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Prepared Closing Keynote of Commissioner Rebecca Kelly Slaughter*
6th Bill Kovacic Antitrust Salon: Where is Antitrust Policy Going?
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It is great to be here today, and it is a great time to be at the FTC, as thought leaders around the country, the globe, and in this room are engaged in a far-reaching conversation about competition law and policy. Much of that conversation was aired here today, and I know the discussion will continue. To close out the day, I want to offer just a few thoughts about why we are in this moment of debate as we consider how to move forward.

Bill opened this afternoon by noting that some of these debates about antitrust have been going on for decades; that is certainly true in a sense. But I believe this moment is different, because of three factors that are driving today's conversation:

First, concentration is increasing across many sectors of the economy, and our citizens are feeling the pinch of that concentration in their lived experience as both consumers and workers. Second, technological innovation is reaching through all those sectors and often blurring the line between competition and consumer protection questions. And finally, the contrast between US law and the laws of other jurisdictions is becoming more acute, leading to an opportunity for useful comparative analysis.

Let me begin by addressing increased concentration. There is a variety of evidence that shows markets and industry sectors are becoming increasingly concentrated across the economy. We can fairly debate individual studies and how they inform antitrust policy, as well as the role of this data in the Commission's case-by-case analysis.

But this empirical evidence cannot be ignored, and neither can the experience of American citizens. According to a new [poll](#) by Marketplace and Edison Research, 71% of Americans believe that the economy is rigged against them. These poll numbers may be explained in part by the way consumers experience a lack of competition on a daily basis.

We have all encountered it in air travel. Costs are going up as seat sizes are going down, so travelers feel literally squeezed. And just this week is news that all of the major airlines have raised checked bag fees. Again. Without viable competitors to which they can turn, consumers

* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

are stuck with these costs. The same frustrations are true in high-speed broadband, health insurance, and mobile-operating systems.

Consumers suffer from lack of competition even in areas that appear to have substantial numbers of players. While it may seem like there are many choices in, for example, cosmetics or eyeglass retailers, the competition between different labels is merely illusory, because many brands fall under the umbrella of the same parent company.

Americans are feeling this concentration crunch from their perspective as workers as well as consumers. Evidence is pointing to greater concentration in labor markets that may deprive workers of the competitive process for their employment, and may help explain wage stagnation. We are also seeing a proliferation of non-compete agreements in employment contracts, and anti-poaching provisions in franchise agreements, on which state AGs have been effectively cracking down.

This conversation about the future of antitrust is also being driven by technological innovation. I am not referring merely to “tech titans,” about which there was a whole panel earlier, though it is undisputable that some very large tech companies control substantial market share in their sectors. I am referring to the fact that even as traditionally analog industries become more concentrated, they are becoming increasingly technologically dependent. Technology is no longer simply an industry, it is a part of every industry. As a result, it is relevant in more and more enforcement matters for both competition and consumer protection.

Privacy and data security might come to mind first, but the FTC’s consumer protection staff also grapple with the implications of technology when tackling cryptocurrencies, data throttling, online marketing, tech support scams, fintech—and even robocalls. And many of these consumer protection issues arise in companies with substantial market share.

On the competition side, we have also long had to keep pace with technological advancement. We are seeing more and more mergers and conduct matters with technology-related issues such as data collection, intellectual property, and network effects. And as consumers become data commodities themselves, the nature of competition has been evolving as well.

What is most interesting to me is how concerns about competition and consumer protection no longer exist in isolation. Addressing a legal question on one side often has profound implications for the other. Consider a hypothetical merger between two companies that each control substantial consumer data; what are the privacy and security implications of that rollup? Consider also the consequences for consumers when limited competition means there is no meaningful choice about whether to patronize a company that may not prioritize user privacy.

Policy changes on the consumer protection side have competition implications as well – how could effective data portability help facilitate entry and competition while sufficiently protecting privacy? Will new privacy regulations have the unintended consequence of stifling innovation and entrenching incumbents?

As Bill Kovacic has noted, with its dual mission, the FTC has the capacity to tackle these issues with thoughtful attention to their interplay. While many other jurisdictions have completely separate agencies to address privacy, consumer protection, and competition, the FTC is somewhat anomalous by having these issue sets housed under our single umbrella. It is incumbent on us to take advantage of our structure and our expertise to meet this economic moment.

