FTC Hearing #2: Competition and Consumer Protection in the 21st Century
September 21, 2018
Segment 2
Transcript

ALDEN ABBOTT: We are about to start again, second panel on the state of US Antitrust Law. We're going to cover a lot of the questions we did and get a variety of new perspectives, which is very valuable. Again, I'm Alden Abbott, General Counsel of the FTC. Before proceeding, I want to again announce that two of our FTC interns will be handing out questions, little cards, and people may submit questions. And if we don't have the time to address the questions audience members have, we are keeping them, and we will consider them as we prepare the record. So don't be concerned, but do feel free to write up your questions.

Also we have a cafeteria next to the auditorium, which is open until 2:30. Let me start out right again and announce the new panelists. So next panel, we'll have Debbie Feinstein, who is a partner and head of the Global Antitrust Group at Arnold and Porter Kaye Scholer LLP, formerly director of the FTC Bureau of Competition and also an assistant to the director and attorney adviser at the FTC.

Michael Kades is the director of free markets and competition policy at Washington Center for Equitable Growth. Previously he worked as antitrust counsel to Senator Amy Klobuchar. And previously, he was an attorney at the FTC, including as attorney adviser to Chairman Jon Leibowitz. I might mention that Mike worked on a number of important pharma matters while he was at the FTC.

We welcome, again, to the panel Professor Bill Kovacic, again professor at GW Law School, former FTC chairman, currently still Non-executive Director of the UK'S Competition and Markets Authority. Diana Moss, Dr. Moss is president of the American Antitrust Institute and adjunct faculty in the Department the Economics at the University of Colorado at Boulder. Prior to joining AAI in 2001, she was that the Federal Energy Regulatory Commission, where she coordinated the agency's competition analysis for electricity mergers.

And last but certainly not least, professor Bobby Robert D Willig, professor of Economics and Public Affairs Emeritus at the Woodrow Wilson School and the economics department at Princeton University and senior consultant at Compass Lexecon. From 1989 to 1991, professor Willig served as Deputy Assistant Attorney General for Economics in the Antitrust Division of the Justice Department.

So we're going to follow a very similar format to the first panel. And just for starters, I would like-- and try to keep it brief-- but get quick reactions to what you've heard, in particular the keynote address, but also are some of the commentary on the keynote addresses. Let's quickly go down the ranks-- Debbie Feinstein.

DEBBIE FEINSTEIN: Great. Well, thank you very much for having me here. This has been an absolutely fascinating morning so far. Listening to everybody, it was fascinating because I expected there to be a lot of discussion about all the ways in which antitrust isn't getting it right

because they aren't considering all of these other factors. In fact, what I heard is that antitrust does cover all of these things. There's just a huge divergence of views as to whether or not the courts are getting it right.

So on the one hand, you could completely agree with Professor Hylton that the state of antitrust law is strong in the sense that all the cases we're talking about and we're complaining about are all ones that are in the courts. They're not getting knocked out on motions to dismiss as being unrelated to the antitrust laws. They're antitrust cases. On the other hand, you could agree with others, including Professor Fox, who say it's wrong in the sense that the decisions didn't come out the way some folks would like to.

But for all the discussion about whether or not antitrust should take into account other factors, something we'll talk about later, the discussion this morning was almost entirely about simply things that are within the box of antitrust. I think that's where we should stay, frankly, for reasons I'll explain later, and I think there's plenty to talk about there.

But when you hear the things that we're talking about, that the rules on predatory pricing are wrong, that we should focus more on combinations of big data. Well, that can be taken care of by monopolization. When you think about whether we should be thinking about two sided platforms or one sided platform, that is an antitrust case. It made it to the Supreme Court. That is within the role of the antitrust laws.

