don't get the credit for it or the same credit for it, or if you hold off, you don't get the same credit.

There can be a competition among agencies to be the most relevant, to be seen as doing something. I think agencies cooperating and talking and trying to come to a consistent, well-considered approach on issues that really are common across the agencies is an important challenge.

MS. KAPIN: Thank you.

MR. FORTIN: I would agree with that, and I would add I think -- I was going to say that in our world we see a lot of requests for information. We don't see that many true joint investigations. Maybe for one of the reasons you just mentioned, are we competing one against another or do we really want to
1 achieve a joint result and coordinate our efforts so that we achieve the results in a very coordinated manner, so I think it's really important.

MR. SAMPA: I would say privacy laws, that's a big challenge to us, we failed to coordinate or cooperate or even carry out investigations because of the privacy laws. One way of probably dealing with that is maybe coming up within the frameworks of the ICN or the ICPEN of the common denomination of what confidential information is. We've seen sometimes that agencies may not -- may use the privacy law even to not share nonconfidential information. So maybe if there is some kind of common definition of what confidential information may be, that could sort of help.

Then, of course, I think the informal cooperation is top, up there in terms of cooperating, that you can get quite a lot done just with the informal cooperation that you receive.

MS. KAPIN: And you have the last word, Matt.

MR. BOSWELL: Oh, okay. Well, I'll go back to what has been a common theme, which is supporting the ongoing personal relationships between people around the world. You know, people move in and out of
jobs. You have to keep those relationships, and it can be expensive. And it can be to certain outside parties hard to justify to expend those resources on having people attend, for example, ICN workshops so that they know people around the world, they're sharing best practices, we're not reinventing the wheel. Somebody has come up with a good way to do something, we should have those relationships where we can learn it, but it costs money to invest and to always invest in relationships.

MS. KAPIN: Well, I want to thank everyone. I think we heard a recognition that we should recognize the value of infrastructure, some common protocols and definitions and best practices can also help us overcome the challenges for international cooperation.

But first and foremost, what I heard echoed was the recognition that this human glue really is the stuff that lets us stick together and accomplish our common goals.

So, Molly?

MS. ASKIN: I think one thing I've also heard is the importance of the networks that we have seen evolve over, if we're looking at the past 25 years, either be founded in the first instance or have
changed in their mission to really be able to be nimble enough to address some of these important issues and give agencies a forum for interaction that can facilitate both the tools and the relationships.

So thank you all very much for participating. And we are now going to go into a 15-minute break and return for the next panel at 11:30. Thank you.

MS. KAPIN: Thank you.
CONSUMER PROTECTION AND PRIVACY ENFORCEMENT COOPERATION

MS. FEUER: Okay, it’s about one minute early, but we’d like to get started. I’m Stacy Feuer. I’m the Assistant Director for International Consumer Protection and Privacy here at the FTC’s Office of International Affairs. This entire morning we’ve heard about a number of very interesting enforcement developments and challenges all over the world. Now we’re going to take a deeper dive into enforcement cooperation in the area of consumer protection and privacy.

One of the most interesting aspects of our work here at the FTC on international consumer protection and privacy matters is the very wide range of issues we cooperate on, everything from telemarketing scams to online subscription traps to cross-border data transfer mechanisms, and to other privacy law violations.

Equally remarkable to me is the incredibly wide range of authorities that we cooperate. So, for example, we cooperate with not only consumer protection agencies but data protection authorities, criminal regulators, and sometimes telecommunications and financial regulators.
Our panelists that we have here today represent these different strands of our enforcement cooperation activities. They will highlight the issues involved in some of these different cooperation strands, and I will introduce them individually as we move through this panel.

I do want to remind you at the outset that we have comment cards available, and please do send up questions. We’ll try and be a little interactive and ask some of your questions during the panel and not just wait until the end. So please ask away.

So we’ve segmented our panelists into mini-groups so as to better draw out some of the cooperation strands. I’ll turn first to James Dipple-Johnstone who is the Deputy Commissioner at the UK’s Information Commissioner’s Office and ask him, and then followed by Deputy Assistant Secretary Jim Sullivan from the Department of Commerce’s International Trade Administration for their thoughts about cooperation and particularly focusing on the privacy sphere. We are so pleased that you are both here.

So, Commissioner Dipple-Johnstone, can you begin?

MR. DIPPLE-JOHNSTONE: Yes, and thank you,
Stacy, and thank you to FTC colleagues for your invite and the opportunity to speak with you today. I’m looking forward to our discussion of these important issues, and it was interesting to hear the different perspectives from the previous panel.

A little bit about the Information Commissioner’s Office first, given there’s a range of different types of organizations on the panel, in case it helps with my comments later on. With the implementation of the GDPR, which has already been referenced this morning, I’m pleased to hear, and the new equivalent legislation in the UK, the ICO has been through a significant growth process over the past 12 to 18 months. We’ve taken on new powers, and as has been mentioned this morning, as many other organizations, we’ve been through a capability growth over the past few months, which has begun to see us work more internationally and deal with more complex and challenging caseload.

This reflects in part the importance the UK Government places on data protection and consumer protection, but also the seriousness of some of the recent scandals we’ve seen, for example, that involving Cambridge Analytica recently. In granting powers, the UK Parliament has gone further than many
other EU legislatures to ensure that the ICO has both
the funding through its funding regime to give us the
financial resources, but also the new powers to do its
work in the digital age.
There was significant national debate in the
UK about these new powers, many of which are actually
quite intrusive and are more common in law enforcement
agencies than in a traditional data protection
authority and the balances in checks and balances
being put in place to go with those powers through the
UK’s Information Rights Tribunal who oversee our work
and our individual case judgments.
I couldn’t come here and talk to you without
recognizing there’s quite a lot of difference within
the ICO as well. As well as our data protection
remit, we have a remit for access to information. So
one part of the office is working very hard around
keeping privacy concerns and how data can be
safeguarded and secured and only disclosed where
appropriate; another side of the office is hearing
appeals about how to make public information more
widely available.
We have around 700 officers and new powers
to seize equipment, search premises, examine
algorithms in situ for bias to make sure that they are
working effectively, and audit company systems and processes. We also have powers which were touched upon this morning as well, around the power to compel provision of information from wherever and whomever holds it, which is quite a wide remit for an office of our type.

We deal with around 50,000 citizen complaints each year and undertake around 3,500 investigations across different parts of our office. And we cover both the commercial sector, but also the public and law enforcement sector. In many ways, as colleagues are, we're learning as we go with these powers and these new resources. And one of those key areas of learning has been that which has been touched upon this morning. And that’s the importance of working collaboratively with others internationally.

Many of the most significant files on my desk -- and I have responsibility for the enforcement and investigation arms of the office -- in the last 12 months, we’ve engaged with 50 international colleagues on various different files. And most of the major cases we have on at the moment are involving international colleagues, either as joint investigations, seconding staff to and from other offices, or sharing information and intelligence about
the work we're doing.

As our citizens become more aware and concerned about the use of data and as the digital economy becomes the economy, people expect this kind of international engagement. And with this in mind, we value hugely the UK's positive relationship with its colleagues on this side of the Atlantic, the FTC, but also our colleagues in Canada who have been speaking this morning.

We value the different networks we're involved in. There have been mention of some of those networks already, but in particularly GPEN, the Global Privacy Enforcement Network, but also those networks which involve looking at unsolicited communications, which continues to be a significant part of my office's work.

We learn a huge amount from these relationships, as well as the sort of human glue that was described this morning, just the opportunity to discuss tactics, approaches, to understand how each other work is a real positive that comes out of that work and allows us to do our jobs more effectively.

To support this, we have a number of legal gateways to share and receive information. These are backed by strict protections within UK domestic law,
which bite both collectively on the organization but also the individual officials within that. They are backed by criminal sanctions, and nothing focuses the mind like those.

In the course of our investigation, we could use one or any of MOUs, MLATs, and we’ve heard about the challenges with the time scales that MLATs take. Membership arrangements, such as GPEN or the International Conference of Data and Privacy Commissioner arrangements or, indeed, Convention 108. This very much depends on the exchange of information, what's involved, who it’s going to, who’s asked for it, and what we need to do our work.

Of particular note are the DPA 2018, which is the Data Protection Act in the UK. That contains formal information gateways. That allows us to share information for law enforcement purposes or for regulatory purposes where there’s an overlap and there’s a public interest. Of relevance to the FTC in particular is Schedule 2 of the DPA. That sets out the conditions for public interest and information-sharing within the UK law.

And I understand the UK has been working through these for a number of years from the 1998 act and now into the 2019 act and working with colleagues.
at the FTC through the SAFE WEB Act provisions and the criteria for sharing information there with foreign enforcers. And that's been a huge positive. Just in the short time I've been with the Office over the last two years, there have been a number of cases that we've been working on, on sharing information and understanding.

And, of course, this goes alongside our EU work. We mustn’t forget that. We are a competent authority under the GDPR, the EU provisions for the one-stop-shop mechanism. And around a fifth of those cases in the mechanism over the past year have involved the UK as either a lead supervisory authority or a concerned supervisory authority.

Many of the big issues we are grappling with is privacy authorities, algorithmic transparency, adtech, microtargeting and profiling of citizens, part of the bread and butter of those cases we're working through. And our ability to work with international colleagues, in particular the FTC, has been really helpful in us discharging our role, notably on the Ashley Madison file, but also on other confidential matters more recently, where we found the insight afforded by our bilateral arrangements with the FTC help us fill in the missing pieces. They help us make
better investigations.

We know that the FTC has helped us by using its SAFE WEB powers to obtain information for us, in particular with some of the -- I think you call them robocalls here, but unsolicited communications in the UK, and that information has been hugely beneficial in protecting UK citizens. And we hope the reciprocal has been helpful to the FTC and colleagues here.

And I’m mindful of time, but in closing, I'd just like to say we're very keen in the ICO to continue to use these positive engagements and continue to build them, particularly as you come to look at the renewal of the SAFE WEB Act. Thank you.

MS. FEUER: Thank you very much.

Deputy Assistant Secretary Sullivan, how does the issue of privacy enforcement cooperation come within your purview at the Department of Commerce?

MR. SULLIVAN: So in my role, I'm in the International Trade Administration, which is one of the agencies at the Commerce Department, and one of the offices that I oversee is responsible -- they are the US Government Administrator for and our interagency lead on different privacy frameworks -- international privacy frameworks, including both privacy shield frameworks, the EU and US Privacy
Shield and the Swiss-US Privacy Shield.

We're also very actively engaged in promoting the expansion of the Asia-Pacific Economic Cooperation and Cross-Border Privacy Rule system, APEC CBPR as it’s called. And we work extremely closely with the FTC on those issues around the world as we see a growing number of countries grappling with privacy while trying to balance innovation at the same time, which as everyone here knows, I'm sure it's not always the easiest formula. So that's a quick summary of what we do at Commerce. I'll leave it at that for now.

MS. FEUER: Great, great. Well, it's interesting to hear you both speak about the importance of enforcement cooperation in the privacy area, James, for your agency on many, many individual files and Jim as the sort of overarching systemic systems for cross-border transfers. So I want to follow up with a few questions.

So, James, sort of the elephant in the room, we've heard a lot this morning in the first panel about privacy as a "barrier" to regulatory enforcement cooperation. And I’m wondering what your view is of that statement or assertion and what kinds of tools do agencies need to cooperate effectively given some of
these limitations and, of course, in privacy enforcement investigations?

MR. DIPPLE-JOHNSTONE: Yes, yes. And it's not something we've -- you know, which is uncommon to us. We get that call often. I mean, we want to be clear, we're not the "ministry of no." But, actually, what's really important in this space is to do that groundwork and that thinking about what information do you need, how is it going to be transmitted, how is it going to be secured, what purpose is it going to be used for. And we often find there are many avenues and routes to be able to share information.