Finally, we are considering questions about our competition laws because we are at a time when the contrast between United States law and the laws of other jurisdictions is particularly striking.

Currently, the European Commission is pursuing high profile competition cases that involve American companies. Of course, as we heard on an earlier panel, they are working with a different set of laws with respect to competition – the abuse of dominance standard, which does not exist in our statutory framework, puts specific burdens on firms that reach a certain market share. As we observe the European cases in practice, we have an opportunity to consider the benefits or risks of changing our statutory standards here.

Furthermore, the passage and implementation of GDPR across the pond as well as the CCPA closer to home provide excellent natural experiments for us to see how longstanding ideas like the right to be forgotten work in practice. We can also monitor implementation for unintended consequences, including for competition.

And finally, it's important to note that there have been significant developments in US federal law even though we have not passed any new statutes: our courts are generally making competition enforcement in the US harder. Commissioner Ohlhausen mentioned several of the FTC's recent litigation successes, and I do not want to minimize them; they are extremely important. However, many other jurisprudential developments are throwing up new roadblocks to enforcement.

For example, in the Supreme Court, *American Express* may make it harder to bring cases against anticompetitive conduct in "two sided markets." *Leegin* essentially gave the greenlight to manufacturers to prohibit retailers from providing discounts to consumers. In *Italian Colors*, the Supreme Court slammed the courthouse doors on a small business challenging anticompetitive conduct and forced them into binding arbitration. And there will be oral argument this fall in *Apple v. Pepper*, another case that will determine whether consumers even get in the courthouse doors to make their case.

And this is only the Supreme Court. Commissioner Ohlhausen called attention to the damaging district court decision in *ViroPharma*, in which the court imposed a new "imminence" standard for our 13(b) cases. Commissioner Ohlhausen also mentioned that the FTC had to appeal adverse district court opinions in multiple hospital merger cases. Thankfully, the courts of appeal vindicated our position, and ensured the harmful mergers were blocked. And finally the recent district court ruling against DOJ in the AT&T/Time Warner merger has generated concern about the ability to challenge vertical consolidation going forward.

All of these pieces taken together – aggressive enforcement in Europe under a different statutory framework, the passage of new privacy laws with competition implications, and the erosion of enforcement authority in US federal jurisprudence – work in concert to highlight the distinctions between the US and other jurisdictions. Those differences can be very instructive as we consider the future of antitrust in the US and worldwide.

Finally, I want to note I have heard several understandable concerns with moving away from the current US system to other models of competition or consumer protection enforcement. For example, my colleague Commissioner Phillips and others have expressed anxiety that GDPR could foreclose entry by innovative start-ups, damaging competition. And several very smart thinkers, including Bill and Einer Elhauge today, have justified the development and use of the consumer welfare standard based on its administrability. Bill has frequently observed that the genesis of the consumer welfare standard was to lend clarity and predictability to enforcement, and that an unadministrable alternative would run afoul of the Supreme Court.

These concerns are fair and important, but I do not believe they are dispositive or that they justify the status quo. For example, while I share the concern about GDPR's effect on competition, it does not follow that *all* privacy regulation necessarily will entrench incumbents. And while I agree that the goal of the consumer welfare standard was to be administrable, I query whether it really is administrable as it is applied today in cases that turn on costly economic inquiry and often boil down to a battle of the experts. Further, it does not follow that any alternative will necessarily be amorphous and unworkable.

Having this far reaching debate is important, and it is valuable to have the breadth of perspectives and experience that gatherings like this and like the current FTC hearings bring together; the range of sophisticated viewpoints can help us think both radically and carefully about how to improve our current competition framework.

This is an exciting moment for the FTC. We have the ability to chart a new course of enforcement, strategically pushing the law where it needs to go to protect consumers adequately. We can do this both by focusing our enforcement efforts to be more effective with our current toolbox and by identifying areas where we need to supplement that toolbox with additional authority or additional resources.

I look forward to this continuing conversation, and am grateful for the opportunity to take part in it.