So to me the question is, if antitrust is getting it wrong, if the Supreme Court is making decisions that people don't think are in their best interests, why and what can be done about it. And I think that's something that we'll talk about as the panel goes on. But I think that's where the focus ought to be, which is, if there's a view, that we're getting it wrong and that the economy is suffering, how do we right the course. And I have thoughts on that that we can discuss later, but focusing the discussion on that rather than should we recreate the body of antitrust to take into account considerations that are far beyond and really didn't end up being what the first panel ended up talking about-- and I found that fascinating.

MICHAEL KADES: Mike Kades-- thank you, and it's a pleasure to be back at the Federal Trade Commission. It's somewhat like my second home. I'm very honored to be part of this panel. And I guess I've taken way two things. First from Professor Stiglitz's presentation seems to me really put out a challenge to the antitrust community and said there's a monopoly problem in the United States and the failure of the antitrust laws is contributing to that problem.

And for me that immediately begs the question, is how do you decide whether an institution, the antitrust enforcement institution, is succeeding in protecting competition. So you this might be called the trial lawyers assessment, which is if I won my last case, clearly the antitrust laws are working. And if I've lost my last case, clearly the antitrust laws are to blame.

You can look into scholarship, and there's lots of articles talking doctrinally, but I think that misses the larger point that Professor Stiglitz is making, is that there's something really gone wrong in the American economy, and we need to think about what antitrust role is in that economy.

And from my intel, I'm going to propose the water is wet test, which is, if plaintiffs in the government are consistently having to prove water is wet in court, if they are fighting over very simple straightforward antitrust matters, then probably the antitrust enforcement laws are under deterring. And when you look at the Supreme Court and American Express, if you look at the implications of Trinko, if you look at the implications of, just last year, the FTC spending four days, 1,600 exhibits, to block a physician practice merger that went near monopoly in Bismarck.

It looks to me like that's where the antitrust action is in litigation. The cases is the government is litigating the are not on the frontier. They're in what we call the homeland of the antitrust, and that seems a very strong indication to me-- the antitrust laws, as they're interpreted today, are failing.

ALDEN ABBOTT: Antitrust laws are failing. Interesting perspective. Professor Bill Kovacic.

BILL KOVACIC: Yeah, I enjoyed the earlier segments. They were terrific. I especially liked the second key note. That was a real highlight for me. So just giving you a quick assessment. One thought about the discussion of aims and what the agencies do and how they think of things-- I've spent time looking at the budget requests of the two agencies going back about 50 years, where each year they have to go before Congress and justify the sums that they'll be given to enforce the law.

And those requests, I think, say a lot about the agency's own perception of what their aims are. Certainly interested in basic questions of economic performance, innovation pricing, but there's always been a component involving distribution and equity to them. To take the FTC, as an example, how do you suppose the Commission has sought funds from Congress to carry out its competition program?

It's always identified what were called at different times market basket issues. We're interested in energy, food, health care, and a set of other concerns. There's never a budget request that says we're really concerned about the overpricing of luxury yachts. So we're going to focus a lot of attention on the out sector. All of the budget requests to the Commission and certainly those to the Department focus fundamentally on delivering good results to average citizens.

So embedded in that, I see a basic concern about distribution about equity. The major program that the department developed over time involving public procurement, the principal beneficiaries of improvements in public procurement performance that would have come about as a consequence of the department's anti-cartel program are, for the most part, people in the second half of the income distribution.

So if we ask, has competition law been concerned with equity, with distribution, I would say the way in which the agencies have allocated resources over time would say decisively yes. Now they've done this in the context of the admittedly amorphous consumer welfare standard. And if you were skeptical of that, you would dismiss it as a slogan that's deliberately designed to obscure difficult policy choices.

But under the framework of focusing on consumers first and foremost, they've built programs that in many ways encompass a fundamental concern with equity and distribution without labeling it as such. But that has been the overwhelming center of attention when it comes to formulating budget approaches. The agencies, when they have brought cases outside of that zone, have invariably done it to establish a doctrinal point.