We also get the -- interesting when we ask for information, we sometimes get from colleagues internationally, we can't because of privacy. And, oh, that's an interesting concept. How do we work through that? We've often found there is a way through. Sometimes where these arrangements are being agreed internationally and where, for example, it was mentioned this morning about the challenge with the advent of the GDPR, IOSCO working with colleagues at the EDPB and needing to sort of tease through that, it can sometimes be tough to be the first going through that process, but once those processes are in place, people understand how they work, those relationships
are built, that common understanding is built. Things
do flow a lot quicker and a lot easier in subsequent
cases. And so very much it’s that sort of keep
talking, keep engaging.

And, importantly, I’ve recently come back
from an international conference working group, where
one of the key challenges has been that with the scale
and pace of change internationally with enforcement
agencies and enforcement bodies, some of which, again,
was referenced this morning, just keeping pace of who
can do what where and with what data is really
important. So if those international networks can
really help their members understanding where the
right levers are and how their respective national
laws work, that can only be a good thing.

MS. FEUER: Thank you.

Well, Secretary Sullivan, in your
experience, how important has the issue of enforcement
cooperation been with the foreign governments and
stakeholders that you have negotiated these
international data transfer mechanisms with, and how
important are the powers that the FTC has in those
discussions?

MR. SULLIVAN: So, again, I'm going to refer
to the three frameworks that I cited just a moment
ago. And both the enforcement power and the international cooperation authority granted to the FTC under the SAFE WEB Act are both integral to the functioning of those frameworks, I think. Without them, they would lack legitimacy or credibility.

You have to have some teeth behind these frameworks so that folks know that companies are going to be held accountable for the pledges and the promises and commitments they’re going to make to comply with the principles or the practices that they have pledged to comply with in accordance with these frameworks. I don't know how that would be possible without what we just cited to, both the powers to enforce but also to coordinate with other enforcement agencies cross-border.

MS. FEUER: Thanks. As a follow-up, I asked you about how important this is for foreign governments, but I'm wondering what you hear from your industry stakeholders here in the US.

MR. SULLIVAN: I don't want to generalize. We certainly hear a lot. I think there's a strong recognition among most of the stakeholders that we engage with, sort of along the lines of what I just said. I mean, first of all, what would be the incentive to comply with something that really didn't
have any teeth? I think they know increasingly how important it is to align their practices with these frameworks, given a lot of the developments. We've seen recently, and it's I think -- they generally -- and I am generalizing -- they do want to see strong frameworks that are actually enforceable and, they do want to see, as I think James just alluded to, greater collaboration because that's going to lead to more consistent best practices or principles and approaches to a lot of these issues as opposed to just this fragmented, diverse, ad hoc approach to a lot of these same dilemmas that we're all facing.

MS. FEUER: Thank you.

I want to ask my fellow panelists, while we're talking about privacy, whether there was anything that they want to add in sort of response to what Commissioner Dibble-Johnstone and Secretary Sullivan were talking about. So does anyone want to -- it looks like Marie-Paule wants to hop in.

MS. BENASSI: Yes. What I would like to say is that we should make a difference between issues related to privacy and to the confidentiality of investigations. And very often, indeed, it is quite a common answer to refuse cooperation, to say, oh, no,
we cannot share information because of problems of privacy.

But in the European Union, first of all, I think we have solved this, and I think that our GDPR itself helps a lot to clarify that authorities can exchange information, including information which contains personal data. And so this enables, in principle, very seamless type of cooperation in the European Union, because for law enforcement purposes, we can exchange this information between authorities in one member state or in other member states.

And this -- I think in this way, the GDPR is an enabler. And when we look into the implementation of the GDPR for international cooperation, we should also look at it in the same way as an abler and enabler, because if it is respected; then exchange of information for law enforcement purposes should be facilitated. And, for example, we are also doing adequacy decisions, for example, with some other countries in order to also create the seamless facilities, including for law enforcement purposes.

MS. FEUER: Thank you.

Anyone else? Kurt.

MR. GRESENZ: So I agree with Marie-Paule's sentiments there. You know, the issue that we
encountered at the SEC as a civil agency with
administrative investigatory powers, while the
Department of Justice was out in front with an
umbrella agreement to facilitate cooperation in the
criminal sphere under the public interest mechanism,
which is something that James talked about at the
beginning, it was less clear how that applies in the
civil or administrative context. So the step that
IOSCO took to negotiate what is the first
administrative arrangement under the GDPR will enable
the second step of what Marie-Paule talked about,
which are transfers of personal data from the EU to
jurisdictions and authorities outside the EU.

And now with that process, as Jean-François
in the earlier panel talked about, having been blessed
by the European Data Protection Privacy Board, we in
the security space are looking forward to the data
protection authorities in the 28, possibly 27, EU
members states adopting that and approving that and so
it can be the standard with the securities authorities
who are IOSCO members.

MS. FEUER: Thanks. So I want to shift us
now from what has been a privacy-heavy conversation to
more of a focus on consumer protection. Our second
pair of panelists represent two of the different
strands of the kind of consumer protection enforcement cooperation we do here. So to hear about the EU enforcement model, we'll have Marie-Paule Benassi from the European Commission’s DG Justice, and to hear about our cross-border work with our Canadian criminal counterparts, we'll hear from Jeff Thompson, Acting Superintendent in Charge of the RCMP's Canadian Anti-Fraud Centre.

So, Marie-Paule, can you start us off?

MS. BENASSI: So thank you, Stacey and thank you for the FTC to invite me. So, first of all, I would like to remind you that the European Union is currently counting 28 member states, and it's very well known for being something very complicated, and I would like to try to break that myth. But unfortunately, I think, or fortunately for a better understanding of the complexity of the Union, I think that Brexit and the interest which this is bringing in the headlines is also maybe shedding some light on why it is so complicated.

So we have an integration of EU-level and national laws, a model, and this is where I think it’s simple. It's based on a very simple principle. We have one EU law in a certain domain, and it tries to harmonize national laws using key high-level
principles. What is not harmonized is how this law is implemented. So it is -- except in a very few cases, it is implemented nationally. It is enforced nationally, and we try to do this in a way which preserves the diversity of the enforcement model in the member states.

And so in the area of consumer protection, it is how it works. And the European Commission for which I'm working has no direct enforcement power. It is the member states which have the enforcement powers. So when I speak of enforcement, it means enforcement of the law towards businesses and other possible subjects because the European Commission is in charge of checking that the member states are enforcing the laws correctly, but we are not directly involved to stamp out illegal practices.

In the area of consumer protection, so we have a strong role. And this role has been strengthened in the recent past. What is our role? Our role is to facilitate the cooperation of the member states because this is a EU, I would say, a harmonized law, and we want it to be implemented in a consistent manner in all the member states. And to do this, the only solution is cooperation.

So we have a long tradition of cooperation
inside the European Union and now we are doing it via a law which is called the Consumer Protection Cooperation Regulation. This law is establishing the framework for cooperation. So we start by first saying even if the member states are very different, they should have similar type of powers, so investigative powers. For example, the power for mystery shopping, the power to request information on financial flows, the power to obscure illegal content online.

Another thing, also, is the framework for cooperation. So we have two types of cooperation now in our new legislation. One is what we call the bilateral cooperation, the more traditional cooperation, where one member state asks -- requests enforcement cooperation from another member state.

But now we have this new system which is E-level coordination. And there, the European Commission has a new role because we have a role of market surveillance. And from this role, we can ask the member states to check some practices that we think are likely to be illegal. And if the member states find that there is sufficient evidence to start an investigation, then the Commission is coordinating this investigation.
We also have a new power in terms of intelligence I mentioned. And we are also doing coordination of priorities. So, in fact, the role which we have is quite strong. And the new model, which we are going to implement from January next year, in fact, is already functioning, maybe in a lighter way. And it's working. So we have in the past done some coordinated actions, which are concerning. For example, illegal practices by big companies operating at the level of the European Union.

Today, we are publishing a press release on an action done in the field of car rental, for example. So with the authorities, we have been working together with the authorities to find -- to analyze bad practices of the five leaders of this sector, and we wrote a common position asking these companies to change their practices. They made commitments, and now we have been monitoring the commitments and concluding that finally these companies are implementing these commitments. This is a negotiated procedure, so this is another element I would like to stress.

These EU-level actions are not based on strong enforcement means because they don't exist at
the European level. They are based on a coordinated approach and the cooperation with the traders. If the traders refuse to cooperate, do not cooperate sufficiently, or do not follow their commitments, then what is going to happen is coordinated enforcement action by the member states.

And we have just added something very recently which is a system of fining that can be applied for this kind of EU-level infringement and coordination of the fines. And this is a big -- it's not yet completely finalized, but it's going to be a big step forward because in certain member states, they don't even have a fining system for consumer offenses. So we are building the system.

So for the future, what is -- what can we do? We can do international agreements. So there is a possibility on the basis of this framework to agree international cooperation agreements with certain countries. And the framework which I've described can be applied also with the said countries to the extent possible, of course, depending on the type of base laws that exist in the member states.

And what I could say is that we would like to start discussing on the basis of this new regulation with the FTC, if we can progress such an
agreement. Why an agreement would be necessary?
Because it's important that the formal part is there.
Because as we heard from various speakers, the formal
part is an enabler also for an efficient cooperation.

This system, however, has several challenges. One of the challenges, as I said, it's based on negotiation with traders. So it doesn't work when there is fraud, fraudulent operators. This is really required to develop additional cooperation, for example, with police forces because in most of our EU member states, they don't have this possibility of going against fraudulent operators. They need the cooperation of police, so this is an area where we need to develop in the future.

And then relation with competition, relation with data protection, these are the future avenues for our cooperation. Thank you.

MS. FEUER: Thank you very much, Marie-Paule. And that was the perfect segue to Jeff Thompson, who is from the RCMP's Canadian Anti-Fraud Centre. And, Jeff, maybe you can sort of talk us through a little bit about what some of the tools and challenges you face and we face in cooperating on US-Canada cross-border fraud matters.

MR. THOMPSON: Sure. Thank you, Stacy.
It's a pleasure to be here today to talk about international cooperation and consumer protection. Since the start of my career, I've learned that cross-border fraud was an evolving criminal market that cannot be tackled by any one country alone and even more so today. Consumer Sentinel reporting shows more than 1.4 million reports were received in 2018, up from 433,000 in 2005. Similarly, the Canadian Anti-Fraud Centre data shows annual losses to fraud continues to increase, reaching 119 million in 2018, a 495 percent increase since 2005.

So it's easy to say that mass marketing fraud and cross-border fraud continues to be a threat to the economic integrity of Canada and the US, furthermore, if you consider technology, voice-over-net protocols, social media, virtual currencies, money service businesses, and other key facilitators that continue to provide criminals and criminal organizations behind a scam opportunities to operate across multiple international jurisdictions.

And as we heard this morning, while this is an evolving threat, there is good news. There are, indeed, existing strategies that do exist and tools that provide an effective approach to attack on this criminal market. In fact, as we heard this morning
again, the history between Canada and the US is long. It dates back to 1997, when Former President Clinton and Prime Minister Chretien met at the first US Cross-Border Crime Forum. It was at this meeting that telemarketing fraud first got identified as a major Canada-US cross-border crime concern. And it also made a number of recommendations, including the establishment of a multiagency task force, the development of consumer reporting and information-sharing systems, enforcement actions, and better public education and prevention measures.