Polygram deals with concert performances. Is that a key distributional impact concern? Well, I suppose wealthier people tend to go to those concerts and get tickets, but there was a crucial doctrinal aim there, which was to rehabilitate a rule of reason that had taken a serious blow in California Dunnel, followed up by other cases to do the same. So if you look at the wide range of cases that the agencies have brought over time, especially those within what might be called their larger zone of discretion for setting priorities, this has always been in the back of their minds.

And I think competition law priority setting's done a good job of having that first and foremost in their minds in deciding what to do, even though the technical tools that are used might focus more and more specifically on this large category of concern called consumer welfare. That attentiveness to the concerns of average citizens, especially those with perhaps less than average means, I think has been a perhaps not explicit but a very visible element of what the agencies have done.

ALDEN ABBOTT: OK, Diana.

DIANA MOSS: Yes, thank you very much for inviting me here today. It's been a terrific discussion so far, and I'm actually surprised but heartened to hear more consensus on some key underlying issues but still some areas of disagreement. So I view that as progress being made in our community, in the antitrust community, the policy community to deal with these issues moving forward.

I guess a few takeaways from this morning's conversation-- one is I think that we have a debate going on in the antitrust community over the perils of high concentration. These warning signs have been around for a long time, as Professor Stiglitz noted, back even to the 70s. There is a very interesting debate going on between economists in the antitrust community about whether more aggregate measures of concentration are actually relevant to antitrust analysis.

So my view on that-- I've just written an article coming out in the Antitrust Magazine on this-- is for IO economists who engage actively in this debate, not to be naysayers or put their heads in the sand, but to actively engage and figure out ways we can map over high levels of aggregate concentration to what's going on in antitrust markets because relevant markets and antitrust, many antitrust markets are very highly concentrated. We should be figuring out ways to add to the debate, to develop a constructive agenda moving forward. The labor economists and the macro economists are way ahead, way ahead of what's going on in the IO field.

Second, what I'm hearing today really fits nicely or neatly, if you will, into a concept of the antitrust laws that has been driven by static analysis versus dynamic analysis. If you count the number of times you heard dynamic up here already today, it's a lot, and that says something. So we have approached antitrust in this country for many years in a very static way, but we have

lost track of the dynamic effects of mergers. And in building market power and accumulating market power, we have lost track of the fact that avoiding false positives and using decision theory is a very static approach to doing antitrust.

There are many other examples, even down to looking at mergers and looking at static price effects on one hand versus dynamic efficiency effects on the other hand. So these things don't match up. And I think we're seeing the tension and the adverse outcomes that are coming from a misalignment of using antitrust in a static way with a static vision versus a longer termed dynamic vision.

And then, finally, I think there are definitely policy needs and prescriptions on the table here. Absolutely, we need to be asking, what lines can we no longer cross. Lines have been crossed. That's why we're having the declining competition problems we have now. So do we want to think about requirements, requirements for example, to show efficiencies to require companies to show efficiencies in merger cases? Do we want to think about requirements that savings, cost savings be passed on to consumers? Do we want to think about the effectiveness of remedies? And this links back to the importance of doing merger retrospectives, as Dennis was saying.

And do we want to think about a broader set of presumptions in addition to the structural presumption, for example, a vertical merger structural presumption, presumptions on predation? There's a whole host of lines I think that have been crossed where we need to give some deep thought to policy prescriptions for addressing policy responses.

ALDEN ABBOTT: Bobby.

BOBBY WILLIG: Oh, thank you. I'd like to use my opening moments to respond more granularly I think to Professor Stiglitz, henceforth Joe. I've known him forever, and I know that he is wildly prolific and wildly stimulating. And so it would take me and the rest of us days, if not years, to fully respond to his 30 minutes of presentation. And that's sort of the rate of exchange between him and the profession. He upsets the field, and he fixes it. And then he moves on to another field. And he just takes days to do what the rest of us take an entire lifetime to do. So I need to rush through this, but I'll continue on these themes for the next hour if I'm allowed to.