Since then, both US and Canada cooperate to implement and refine a number of these strategies, and while all recommendations made are important, I'm going to focus my discussion on the existing multiagency task force, or in today's terms, strategic partnerships.

This case and work that the partnerships have done showcase an effective enforcement approach. They highlight intelligence-led policing and integrated policing models, along with providing insight into some of the tools and approaches to consumer protection. So if we consider the cross-border fraud partnerships as an intelligence-led approach, what we see is a group of key stakeholders
joining efforts to achieve a common enforcement objective, namely, reducing fraud.

To give you a practical idea of this, I think back to some of my early meetings at the Toronto Strategic Partnership. I did not fully recognize or appreciate the significance of the discussions held around the table. Members from several different agencies and organizations discussed top reported scams, scam trends, top offenders, current investigations, and gaps and challenges in enforcement options. Oftentimes, this intelligence-led approach was started by members from the Federal Trade Commission or the Canadian Anti-Fraud Centre, bringing intelligence developed from their respective central databases, Consumer Sentinel and the Anti-Fraud Centre database.

This dialogue helped identify the new and emerging scam trends and discussion around the key facilitators to the scams. It also helped to coordinate joint priority setting, identify lead agencies, investigative assistance, and actions required to complete the files, and in many cases helps with deconfliction amongst the agencies.

Sharing information around the table was a key factor, and as long as there’s a willingness to
share, there is a way to share. There is also a common trust and understanding amongst the partners to share information within the confines of law. Thus, the partnerships serve as an intelligence-led approach in as far as they create a platform to share and synthesize information from multiple perspectives.

Turning now to consider the partnerships as an integrated policing approach, we begin to realize that criminals and criminal markets can be disrupted through civil, regulatory, or criminal investigations and that different agencies and different laws all play a role. If we dissect again the Toronto Partnership, we have a minimum of eight different organizations: the Federal Trade Commission, the Royal Canadian Mounted Police, the United States Postal Inspection Service, Toronto Police, the Ontario Provincial Police, the Ministry of Consumer and Government Services, the Competition Bureau of Canada, and the Ministry of Finance.

The FTC alone has 70 different laws that it enforces. Who really knew that the Ministry of Consumer and Government Services enforces numerous consumer protection laws such as the Loan Brokers Act, which can be used to go after the advance-fee loan scammers? Or that, again, as we heard this morning,
CASL legislation also has clauses that allow for foreign enforcement to request assistance from respective Canadian law enforcement partners?

At the heart of an integrated policing model is a give-and-take approach. And in the US-Canada cross-border partnership context, this approach is formalized by MOUS. As recent as 2017, the Federal Trade Commission and the Royal Canadian Mounted Police formalized an MOU that identifies best efforts that participants can use to further the common interest of combating fraud.

The language used highlights the foundation of information-sharing and cooperation. Participants shall share materials, provide assistance to obtain evidence, exchange and provide materials, coordinate enforcement, and meet at least once a year. So, again, if we take a practical view, the strategic partnership model against cross-border fraud uses intelligence-led and an integrated policing approach that allows investigators from Canada and the US to move beyond simply coming together to talk about cross-border fraud concerns to developing investigative plans that identify investigative steps and processes needed to gather that evidence.

Each participant brings a range of tools
that can be leveraged to ensure the effective cooperation. One such tool that we’ve heard plenty of today is the US SAFE WEB Act. From a Canadian-US perspective or from the Canadian perspective, I mean, it provides us an avenue to formally seek investigative assistance in the US from the FTC. It also formally acknowledges by name some of the regional partnerships that exist today.

This act alone has assisted strategic partnerships in countless cases, at least 22 by my count since 2007, and as we’ve heard, a lot more. These cases have led to arrests -- civil arrest charges, civil forfeitures, and, most importantly, victim restitution, which in the Canadian context is often rare to see. This includes Operation Telephony, which involved more than 180 actions brought by the Federal Trade Commission, including actions in Canada and the US, and it also includes the Expense Management Case that we heard about in the last panel involving $2 million that was eventually turned over to the FTC for consumer redress.

And while there's a history of success and continuing work and outcomes to look forward to, we know that the criminals adapt. Today's frauds typically involve solicitations coming from one
country targeting consumers in another country and funds going to yet another one. Mass marketing fraud is truly a transnational crime. We know that in a number of cases, the criminals and criminal groups involved are deeply rooted in Canada and the US and that moreso today, the work being done by these partnerships exposes these international networks who are also providing each other an opportunity to leverage our international networks to tackle this problem collectively.

And we’re already doing this to some extent. The International Mass Marketing Fraud Working Group is another example of how Canada and the US cooperation has extended beyond North America. As recently as March 7th, this group announced -- or the US Department of Justice announced the largest ever nationwide elder fraud sweep, and the International Mass Marketing Fraud Working Group played a role. At least eight different countries were engaged.

At the same time, there are other challenges, such as the willingness of other countries to identify mass marketing fraud as a transnational threat, whereas in many cases fraud or financial crime is not a priority. And this even holds true today to some extent. The parties and law enforcement agencies
are subject to change, and the ability of any one agency to solely lead a partnership can be impacted by this change. Albeit, there's still partnership models that work in which chairs to partnerships rotate and changing priorities are acknowledged.

In May of 2018, the RMCP coordinated a national mass marketing fraud working group meeting whereby we acknowledged the changing nature of mass marketing fraud and sought to renew our efforts. We also sought input from key US stakeholders. The Federal Trade Commission and the United States Postal Inspection Service were at these meetings. And while work continues to renew this renewal, such as the emergence of a Pacific partnership to replace Project Emptor, there's still work to be done.

So in concluding, there’s a long and successful history of Canada-US enforcement in consumer protection, and that demonstrates effective cooperation through integrated and intelligence-led approaches and that this continued cooperation is integral to combating this transnational crime today.

Thank you.

MS. FEUER: Thank you very much, Jeff.

So I think that we now have a couple of very interesting issues out on the table about consumer
protection and enforcement cooperation, both the EU
model of the CPC network and the FTC Canada model,
which focuses on these seven strategic partnerships
that exist in Canada. So I want to ask a few
questions of our panelists, Marie-Paule and Jeff
Thompson, and then I do want to turn back to Secretary
Sullivan.

But, first, Marie-Paule, I did want to ask
you one thing. I know that the CPC network uses a
technological tool to facilitate the cooperation among
the 28 member agencies. I'm wondering your thoughts
about how well that works and how it might work in a
more multilateral context.

MS. BENASSI: Thank you, Stacy, for this.
So, first of all, I think I would like to make two
types of tools. One is the system which we use to
network, and I would say this is based on technologies
of collaborative websites. And we have been using
them now since several years and we are quite
confident that it is safe for exchanging information
and including information on containing personal data,
for example, on businesses or on witnesses, and also
it can be adapted. But currently, the CPC system
doesn't contain a lot of cases. So it's growing
organically, I would say. And it's also very much
used to exchange information, best practices, for example.

In the future, we are building something which is going to be a case management system and it will contain several modules, including a module for our external [indiscernible]. So we are going to open this to various entities -- NGOs, entities. And so we are going to build doors, in fact, in such a way that the two systems can communicate, but without having [indiscernible] you know, for -- so that the stakeholders will only see their external areas. And I'm quite confident that we can build the same type of modules for international cooperation with our technology.

But what I would like to say is that we are also developing technologies for online enforcement tools. And what we want is to create, for example, a system where we would have an internet lab that could be used by the various member states, and we are also building capacities of administration in the EU countries. We are developing training, and we think also that this kind of tools could benefit from pooling of expertise from various agencies, including in an international context.

MS. FEUER: Thank you. So I want to turn --
before I turn back to Jeff Thompson, I want to turn back to Secretary Sullivan and ask what are the tools that can be used to facilitate cooperation under the various cross-border mechanisms? And why are they important?

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

So this is all great. The problem we're dealing with is that different counties now take very different approaches to how they regulate these data flows specifically on privacy. And so what I wanted to just touch on a bit was what we do, the Commerce Department, in conjunction and partnership with the
FTC to deal with this issue, this dilemma. How do you continue to facilitate these cross-border data flows when you are dealing with countries that have all adopted varying approaches, legal regimes, or policy priorities.

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

So in response to this challenge, one approach that we've taken, as I alluded to earlier, for example, is the APEC CBPR system. And it's basically a voluntary enforcement code of conduct based on internationally recognized data protection guidelines. It establishes principles for both governments and for businesses to follow to protect personal data and to allow the data flows between APEC
To join this system, an APEC economy has to designate a third party called an accountability agent. And that accountability agent is empowered to audit a company's privacy practices and take enforcement action as necessary in some instances, but if that accountability agent cannot do that, resolve a particular issue, an APEC economy, their domestic enforcement authority serves as a backstop for dispute resolution.

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

I do want to note all CBPR participating economies also have to join the cross-border privacy enforcement arrangement, CPEA, to ensure cooperation and collaboration among their designated enforcement authorities. To date, if memory serves, I know the FTC has brought four enforcement actions against companies for making deceptive statements about their participation in CBPR, and it's also used its authority under the SAFE WEB Act to enhance
cooperation with other privacy and data protection regulators within APEC.

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

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

We all know, and it’s been touched on, about a year ago, GDPR was put into effect in Europe. And like the predecessor directed before it, it imposes certain restrictions on the ability of companies to transfer certain data from Europe to other jurisdictions, so we have Privacy Shield. And, again,
like CBPR, it's a voluntary enforceable mechanism that companies can use to promise certain protections for data transferred from Europe to the United States, and the FTC enforces those promises made by Privacy Shield-participating companies in its jurisdiction.

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

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

And I do want to note that about 3,000 -- nearly 3,000 -- of those companies are actually SMEs,
so it’s not just the big tech companies that we’re talking about.

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

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

So, again, as with CBPR and APEC, the FTC has been just an essential element in bridging the gap.
between the EU and the US approaches to privacy. And, again, I'll just end by saying you're not going to get buy-in legitimacy or credibility without that enforcement power and that collaboration and cooperation that we're all talking about today. So thank you.

MS. FEUER: Thank you very much.

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

MR. THOMPSON: Sure. Thanks, Stacy. So, yeah, the status of the partnerships -- as I mentioned, the partnerships stem from a 1997 meeting. There were three partnerships created across Canada -- one in Vancouver, one in Toronto, Ontario, and one in Montreal, Quebec. At one point in time, we saw this increase to seven Canada-US cross-border partnerships, but that wasn't maintainable for a number of reasons,
primarily being there wasn't a lot of enforcement work in Atlantic Canada and Saskatchewan, for instance.

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

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

So the information we house that there's
other alternatives to enforcement, and those are some
of the areas that need to be improved on
internationally.

MS. FEUER: Thank you very much.

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

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

Okay, so let me start out with building on
some of the themes that have been talked about. One
of the reasons, I think, that we have been successful
in forging a pretty broad alliance of securities
authorities around the world that are cooperating is by virtue of the fact that the IOSCO principles of securities regulation are part of what national economies are assessed against as part of the financial sector assessment program that is done by the IMF. So essentially when the IMF and team comes into a jurisdiction to grade you on your financial resiliency and financial regulation, they're going to look at the IOSCO principles.

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

So in the scale of cooperation, Jean-François talked about over 5,000 requests that were made under the MMOU last year. The SEC is, as you might expect, a big user of those, probably 600 to 800
of those were ours. So we have an incentive in that process working smoothly. And where the parallels are, I think, for me is when I talk to my colleagues at the FTC, we're talking about consumer protection. And the concept of investor protection is essentially the same concept. The investor is our consumer. And one of the focuses of our enforcement priorities is on the mom-and-pop investor, the retail investor who really is somebody that will benefit from an active securities authority acting in their stead.

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

So those are the challenges, and building through those, and I think we've had a good discussion of the privacy challenges, but two things I want to
mention that also came up in the earlier points is one is what I call regulatory arbitrage, which somebody called regulatory competition. Cooperation works very well, but we also have to be cognizant that there are competing policy concerns with how we approach our enforcement tasks.

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

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

I will tell you that from an SEC investigative perspective, which I'm sure people around the room and at this table would share, that people acting in a manner that is entirely consistent with their own investigative processes and procedures,
but that may be contrary to what somebody is doing elsewhere. Those are things that are going to almost always result in people wanting to control their own investigation, perhaps at the expense of greater coordination. And I think that's where, you know, discussion is certainly important.

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

And then the case of the ambitious prosecutor, he or she who may leak to the press. I know that that’s always a source of great
consternation, whether it's the SEC or DOJ or elsewhere, when you read confidential details that are unattributed by a source who’s not authorized to speak about something that you thought you transmitted in confidence. So I do want to talk about those.

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

So cooperation works, but we have to be, I
think, vigilant of the challenges to that, and like
we’ve already talked about in the GDPR space, how do
we get to a solution that works for most people most
time.

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

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

The first one is what I call our access
request authority, and what this says is the
Commission has discretion to share confidential file
materials with any person, provided that person
demonstrates need and can make appropriate provisions
of confidentiality. And I think more or less that
tracks what the FTC can do, although maybe the Safe Web is restricted to regulatory authorities, where the SEC, in theory, has discretion to share with any person.

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

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

Number two, the authority has to be able to provide reciprocal assistance. And, again, if it’s an
MMOU party, that's already written in and baked into our principal cooperation mechanism. The sharing has to be consistent with the public interest of the United States, and we go through that process of the deconfliction process with the US Department of Justice. So that's something else that is taken care of.

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

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

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

So we have a lot here to work with to start us off on questions, and there are so many strands to the strands that we've brought out that it's hard to know where to start, but I am going to start with two questions that have come in. And the first really builds on, Kurt, what you were just talking about, that your investigative assistance power doesn't
require the law violation to be a law violation in the
United States if it is a law violation in another
country.

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

James?

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

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

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

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

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

But requests for information and other types of assistance I think can function. And what we see when we work with cooperation in an informal setting
with other jurisdictions outside of the European Union is that very often the principles -- at least the principles are quite the same. And so it’s on this basis, I think, that in many cases exchange of information can be possible.

MS. FEUER: Jeff.

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

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

MS. FEUER: So that’s very interesting. So there are really a range of options here from a very
broadly defined public interest standard to the
European Union's concept of minimally or maximally
harmonized laws, which essentially means whether every
EU country has the exact same law or whether they have
more leverage and freedom to implement laws
differently. To the example that Jeff has given with
disruption and also being able to cooperate across the
civil and criminal divide, because we obviously
cooperate with the RCMP as a criminal agency, and many
of our colleagues, for example, the UK ICO, has
criminal authority as well as civil authority.

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

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

So you know, in the US, depending, we have
different sovereigns for different purposes. What
some of my colleagues overseas have said that
essentially should the SEC take some action, even
administrative action against an actor where the
conduct is based on something the foreign authority is
looking at that that could potentially preclude the
foreign authority from doing any action at all? So
that's in one direction we have to be sensitive to
that.

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

You know, from our side, we take Foreign
Corrupt Practices Act violations seriously. And from
an economic perspective, my personal view is there's a
really good strong reason to do that. That's not
always the approach that some foreign jurisdictions
take. And we have from time to time encountered
hesitancy to help us on our FCPA investigations on the
SEC side, not speaking for the Department of Justice,
because of a view that well, you know, I don't
understand how that falls into a securities violation.
It could be just code for, well, we don't really look
at it in that way from our country. So we don't think
we can help you. Again, people have to decide are they going to step up and are they going to help.

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

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

And this will continue to be a theme as we go forward. Countries like India are looking at the
data protection bill, going through their Parliament and their legislative process. They will be significant, given the scale and size of their economies and their country. So we should look for the opportunities to work better together.

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

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

MS. FEUER: So any other observations on the question? It focuses on whether changes in privacy laws might affect cooperation, but I think the question is really broader. As we talked about this morning, many countries are in the process of updating their laws, whether it be consumer protection laws, privacy laws, securities laws, maybe? And so I wonder
how this whole issue of changing laws, changing standards affects the way or the opportunities or the challenges for cooperation.

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

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

I think this goes back to what I was talking about. This is my personal opinion. I think we're probably quite a long ways off from any global standard. I think -- you know, you talked about India, Brazil. A lot of countries, you know, many have been looking to GDPR as an example, but no one is replicating GDPR exactly. There are still these differences, and those are going to continue because, as I think I said earlier, different countries have different cultural norms and legal traditions and histories, and they have different policy priorities.
that are all going to, you know, result in differences of kind if not degree.

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

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

On the one hand, it definitely protects privacy, but it can deal with technology because we in
government are always going to be one step behind in regulation and legislation to begin with, but in this space in particular with the technology evolving so quickly, I really think there’s great appeal there.

MS. FEUER: Thanks.

Anyone else? Marie-Paule?

MS. BENASSI: I agree with what James Sullivan said. I think it's going to be really incredibly difficult to sort of have a very harmonized universal framework for that data protection but also for consumer protection. And in the European Union, we are -- we have these principle-based laws and even in case of maximum harmonizations, there remain some differences.

So our reply is to work on common enforcement actions and develop these actions in a way that they have become also guidance in a way. So -- and they are less theoretical than the law because they are applied to practical problems, practical practices. And in the future, what we want to do is to do more of these actions where, in fact, we have -- we publish the common position of the CPC network in the form of a guidance that can be applied by all the different operators in a certain industry.

The other point I wanted to mention is
notice and action procedures. So in the European Union, we have a law which is called the E-Commerce Directive, and which provides that marketplaces and social networks do not have a duty to monitor illegal practices, but they have a duty to act upon notification against an illegal practice. And this means, for example, withdrawing the account, obscuring the information.

One of the problems of these operators, because we are now discussing a lot with them, is that, first of all, the domain of laws, which should apply, which is enormous and then it's -- for them, it's very difficult in a way to have an efficient action when the domain of law is so big and also the enforcement type are very big.

And so I think that also cooperation on common notice and action procedures at the international level with a certain level of recognition, so this is what Jeff is saying about this disruption, so looking into also other type of models which are more based on practical enforcement tools, systems.

MS. FEUER: Thank you.

Anyone else?

So in the few minutes we have remaining,
what I'd like to do is turn to each of the panelists and, similar to the first panel today, ask for a one-, maybe two-minute takeaway of what you see as the most important tools for international cooperation, what you see as your main challenges, and how you might remedy them.

So I'm going to put Kurt on the spot and ask our SEC colleague to start first.

MR. GRESENZ: So when you started with tools, I did remember the third tool that was so important that I forgot it, but it actually is very important. So we have two provisions of law which help us protect information we receive from foreign authorities. The first one is a statutory protection that protects from any third parties any materials that we receive from foreign securities authorities. So outside of the litigation context, that essentially gives us ironclad protection for SEC files for enforcement purposes.

But more recently, we added a legal amendment, a new tool that protects in litigation any material that would be privileged in the foreign jurisdiction. So let's say, for example, we get confidential financial intelligence from a foreign authority, and as a condition of receiving that, the
foreign authority makes a good faith representation
that this is for intelligence purposes, and it is
privileged from disclosure in our jurisdiction.

Under Section 24(f) of our 34 act, that
protection would carry over into US law, and there is
an absolute privilege it would stand discovery, for
example, that it will carry over the foreign privilege
to US law. And it could be anything. It could be
financial intelligence, it could priest-penitent. I
mean, if there is a privilege that is recognized in
the foreign jurisdiction and we receive materials
pursuant to that privilege without waiver, then
there's no examination behind the statute for the
court to make. It just has to be the representation.

So that, I think, gives us added teeth when
it comes to representations that we, in fact, can
protect things in our files. So, you know, the
takeaway for me is the big difference that I see is it
looks like what we do in the security space is much
more concentrated. You know, we know exactly who the
players are. We see them all the time. There's
crossover to some criminal authorities and other
domestic agencies, but by and large, we seem to be in
a more narrow lane.

And I think my takeaway would be that
listening to my colleagues here is there's a lot of lanes running in parallel and overlapping and overpasses and other sides that I think that we just don't have that much of in the security space in my view.

MS. FEUER: Thanks. And that raises two interesting points. I think this afternoon we'll have a panel on competition enforcement, and I think there might be a few less lanes, although I know there are some. And, also, your mention of your statutory ability to protect information, we have an analog in the SAFE WEB context for information provided by foreign law enforcement agencies when they ask for confidentiality that gives a privilege against FOIA disclosure.

So turning now to Jeff, your top takeaway.

MR. THOMPSON: At the end of the day, what I got out of this is, I mean, there's an increasing abundance of information in the world, and we need to be able to prioritize our enforcement efforts. So it's processing all that information that's certainly a challenge, and there's all kinds of technology tools to help us. But not only that, it's setting the right priorities and working smarter. So the intelligence-led approach, where we're using the central fraud
databases such as Consumer Sentinel or Anti-Fraud Centre to start driving enforcement action in a more targeted and effective manner.

MS. FEUER: Thank you. So intelligence is key to international cooperation.

Marie-Paule?

MS. BENASSI: So I wanted to say two things. The first thing Jeff said it already, which is about prioritization. And I think that fraud is becoming internet fraud, all the different facets of it, and its internationalization, I think, is becoming a very big problem in terms of the harm caused to consumers and collectively in the world.

And also in this respect, the role of the big platforms, you know? And if we don't prioritize and don't find efficient ways, building also on what this platform can do, I think is going to become more and more difficult to prevent fraud. And we see organized crime moving into these kind of activities, which seems to be giving them the possibility to earn a lot of money very easily.

But then we have a different type of problem which we didn't discuss much, because also we have a bit -- had discussions a bit in silos here, but which is how to tackle the new types of misleading practices
which are developing and which are based on the data economics. So on this we need to build links between competition, data protection, and consumer protection in order to understand this and see how -- what are the impact on consumers in terms of also the possible harm and also for businesses, possible lack of competition that this type of new data models are creating.

MS. FEUER: Thank you.

Secretary Sullivan.

MR. SULLIVAN: So, again, for me, my perspective, the biggest challenge we're dealing with right now is the fragmentation or the vulcanization of the internet around the globe. You're seeing rising delocalization, which, again, I think that just impoverishes everybody, those within the country that have imposed delocalization measures, those that have overly strict restrictions on data flows. I think certainly we share a legitimate and strong desire for consumer privacy with a lot of other countries. And as I noted earlier, we take different approaches.

I do think we need to be very wary because these issues, the way we're headed and in the coming years, we're going to be looking at, you know, more and more connected devices that are transmitting data,
and this data has to be protected on the one hand, but
it can lead to such tremendous opportunities. I mean,
in the public sphere, in terms of smart cities and
efficiencies and health breakthroughs and precision
medicine and detecting disease patterns. And we want
to be very wary of going too far in one direction, I
think. So I agree with you about the balancing of
these interests.

And, again, I'll go back to my -- I really
think, you know, the EU, for example, and the US do
take different approaches, but we ultimately share, at
eye level, the very same goal. And I think
interoperability between GDPR on the one and CBPR on
the other could be a very positive development. I
know there was a referential a few years ago with
BCRs, binding corporate rules, which is an EU proof
mechanism for data transfers and mapping it relative
to CBPRs.

And, again, these all derive from the same
OECD guidelines, and I think there's a lot of overlap.
And I know GDPR allows for certification mechanisms,
and I think there's a tremendous opportunity there for
us to make these systems work together and make sure
that we are extending privacy protections around the
globe, while at the same time making sure that we're
not quashing or squashing innovation and, again, doing
damage to our long-term interests.

So I think interoperability would be my
solution there. And as, again, I've said a couple
times already, you know, the FTC is probably the
preeminent privacy data protection authority, as it
were, in the world going back to the 1970s, has been a
great partner as we go around the world and talk to
countries on this. And so we should continue to do
that. And I hope we can partner with other like-
minded countries to that end.

MS. FEUER: Thank you.

And the clock is quickly counting down, so
I’ll ask Commissioner Dipple-Johnstone to say a final
word.

MR. DIPPLE-JOHNSTONE: I will be very quick,
then. I mean, I can almost echo the comments of
others. I think it’s that keeping updated and keeping
pace with vast changes in the landscape and technology
and making sure that we don't become the ministries of
no, that we support innovation in a very practical
sense. And as part of that, it’s making sure we make
the right links both internationally with each other
but also in each of our respective homes with the
other agencies and authorities we have to work with so
that the offer we can make internationally is the right one.

MS. FEUER: So thank you very much to the panel for some incredibly thought-provoking ideas. Before we break for lunch, I just want to mention that the Top of the Trade on the 7th floor has catering available for you to purchase. There's a handout on the table just outside with information about nearby restaurants. If you leave the building, you will have to go through security again unless you are an FTC employee. And be mindful that there is a small group of protesters outside the building, so leave ample time to get back in for our fascinating afternoon panels. Thank you.

(Applause.)
1 AFTERNOON SESSION

2 COMPETITION ENFORCEMENT COOPERATION

3 MS. COPPOLA: Okay. I’m getting the green light from Bilal Sayyed, our head of Policy. So I think we should get started.

4 Thank you all for coming to this afternoon’s panel. Today, we’re going to talk about enforcement cooperation on the competition side. You’ve just heard, in the break before lunch, about cooperation on the consumer side. It has a very different nature on the competition side. So we’ll be talking about that this afternoon.

5 I’d like to introduce my panelists briefly. Starting with -- going in alphabetical order, Nick Banasevic. Nick is from the European Commission’s DG Competition where he heads the unit that covers IT, internet, and consumer electronics. So we’ve had the very good fortune to cooperate with Nick on a number of cases.

6 Next to Nick is Marcus Bezzi. He is the Executive Director at the Australian Competition and Consumer Commission, where, among other things, he oversees all of the ACCC’s international engagements. So I also have had a great time working with him, even though very often the calls were extremely early for
us and extremely late for him. We still have a
terrific relationship.

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

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

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

Just I guess to set the stage in thinking
about cooperation in general, we engage in enforcement
cooperation for a number of reasons. Often, we find that it will improve our own analyses. It allows us to identify issues where we have a common interest, it allows us to avoid inconsistent outcomes, and perhaps, most importantly, for the outcome to coordinate remedies.

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

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

My elevator ride is 27 floors up and it takes about half a minute. So I don’t know if that’s how long I’ve got. But I think my five-second message is don’t neglect cooperation, it can really bring benefits. Of course, I think the first instinct that we have and what we’re responsible for by definition is our own jurisdiction, and the bread and butter of that is doing individual cases and that’s what we
focus on. That’s, as I say, the bread and butter of our work.

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

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

So from my perspective, I’ve had very good experiences over the years and I will give some more insights as we go on.
MS. COPPOLA: Thanks.

Marcus?

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

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

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

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

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

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

So I think from a private practitioner perspective, I agree there is a lot to be gained from cooperation. And I would love to use this panel to talk about practical ways that we can enhance
cooperation, again using Kovacic’s human glue analogy, more at that human level than at the formal, procedural MLAT kind of level that I think we’ve all worked with or had our frustrations with over the last decade or so, and have found that it is these informal connections and understandings that have facilitated greater cooperation more than the very formalistic process.

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

But it’s -- as all of these people have said, it’s more than about sharing information, it’s that human glue. It’s having the trust amongst agencies to be able to have productive discussions, to be able to exchange theories of harm, to talk about what they’re hearing from the marketplace, to sort of be in a united front with the businesses so that they understand that it is in their benefit and it will be
more efficient for them to cooperate with all of us together.

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

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

MS. COPPOLA: Thanks, Jeanne.

Okay. So there’s a lot of human glue. So we seem to all agree that there’s a lot of great things that come out of cooperation, cooperation is very important. I guess drilling down to the next level, what can parties expect for agencies, and I guess for Fiona, what can agencies expect at a more detailed level from cooperation. Why don’t we start with Marcus this time.
MR. BEZZI: Thanks, Maria.

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

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

I should say that in mergers, the informal cooperation works extremely well and we don’t have to rely upon the formal. A lot of the time in Australia, we use the processes to coordinate remedies and people can reasonably expect us to do that in a fairly
efficient way. I think that is a good aspect of the current system.

MS. COPPOLA: Thanks.

Jeanne, do you want to --

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

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

And where cross border competition concerns are identified, you can expect the Canadian Competition Bureau to engage agencies in remedy discussions, because we need to make sure that those
remedy discussions are considered in the broader context, including the need for remedies in one or more jurisdictions and whether a remedy in one jurisdiction may actually be sufficient to address concerns in another, so that we may not need our own consent agreement in Canada. We also look at whether a common monitor should be appointed or looking at the consistency of the language around preservation of assets or hold separate arrangements.

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

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

MS. COPPOLA: Thanks, Jeanne, very much.

I’m very sorry to have to ask Nick to add to that because I think you about covered the universe. But, Nick, what do you think that parties can expect from cooperation and thinking specifically about your
perspective from a shop that deals with conduct matters?

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

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

MR. BANASEVIC: In the post-panel, perhaps.

No, but I think, as Jeanne said -- and perhaps -- and this is something I think we’ll develop perhaps as a difference in terms of incentives in conduct in mergers. Most of what my experience, in terms of what parties have incentive-wise, is in conduct. I’ve worked on a few mergers where the incentives have been aligned. We’ve had issues with parties where sometimes they don’t want to give waivers in conduct cases because they feel that that would somehow not be beneficial to them. That is, of course, their prerogative.

My personal view is that actually, you know if they’ve got a good story to tell, there’s no issue with giving away, but because it’s precisely those things that we can discuss openly with them and with our colleagues, our sister agencies. But I think exactly the kinds of things that -- whether or not
there is a waiver, because I think even without a waiver we’re able to, from our perspective, in terms of what we can gain, talk about theories of harm in the abstract and general levels, test, test theories, test realities.

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

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

So I think we, in terms of both policy development -- and then when we’re doing cases, I think it is invaluable and we each have a lot to gain
in terms of, again, coming back to some of the things I’ve said in terms of case specifics, theories of harm, making sure that we’ve got a reality check on whether something is correct or not, testing these theories with each other, and if appropriate, moving the cases forward in the same or similar direction. If not, at least understanding the background to where we’re each coming from and why we may take a different approach. And I found that invaluable over the years in many cases, and I’ll develop that a bit more a bit later.

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

Fiona?

MS. SCHAEFFER: Sure. Well, I think from the parties’ perspective -- and my comments are primarily in the context of merger reviews -- the goals of what can realistically be achieved from cooperation include reducing duplicative effort, reducing the burdens of investigation, convincing the agency, through cooperation, that just because there is a hill there to climb doesn’t mean that everyone
has to climb it. One can climb and report, assuming, of course, it is a similar hill.

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

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

I guess a word on waivers just to Nick’s point. In principle, I agree that knowledge is power
and I like everyone at the table to have a similar level of knowledge, if we have good substantive points and arguments and documents to share, or even if not so good. The agency can do a better job armed with that knowledge than if there is some game-playing and trying to orchestrate the process and manage who knows what.

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

We know that we’re dealing with jurisdictions that have very different levels of confidentiality protection, and in some instances, for example, are required to give third parties due process or other government agencies access. So I
think there’s a greater feeling of concern about being able to manage the flow of that information in the conduct arena.

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

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

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

MS. COPPOLA: Yes. That’s why I’m looking at you. I’m sorry.

(Laughter.)

MR. BEZZI: Well, where do I start. So informal -- I’ll start on the informal. And, look, I
1 should say 95 percent of the cooperation that we’re involved in -- probably more than 95 percent is informal and it’s very effective and it involves engagement with the various agencies that we’ve got excellent relationships with. We have many counterpart agencies that we’ve got second generation cooperation agreements with or first generation cooperation agreements with. And they help to create a formal framework in which we can engage in informal cooperation.

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

So what does that actually mean? It means that we can have case teams that have regular phone
calls if we’ve got a common investigation or we’re investigating common or related issues. We can talk about case theories. We can talk about practical things like when we’re going to interview common witnesses. We can talk about lines of inquiry that have not been successful that have been a waste of our time and suggest to each other perhaps don’t bother going there, it won’t lead anywhere or, actually, look here, it’s a better place to look. Those sorts of discussions happen between case teams and they are really valuable.

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

So I think you said, what would be better? Well, some of the processes that exist under IOSCO where -- and, indeed, exist under the antitrust treaty that we have with the US -- where we can ask
counterpart agencies to compel testimony, we can ask counterpart agencies to compel the production of evidence or production of information and to do so in a very timely way, to put in a request that can be responded to in days or weeks rather than months or years. Those sorts of things are things that we aspire to.

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

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

MR. BEZZI: Very much so, yes.

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

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

MS. PRATT: Yeah, I’ll try not to do --
MS. COPPOLA: So we can just --

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

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

So some of the mechanisms that we use outside of informal cooperation on a case to try and do that are the case team leader meetings that you heard Commissioner Boswell talk about this morning, which I find incredibly useful because it is our officers who are doing the work, that are leading those cases, that will take some time out to talk about how they do their work, what issues they are
Facing. Sometimes it’s talking about a particular case development or a lesson learned that they have from their jurisdiction. And that builds relationships amongst our staff, it builds trust, it builds confidence in our counterpart’s abilities as economists and lawyers doing the same type of work.

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

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

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

The other thing that we have found valuable is taking some time out, maybe more publicly, to have workshops on particular issues. The FTC and the DOJ and the Competition Bureau in 2018 had a joint
workshop on competition in residential real estate brokerage. And, you know, we had eight years of litigation in the real estate industry surrounding the use and display of critical sales information through digital platforms that wasn’t resolved until years after the US. But because we had taken so long, there had been a lot of evolution in the law and the economy. And so some of the lessons that we learned along the way were also informative to update since the fight in the US.

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

So if you -- and I think this would be particularly useful in the unilateral conduct side where you may be looking at different incentives. The merging parties may want to get through our process as quickly as possible. They, I think, have come to see more of the benefits of our cooperation to get them
where they need to get to with less conflict and quicker results. But, you know, that kind of a gateway provision could allow us to have discussions on the unilateral conduct side because the discussion is only as good as the two-way communication allows.

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

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

MR. BANASEVIC: So I’m going to go back in time a bit and give you a couple of examples of very intense cooperation with the FTC and the DOJ. Actually, let me first say, to go back a step even, for us, cooperation starts at home in the sense that we’ve got the European Competition Network, which in -- I don’t know if “unique” is the word, but it’s the network of us, the European Commission with all the
national member state competition authorities in the EEA, the European Economic Area, all applying European competition law.

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

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

And then there was a remedy implemented in the US that changed the way that some things were done. So it had a kind of factual impact on some of
the things that we were doing in our case while it was still ongoing. And the issues were also -- even though the liability case here was little bit different, through the remedy, there was an interoperability element as well. So the kinds of issues were very similar.

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

The second example is the kind of policy and case area standard essential patterns. This goes back to even Rambus with the FTC where we had a similar case ourselves in Europe. But more generally and more
recently, or five, six years ago, I guess, this issue of injunctions based on standard essential patterns. The FTC -- I think it was 2013 you had the consent decree with Motorola and we had a prohibition decision against Motorola a year earlier on the same kind of issue.

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

But there were many people saying, how can you possibly do this? There are some people saying that. But against that background of that -- again, I’m not sure if “novel” is the word, but a very complex, important issue, it was really invaluable to
I have both the case coordination with the FTC on Motorola, where we had regular contact in terms of meetings and calls, and then on the policy level with both the FTC and the DOJ, where essentially we were on the same page in terms of developing this policy and this approach towards how we deal with the specific issue of injunctions based on standard essential patterns. I think particularly because it was an area that was so complex and controversial, my personal view is that we all mutually benefitted from being able to really share these experiences and insight.

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

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

Fiona, we’ve heard kind of rah-rah-rah cooperation and lots of pluses on cooperation. You’ve talked about how cooperation doesn’t mean getting to the finish line at the exact same time. What are some
of the practical limitations on cooperation from a
private practitioner’s perspective?

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

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

And even when you’ve done all of those
things and there’s been I think an earnest, concerted
goodwill effort to align those discussions, you’re
inevitably going to have cases where, you know, something surprising happens like one jurisdiction decides, yes, we like the remedy package that everyone else has agreed to, but lo and behold, we think there ought to be a different purchaser in our jurisdiction, which shall remained unnamed, than in the rest of the world, which as you can imagine when you’re dealing with products that are sold around the globe under one brand name can be pretty challenging.

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

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

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

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

(Laughter.)

MS. SCHAEFFER: But I don’t think that
that’s necessarily the case, not for all meetings or
forms of cooperation. So that’s something I think we could do more with.

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

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

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

Marcus, you had mentioned that you have an information gateway in Australia. What does that mean and what can the FTC learn from that?
MR. BEZZI: So an information gateway is a legislative provision that enables our Chairman to make a decision to release material that we’ve obtained through some confidential process either a compulsory power, exercise of a compulsory power, requiring compelled production of information, or otherwise, and it enables us to release that information without the consent of the party whose information it is.

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

As I say, it doesn’t happen very often. There will be more than just a set of conditions imposed. There’s usually a fairly rigorous process that we put in place to ensure that the conditions are complied with. So there’s reporting. And after the agency that’s received the information has finished
with it, we’ll require them to give the information back.

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

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

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

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

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

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

Where there is no bilateral-multilateral cooperation instrument in force, the Bureau does not communicate information protected by Section 29 unless we are fully satisfied with the assurances provided by
the foreign authority with respect to maintaining the confidentiality of the information and the uses to which it will be put. And this, again, is where trust becomes key for us, we’re not going to put our reputation and our effectiveness on the line if we are not certain that those conditions will be satisfied.

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

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

So I guess I would say the gateway for us, while similar to Australia, I think has been used a
little bit different and that mostly is a result of practice, our transparency, the market having a lot of faith in our practices and procedures, to maintain confidentiality. And without it, I don’t think it would be as effective.

MS. COPPOLA: Thanks very much.

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

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

MS. COPPOLA: Right, right.

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

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

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

And what we found -- and this resonated when Marcus was talking about it -- is actually we haven’t needed to use -- to invoke those provisions. And it’s actually encouraged that that framework, and maybe the trust or the mechanics of how things work, have encouraged information provision without needing to use the formal provisions under the agreement. So I think that’s an interesting point.
MS. COPPOLA: Right, yeah, yeah.

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

MS. SCHAEFFER: From a merging party’s perspective or from an investigated party’s perspective?

MS. COPPOLA: From both.

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

I do think, on the merger side, the incentives are greater to provide it anyway. But I think, also, at the same time, the actual exchange of confidential information is relatively rare and I
think its use is overrated. I think the biggest
benefit that I’ve seen from cooperation from a private
party’s perspective -- and I suspect the agencies
might agree with this -- is just being able to discuss
the case, the theories, the investigation, the legal
analysis, the basic understanding of how the products
work, what third party concerns are without, you know,
revealing any confidential information.

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

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

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

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

MS. PRATT: Well, I think it’s -- I guess
from my perspective it would -- I’ve never seen that
risk become realized. Because each of our agencies
are very concerned about the confidential forecast
that we have, that we want to minimize the risk of
that because, otherwise, it would be a reputational
risk for us doing our job.
I do think a lot of the value, unless you are doing a joint investigation where there is evidence that you need in another jurisdiction, most of the value of that cooperation can come from not providing confidential, competitively-sensitive third party information. So if you have waivers or you have a gateway provision, that facilitates that cooperation quite well.

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

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

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

MS. COPPOLA: Right, right.

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

MR. BANASEVIC: Nothing spectacular.

MS. COPPOLA: Okay. I have one question
from the audience, but before we -- and I encourage
other questions. So now is the time to write them.

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

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

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

Well, it’s a story we all told our children
growing up in Australia where, as a child, I really
enjoyed it. The magic pudding just never stopped
producing pudding until the entire town was flooded
with porridge and pudding everywhere.
Well, no agency is a magic pudding. Agencies have limited resources. They can’t just keep on producing. And I think from an agency perspective, as well as from the parties’ perspective, one always ought to ask what are the incremental benefits of this additional investigation we’re doing over -- you know, on top of what five other agencies are doing? What are the incremental benefits of a remedy that is the same or virtually identical to what another agency has obtained as opposed to taking our limited resources and using them for investigations and transactions that these other five agencies couldn’t review?

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

I think some of the larger Brazilian investigations have involved, in more recent times, transactions in the educational sector and the health care sector, in the domestic financial services sector. And their bang for their buck in those
investigations I think is significantly higher than it would be if they were another me-too in a global transaction.

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

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

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

Marcus, what did you say to the magic pudding discussion and what are your thoughts on the topic more generally?
MR. BEZZI: Well, exactly, we are not a magic pudding. We have limited resources. We’ve got to use them intelligently. So we’ve got to focus on the things that are most important within our jurisdiction.

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

Similarly, in mergers, we will focus on the detriment in Australia. We’ll focus on a remedy that can fix the problems we have identified in Australia, and if it happens that that remedy has already been devised somewhere else and the remedy somewhere else will completely fix the problem in Australia, then what we can do is accept what’s called an enforceable
undertaking, which is essentially a statutory promise, which requires the parties to give effect to whatever the commitment that’s being given outside Australia is, give them -- they are required to give that commitment to us in Australia, and that essentially is -- deals with the problem that we’ve got jurisdiction to deal with.

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

MR. BEZZI: We’ve got something that we can enforce.

MS. COPPOLA: Right.

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

MS. COPPOLA: Better focused. Right, right.

Jeanne?

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

The only way we get there, though, is, again, to have really close cooperation. We need to
understand the scope of the issues, we need to understand the scope of the remedy, and, frankly, we also need to have trust in the agency that they are going to enforce that remedy at the end of the day, which we have full faith in the US Department of Justice and the US Federal Trade Commission to do that.

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

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

The second one, which is more recent, was a case we cooperated on with the US Department of Justice, UTC/Rockwell last year, which was an
aerospace systems review, and in that case just to underscore the importance of the cooperation to get us to the comity, we cooperated closely with the US DOJ and the DG Comp throughout the review.

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

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

The other side of comity, which, you know, I’m not sure the parties appreciated at the time, Commissioner Boswell talked about our simultaneous filing of litigation in the Staples/Office Depot merger a couple of years ago. Part of that was we did
not see the need to file an injunction the same day
because we knew that there would be an injunction
proceeding by the FTC. So the parties did actually
benefit because they didn’t have to face an injunction
proceeding north of the border as well as south of the
border. We benefitted greatly from cooperation in
that case.

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

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

Nick, we haven’t heard from you yet on
remedies coordination or forbearance. Is there
anything you want to add?

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

(Laughter.)

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

MS. COPPOLA: Right.

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

Where we have the discretion in terms of
choosing which cases we do and which cases we don’t,
with scarce resources that any public body has by
definition, is a number of things, but not least the
impact -- the potential impact in our market, in our
jurisdiction. We’re responsible for a jurisdiction of
500 million people.

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

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

Again, it’s not that one can or need
guarantee precisely the same outcome, given the
differences possibly in even conduct. I mean, some of our markets are national for some of the products even if the companies are operating globally. But I think there is a great benefit in this up-front shaping, sharing thoughts to, to the extent possible, minimize the risk of divergences.

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

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

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

MS. COPPOLA: There’s these like big guns and, yeah, sledgehammers.

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

MS. COPPOLA: Right.
MR. BANASEVIC: So what was the --

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

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

MS. COPPOLA: Right.

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

MS. SCHAEFFER: Can I just add on to that?

Maybe the Cooperation 2.0 for digital platform investigations is not necessarily between antitrust
agencies, but between antitrust agencies, consumer
protection, and privacy agencies. Because -- and I
think the term “forbearance” might come in there as
well, in that not everything involving a digital
platform is necessarily an antitrust issue.
And we certainly have a lot of intermelding
of privacy and consumer protection concerns, as we see
with the Australian ACCC report. And how do we
jointly investigate those issues or maybe have
antitrust not be the primary investigation and
enforcement mechanism there?
MS. COPPOLA: We are very close to the end
of the session. So I guess, Marcus and Jeanne,
starting with you, and if there’s time, we’ll move on
to Fiona and Nick. What are your last words of advice
for the FTC in the area of enforcement cooperation?
MS. PRATT: I’m not sure I have advice. I
think, as you’ve heard, I have found or we have found
that gateway provision in our legislation to be
particularly useful and, you know, it might be
interesting to consider that in your context and
whether it’s appropriate.
And I would just want to lastly say thank
you very much for having us here. I know the FTC can
continue to rely on the Canadian Competition Bureau’s
commitment to continuing to build upon the solid cooperation foundation that we have and in particularly dynamic fast-moving markets that we have today. I think the business case for cooperation is only getting stronger and will only get better from here.

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

MS. COPPOLA: Thanks.

Nick, Fiona, anything to add?

MR. BANASEVIC: I’ve said it all, I don’t want to repeat. I think it’s don’t underestimate it, use it, and benefit from the interactions and the knowledge you can have with colleagues.

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

(Appause.)

(Brief break.)
INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES:

ARTIFICIAL INTELLIGENCE CASE STUDY

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

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

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

Thank you, and please welcome Julie.

(Applause.)

MS. BRILL: Thank you, Deon. I remember that event, too, and it was great to work with you
there. And it’s really an honor to be here today to contribute to today’s important discussions on the FTC’s international role in a world transformed by digital technology.

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

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

Rapid progress in the field of artificial intelligence has delivered us to the threshold of a new era of computing that will transform every field of human endeavor. Already, almost without us
noticing, AI has become an essential part of our day-
to-day lives. It powers the apps that help us get
from place to place, predict what we might want to
buy, and protects our systems from malware and
viruses.

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

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

In the wake of the Cambridge Analytica
scandal and the spectacle of tech industry experts
being hauled before Congress to answer for their...
business practices, people wonder if technology and
technology companies can be trusted. The truth is
that technology is neither inherently good nor bad.
Cloud computing and artificial intelligence are just
tools that people can use to be more productive and
effective, basically the equivalent of the first
Industrial Revolution’s steam engine. But it is also
true that because technology has never been more
powerful, the potential impact, both positive and
negative, has never been greater.

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

To guide us as we weigh these decisions at
Microsoft, we have adopted six ethical principles for
our work on artificial intelligence. It starts with
transparency and accountability. We know that trust
requires clear information about how AI systems work,
coupled with accountability for the people and companies who develop them. We believe strongly in the principles of fairness which means AI must treat everyone with dignity and respect and without bias.

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

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

Here in the United States, right now, one area of the law demands our attention above all others. That area is privacy. Because so much of who we are is expressed digitally and so much of how we interact with each other and the world is captured and stored in digital form, how people think about privacy has changed. For more than a century, our
understanding of this most fundamental human right has
been shaped by the definition set forth by the great
American legal thinker and fathers of the FTC, Louis
Brandeis, who defined privacy as the right to be let
alone. That right will always be important. But, by
itself, it is no longer sufficient.

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

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

This is why we were the first company to
extend the rights that are at the heart of the
European general protection regulation, and we
extended those to our customers around the world,
including the right to know what data is collected, to
correct that data, and to delete it or take it
somewhere else. And over the last year, we’ve seen
the rise of a global movement to adopt frameworks that
enhance consumer control mechanisms modeled on those
required by Europe’s GDPR.

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

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

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

As part of Microsoft’s commitment to
privacy, we offer a dashboard where people can manage
their privacy settings. Since May of last year, more
than 10 million people around the world have used this
tool, with the number growing every day. I think it is telling that while millions of people around the world are using our tool, our data demonstrates that US citizens are the most active in controlling their data. All of this should serve as a wakeup call for US companies and the US Government.

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

While updated privacy laws are essential to building trust, new uses for artificial intelligence
are emerging that will require special consideration for their own specific regulations. Facial recognition is a prime example. This technology has shown that it can provide new and positive benefits when used to identify missing children or diagnose diseases. But there is a real risk that -- there is a real risk which includes the danger that it will reinforce social bias and be used as a surveillance tool that encroaches individual freedom.

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

We need laws that place appropriate guardrails to ensure that companies don’t take unfair advantage of individuals or violate people’s fundamental rights. That is the essence of trust. We believe that guardrails can be designed in ways that facilitate global interoperability and promote innovation so we can all work together to continue to
harness the potential of the digital revolution to improve people’s lives and drive economic growth. This will require a commitment from all of us to engage in ongoing discussions and consultations that span governments and sectors. This means it’s essential for the US Government and its agencies, including the FTC, to engage in a broad range of discussions with other governments on digital issues like we are doing with the honored guests here today. Just as important are gatherings like this that will bring people together from around the world to explore policy approaches to new emerging technologies like artificial intelligence. More than 100 years ago, when Brandeis defined the right to be let alone in his famous Law Review article, The Right to Privacy, he described, with great eloquence, the ongoing process by which rights evolve as humanity progresses and how the law adopts and adapts in response.

“Political, social, and economic changes entail the recognition of new rights,” Brandeis wrote, “and the law in its eternal youth grows to meet demands of society.” Brandeis was moved to write this article because of the impact of photography, mechanical printing presses, and other disruptive new
technologies of his time.

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

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

(Applause.)
INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES:
ARTIFICIAL INTELLIGENCE CASE STUDY (PANEL)

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

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

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

During this panel, we’ll touch upon a
variety of issues and we’ll go deeper and let you see what these colleagues have to offer. We won’t go into great detail on their bios, but we couldn’t resist showing off a little bit for you and letting you know who they are.

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

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

(Laughter.)

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

Next over to Marcela. She’s a partner at VMCA Advogados in Brazil focusing on data protection
and antitrust. She’s served as Advisor and Chief of Staff for the President of Brazil’s famous CADE.

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

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

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

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

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

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

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

The third is that perhaps some of you have heard that there has been a rich and, again, contentious conversation about the right to privacy in India in the context of state surveillance, but also in the context of state protection. So we’ve had a major case on the right to privacy, and we’ve also got a data protection bill, which is very interesting, so I’m going to describe the highlights of that for you.
And the final -- because we’re discussing this in such an international context is this sort of almost a clash of jurisdictions that arises from the Indians, for example, floating proposals of data localization in certain contexts, but also the ways in which India is coping with norms that are emerging from the US and from Europe.

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

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

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

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

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

I’m going to stop here. I just wanted to flag all of this in case anyone has questions later.

Thank you so much.

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

We’ll move down the line and next up is James.

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

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

This is an emerging area, one where I don’t think we still have a clear picture of what AI’s impact on our societies will be. And with that in mind, it’s important that regulators keep themselves up to date, keep relevant and work together with others. And that’s very much the approach we’ve taken in the UK. The ICO has a remit in some of the
technology, but actually, we work very closely with,
for example, colleagues at the Competition and Market
Authority, the Financial Conduct Authority, the Center
for Data Ethics and Innovation and the Alan Turing
Institute to look at the common issues that face us
all and how we can improve our regulation.

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

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

And so that’s why, as a regulator, we are
really keen to keep abreast of developments. So we are putting a lot of effort into doing that. We are recruiting post-doctoral researchers to help us look at how to regulate AI. We’ve taken new powers to examine AI’s use and look at AI systems in practice and in operation and we’ve reconfigured the office to set up an entire part of the office that will just focus on innovation and technology.

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

MS. CONNELLY: Thank you.

Francis?

MR. KARIUKI: Thank you, Ellen and Deon. It’s a pleasure for me to be here and to share my thoughts in regard to AI.

And my view is as a competition and consumer protection regulator, what am I worried about? And I have about four issues, and these are transparency and
information asymmetries. What I would like to say is that AI has both created positive and external --
externalities. And in terms of competition and consumer protection, there’s an argument which has
been found that they bring more efficiency in terms of prices and greater transparency compared to the traditional retail sales channels, and this is an inquiry which has been conducted in Europe and it has shown that. And, also, they provide additional benefits on these platforms. For example, AI [indiscernible], such platforms could improve choice and value for consumers.

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

And this could be quite catastrophic in the continent I come from where there’s a lot of market concentration, and, therefore, the companies which are in Africa then can expand their space by being biased
against the consumers in Africa.

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

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

Besides information asymmetry, I’ve seen AI can also be used in consumer protection issues, discrimination based on other social issues like the
region where people come from or even race, as I had
mentioned earlier, and these are some of the things
where we need, as regulators, both competition and
consumer, to look before we fly, because right now is
that we are flying blindly and we might be flying into
a storm.

MS. CONNELLY: Thank you.

Marcela?

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

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

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

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

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

If, however, we look from the consumer or data protection side of the discussion, we may come to a very different conclusion. And we may come to realize that, perhaps, consumers don’t want their data shared across different platforms and shared across many companies. So, naturally, both objectives
pursued by either antitrust or privacy and consumer
protection agencies, in the case of Brazil
specifically as I hope to make clear throughout my
interventions, we are at very different development
stages. When it comes to antitrust and consumer
protection, we are much more developed and, as you may
be aware and former Commissioner Julie Brill already
mentioned, in regards to data protection legislation,
our specific legislation was approved just last
August, August 2018, and has not yet come into force.
So building policy that brings all of these
areas of law together in a coherent fashion to address
AI challenges seems to me to be a particularly
important goal and a particularly important topic for
us to focus on.

MS. CONNELLY: Thank you, Marcela.
Isabelle?

MS. DE SILVA: Thanks a lot to the FTC for
the invitation. I’m really glad to be here.
I would like to say that, for me, the main
point is that we think data, artificial intelligence,
algorithm, are really key to the competitive process
and that is why we must look at it closely. Of
course, those processes affect also the way the state
is being run. They also affect and they change
society, but for us, the main issue is how do they affect the competitive process and the way companies do business?

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

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

And in this way, we get a lot of information from companies. They are sometimes reluctant to give information, but we have the legal framework that enable us to get a lot of information. And also we give information back to the market. I think this is really something interesting because some sectors are
moving so fast that even the companies engaging in the sector don’t always have the big picture, and that is something that has been deemed very useful in the field of what we did about programmatic advertising and the way it’s being run because it’s a very complex and new ecosystem.

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

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

And, finally, another tool that we use is the conference or hearings like you have today at the FTC, but really focusing on what is new, for example, in the field of algorithm. Last year, we had lots of
meetings with scientists, sociology experts about what is new about algorithm and also about companies. For example, we had meetings with Google and Facebook to know how they use algorithm in a very precise and detailed matter to help us to understand how it’s being used.

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

And maybe on a final note, I completely agree with what has been said about the fact that competition has a lot of points of contact with other fields of the law, for example, privacy law or consumer protection. And that is why we have set up a special program of acting as a platform between the different regulatory agencies. So we have set up a process where we meet regularly with the chair of the privacy regulator, the telecommunication regulator, the media regulator, and we set up for the first time a joint program about, for example, data or home assistant and to give a global view from the point of view from competition, privacy and media and
telecommunications. So this enables us to interact better also with the government that is thinking about changing the law.

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

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

MS. CONNELLY: Thank you.

But last, but definitely not least, Omer.

MR. TENE: So I want to try to highlight two issues that I think are significant challenges, novel challenges, with regulating AI. The first that comes to mind is the challenge of governing technology that even its creators can’t fully explain. So it’s the
black box issue, the explainability, transparency problem.

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

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

Now, these cases involved one plane. With AI, we think of entire cities that will be ecosystems that are governed by AIs or you can think of militaries that use AI. And then, of course, the implications can be profound. I read somewhere just this past week that some of the auto makers are actually struggling with this issue and they’re
considering skipping semi-autonomous vehicles and just
going to fully autonomous vehicles. I can tell -- you
know, attest to this myself that when I use auto pilot
assist and adaptive cruise control, you tend to be
more passive. Your foot moves away from the brake
and, you know, it’s not good.

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

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

And it’s interesting that just in this
panel, just the last few speakers represent laws from,
I think, 1978 in France and 2018 in Brazil. So 40
years apart, but the framework is still very similar.
It’s very individualized. It’s based on individual
control. It’s still the Allen Weston principles and
individual choice and even the concept of
identifiability, which is very central to the data
protection frameworks currently in the world. But
with data mining and different AI models, it’s
oftentimes not -- no longer about you and your privacy
and the individual and the identity, but about people
like you and lessons that are drawn from groups and
then applied with particular rised implications for
individuals.

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

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

MS. CONNELLY: Thank you.

I just want to make a brief programming
note. We had some trouble with the phone line. And
so, unfortunately, Chinmayi had to leave the
conversation. But we’re hopeful we will still be able
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
we’ll go to the question that’s next on the table, which is, indeed, about research.

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

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

So I would like to give you maybe some points that we will be dealing with in the study that hopefully will be released around summer. First, we will try to make a picture of the different types of algorithm that are being used today in the field of the economy and, of course, I think the fact that the state is using them a lot is incredibly important and
this is something that must be kept into mind.

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

(Laughter.)

MS. WOODS BELL: Oh, that’s a low blow, Isabelle. That’s a really low blow.

(Laughter.)

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

(Laughter.)

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

And so, first, we will try to define what an algorithm is and what are the main types of algorithm that are interesting from a competition point of view. So we will, of course, deal with the issue of collusion. Why is collusion being linked so much to algorithm? And we will try to show in a
very practical manner the different scenarios where you can have a anticompetitive practice linked with algorithm.

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

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

And in that framework, I think that the Google shopping decision is really an extremely
important one because you can see that, in this case, the European Commission really used an effects-based approach. In the decision, you don’t have pages and pages of analysis of the algorithm that was used by Google, but you have a very detailed analysis of the effects that the new algorithm that had been used by Google in the Google shopping service, how did it affect the result pages? So the analysis is very concrete. Of course, the Commission had to analyze a lot of data. But this is an interesting example for me that is one of the key decision when you have an interest on the algorithm.

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

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

MS. MATTIUZZO: Yes. So as I mentioned earlier, Brazil is in a different stage regarding data protection. So we don’t have yet an agency that is doing any research on this topic. However, both our antitrust and our consumer protection legislation are much more developed. And CADE is currently, for example, engaged in a specific study about the digital
economy, which is not focused on AI, but it’s focused on the digital economy all together and also working together with the BRICs. The BRICs are conducting a study on the digital economy. So, that’s something to look forward to that will hopefully shed some light on this topic.

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

So Brazilian Congress last week approved a change in our credit scoring legislation. The Brazilian system before was known as the opt-in model. So you had to specifically say, okay, I want to be
added to this database in order to be part of it. And now, the big change was -- one of the big changes was, it’s an opt-out model. You will be included from the outset. And some research has started to see what the effects of this change will be for the database. Just so you have an idea, currently, there are around 11 million people in the database, which for a country that has over 200 million people is a very small number. So that number should increase and, therefore, the impact on the population as well, access to credit, and so forth.

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

MS. WOODS BELL: Thank you. That’s certainly impressive and also very much of relevance to the work we do at the FTC and our work in the
James, you mentioned something about you transforming your agency based on some of your research. So we hope you’ll be kind enough to share some nuggets of wisdom.

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

(Laughter.)

MS. WOODS BELL: I really am hoping they’re wisdom. I’m confident they’re wisdom.

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

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

The second is sort of establishing as if it
were the state of art. So what is the nature of the
technology? How is it being deployed? What are the
issues that are coming up? And a good example that
we’ve told -- you know, made public in terms of our
investigation is looking at the issue of use of facial
recognition technology by police forces in the UK.

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

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

And as part of that, as well as bringing
people in, we also have an ongoing research and grant
program. And as I mentioned where we’re working with a range of other regulators who are also grappling with these issues because we think it’s probably a common solution rather than something that we’ll dream up ourselves.

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

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

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

So we’ve looked at trying to transform the institution of IRBs, institutional review boards, that exist in academic universities and research institutions to assess ethics of human subject research, trying to convert them to data review boards.
that look at new innovative data uses or projects or products under ethical principles as opposed to just the law.

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

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

(Laughter.)

MS. CONNELLY: Thank you, Deon. So a couple of you have touched on some specific examples of cases or specific uses of the technology. Francis, I know that you, as Deon mentioned in the introduction, have expertise in
FinTech issues. I’d like to maybe start with you and give you a chance to discuss any interesting AI government or private sector use cases that you’ve experienced or had experience with in your work.

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

(Laughter.)

MS. WOODS BELL: He’s very modest. He’s very modest.

(Laughter.)

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

What has happened is that -- and I’m happy Isabelle highlighted also that is what is happening in France -- is that we have increased the [indiscernible] location in terms of research. There’s an area where it’s very expensive to do research. I think people like Omer, they’re very
happy now, because the market is there for them to conduct their --

(Laughter.)

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

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

Researchers in another country, just our neighbor, learning from what we did is, that they have gone ahead and they have tracked field sessions occur and their frequency is high and it is usually the provider who sets the frequency to be high. And this
research documented that these failures are on the side of the channel provider and occur at higher rates for competitors. This has provided evidence that markets to enforce equal channels.

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

(Laughter.)

MR. TENE: Challenge accepted.

(Laughter.)

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

In consumer protection, we shouldn’t forget the voice of the consumer -- I always say that -- and the utility of complaints data. I know FTC has used
consumer complaints data to address crimes in their digital economy. In my country, Kenya, researchers have recently used social media text analysis to measure risk for consumers in banking. We should be developing new models of complaints receival and analysis, and that’s a challenge I would like to pose to myself and also regulators that can quickly categorize and flag concerns related to data privacy and artificial intelligence. These are the areas I may push forward for further research.

MS. CONNELLY: Thank you.

MR. TENE: Can I jump in here?

MS. CONNELLY: Yes, of course.

MR. TENE: Because --

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

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

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

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

We looked at models of trying to govern data uses. So data can be used for these beneficial goals, while not imposing privacy costs or other risks on individuals. And in that context, we looked at models, like IRBs that I mentioned earlier, data review boards or internal committees in companies. Who should head them? Should it be the privacy officer? Should it be someone else?
We looked at some external review committees. So the health care industry, for example, has already instituted some external review boards to try to test the ethics of different products. Cities, so, for example, Seattle created what it calls the CTAB, the Community Technology Advisory Board, to assess innovative data projects.

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

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

MR. DIPPLE-JOHNSTONE: Well, I think in terms of sharing sort of experience, I mean, our work around the Royal Free/Google DeepMind case is probably instructive of some of the issues that Omer was mentioning before in terms of not so much a challenge to the use of the AI, but it was the framework that
went around that. In this particular case, it was an NHS hospital, the Royal Free hospital, that developed with DeepMind a tool that improved diagnosis of a certain condition. So the tool itself was clinically effective.

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

And it was the governance arrangements that went around that’s sort of equivalent of the human-machine interaction. It was the interaction between the health data set and the use of the technology that caused us concern. And that was being put right. And we could see that that was being put right. The organizations were engaging with us as a regulator and were doing the right thing. MS. CONNELLY:

Thank you. Marcela?

MS. MATTIUZZO: Yeah, just quickly to
comment a little bit more on credit scoring, which is, as I mentioned earlier, something that in Brazil was much more developed earlier.

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

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

There’s also a new provision that sensitive
information cannot be used to reach credit scores, that means gender, ethnic origin, and so forth, political views and stuff like that. And also information that is not truly related to credit and information that is truly not related to that person, because all of that in Brazil was used to reach your credit score. So children, how many children you have or information about how those children -- are they good credit payers or not, all of that was used.

And I believe it’s a good example of how research perhaps helped really improve legislation concretely.

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

I’ll turn to --

MR. KARIUKI: I think --

MS. CONNELLY: Yes?

MR. KARIUKI: I think what is coming out and what I would like to see is that there’s a lot of potential for research, but it’s expensive. And from the African continent is that that is why we have -- we are cooperating under the African Competition Forum to harness the resources we have in terms of the budget and also in terms of the human skill so at least we can be able to conduct more research.
Also at issue is more cooperation is needed between north and south, because whatever is happening in the north now, it’s really affecting what is happening in the south. And as we indicated, we don’t really appreciate the AI systems, and we need each other to move forward.

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

(Laughter.)

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

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

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

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

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

MS. WOODS BELLS: Thank you very much. Francis, do you want to us go back over to you?

MR. KARIUKI: Okay. The GDPR law is a work in progress and Julie mentioned about it. It’s a draft bill, which is undergoing legislative process. And I’ve looked a the bill and it creates the Office
of the -- of Dipple James here, the Office of --

(Laughter.)

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

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

MS. WOODS BELL: Thank you. You mentioned something which Chinmaya put on the record. And even
though she’s not here, she just sent a note. She said she is going to put comments on the record. So I’ll just channel a little bit of Chinmayi.

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

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

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

First, you see a sector that has moved
incredibly fast. Last year for the first time, online advertising was a bigger turnover than classical advertising on TV channel, movie, the press, the radio. So online advertising was a bigger budget. And what we saw was that the level of growth was huge, but two actors were taking all that economic growth for themselves, Google and Facebook in the case of the French market.

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

Another thing that was really striking for us was the level of use of data that was going on. We really felt -- and this was a strong message of this inquiry -- that the citizen was completely unaware of the fact that their data was being used in third-party website. I’m sure that 90 percent or 95 percent of the customers are completely unaware that cookies are being followed on all the different website. It’s really interesting because the Facebook case in
Germany is really about this issue that has been used by Facebook on different websites.

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

MR. TENE: Banner.

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

And maybe to finish, already in France, there is a debate that GDPR may not be enough. There
is the debate about should we go even further. For example, the fact that the default mode would be you don’t use data by the users. Users must specifically approve a big use of their data and maybe have something for this data so that’s use -- GDPR’s only been in place a few months and already you have some demands for something more.

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

But I think that those privacy issues will really remain at the core of competition work, consumer protection work and also, of course, data privacy because we had the first fine based on GDPR in France against Google Android about the way they were using data. And this fine was in relation with the
MR. TENE: I think if I can just comment on this. It’s interesting especially coming from a competition authority. You mentioned the hegemony of the two big data companies and the effect on the ad tech market in the same context of GDPR, and maybe you were hinting at the e-privacy regulation or the current directive. I think a lot of critics would argue that GDPR and even more so the e-privacy regulation and also some of the laws that are debated now in the US like the CCPA actually reinforce the big incumbents and the powerful first parties that have the customer relationship. They have the user and, therefore, will obtain the most explicit consent through a banner or some other -- really any way you can think of at that account of the more nimble, the smaller competitors who are playing in this ad tech market. So arguably, these laws have an anticompetitive effect.

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

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

(Laughter.)

MS. WOODS BELL: -- and that’s the way it should be.

Ellen, take it away.

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

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

We heard at the November sessions that cooperation, in terms of steps for regulators looking at how to handle the potential challenges and opportunities brought by AI, is a very important thing. But at the same time, many people at the November sessions pointed out that cooperation would
be very difficult to achieve, and in particular,
convergence of regulations and approaches would be
very difficult to achieve.

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

We’ll just go down the line.

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

Cooperation, again, is challenging. But I
think there’s a lot of goodwill particularly around
the community. And it’s not just privacy cooperation.
It’s got to be cross-sector cooperation, and it’s as
important to look at the cooperation mechanisms within
our respective countries as it is internationally, because it’s not just one sector or one regulation that needs to be addressed.

MS. CONNELLY: Francis?

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

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

The challenge would be in terms of resources, which I indicated, that some have more resources, some can afford better research. But from where I stand is that research conducted in Europe now
can be used in Africa because the platforms are the same, and that is the best thing. It’s not like the competition regulation where we have some different industrial policies and other consumer protection laws. There’s convergence in terms of the problems we are facing.

MS. CONNELLY: Thank you.

Marcela?

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

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

And another important topic that perhaps
will help this difficulty in finding legislation that is the same everywhere is that many uses of technology are global. So if you have higher standards on one place and the company’s global and it has to adapt to that one place, that place can lead legislation elsewhere and can lead market practices elsewhere. So I think that perhaps by using those two tools, we could help bring convergence.

MS. CONNELLY: Isabelle?

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

And I really think that one of the most useful cooperation is the sharing of concrete cases of details, sector inquiries, because it gives us really the material in which we can think about enforcing. Of course, there is this other issue of global convergence on the rules. Will the US adopt a form of
GDPR? I see that some companies like Microsoft have already decided to do it on their own. I think it’s maybe something that we haven’t mentioned enough, the reaction of the business community. This is really a message that I gave to the online advertising community. You must be careful. You must react before you have new rules because if you don’t respond to this issue of the trust, of the fact that the public is worried about the way the data is being used, if you don’t create some internal rules, voluntary rules, you may have a worst case scenario for you with new rules that will be too strict. So we mustn’t forget the companies have a lot to do on their own and they’re also a big part of this landscape.

MR. TENE: Yeah [indiscernible] Microsoft accepted and adopted GDPR globally. It adopted some of the rights that GDPR grants, and I think part of the reason might be that just adopting any specific standard might actually violate standards that are set in other jurisdictions or countries. And I think therein lies the problem for businesses today with the multiplication of efforts. It’s, of course, a good thing, but businesses really seek uniform standard rather than really being concerned where the standard
Because at the end of the day, different standards might require businesses to actually architecture different systems and frameworks and products and, you know, break the internet into a splinternet.

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

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

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