So big themes-- Joe says that changes in the economy and changes in economics as the field have progressed very importantly in the last, he said, third of a century, and those changes should be reflected in changes in antitrust. In a way, that's the biggest theme that I took away. And I would like to comment on those first. So a major part of the changes in the economy, from my point of view, have been the increasing prevalence of economies of scale, also economies of scope.

And I would like to point out that this is not a bad thing in itself because increase in scale economies is really a commandant of the fantastic innovations that we've seen, the increases in productivity, the technological progress, the infusion of technology into a wide variety of sectors. It also means-- and here I think Joe and I are on the same page-- an increasing inapplicability of

the old fashioned, beautiful model of competitive equilibrium, which Chicago did not invent but respected more than others perhaps.

So it's only a bad thing in terms of if you still want to rely on your old competitive equilibrium theory when it comes to policy. Joe, are you here? Yeah, hi, Joe. The lights are blinding. Joe, this means that the Law of One price is dead. You know that. You probably taught that to me. It means we can't expect marginal cost pricing, and it's not even a desideratum anymore because you can't cover the fixed costs that underlie scale economies if we hold ourselves to marginal cost pricing.

We know, as a matter of economic theory, that in the presence of important economies of scale, nonconvexities in the economy, which arise from scale economies-- and also from information problems, as Joe has taught the rest of us-- means that we need price discrimination or at least differential pricing. We need non-linear pricing. We need some of the very kinds of business practices that at least some of us into easy discourse think should be desiderata for competition policy.

But no, complex pricing is an absolute necessity to undergird industries that rely on innovation, that rely on all kinds of fixed costs. And these are good things, not bad things, but we have to recognize the role that complex pricing plays in the modern economy that we have. So more on that later.

Second, Joe says changes in economics as a field have not been fully reflected in antitrust. And in a way, I agree. In a way, I don't agree. I mean, it's amazing how our field-- you say IO was a dead field. New great ideas are coming out all the time. And of course, there's a small lag between the ideas and them being tested academically and their influence on policy, although it was just-- what-- one year ago that the idea of merger analysis through bargaining theory hit the American Economic Review, and here's the Department of Justice really embracing it in the AT&T Time Warner case. I mean, talk about fast adoption of new ideas. To their credit, I think, of the Department of Justice for picking up on that idea.

By the way, also congratulations to the judge for fully understanding the theory and then doing his own weighing of the evidence. So I think he did all that appropriately because the process was good. I don't know about the conclusion, but the process was surely good. In the 1990 guidelines, Joe, information as the perspective totally underlies the 1990-- a long time ago-- perspective on coordinated effects, all that information, in part thanks to the prior work of Joe Stiglitz and others-- so policy staying abreast of new economics.

Unilateral effects in the guidelines-- that's certain 2010 as well-- based on game theory, based on Nash equilibrium and how that would be disturbed, altered because of merger effects. Relevant markets and the old guidelines being based on price discrimination-- and this is not new to antitrust policy. Antitrust policy tends to keep up with economics as far as I can see it. So I'm disputing Joe's point of view on that.

Many more modules, but one more-- Joe said, and I'm quoting, that anti-competitive practices should be presumed illegal unless they're strong cognizable efficiencies. He didn't use the word

cognizable. We know what he meant. Cognizable is important, but how does Joe think that he knows or administrative processes know what is anti-competitive without a holistic analysis of the effects of the conduct. This will be a theme that we'll come back to, but it seems to me that the Supreme Court in AmEx for example got right that there's lots of situations where the assessment of anti-competitiveness has to be holistic. Call it a two sided or an n end sided market, I don't know.

But this is not a fresh thought. We've been doing this for a long time with the approval of the community when it comes to RPM, when it comes to exclusive territories, when it comes to Kodak concerns about the aftermarket, holistic effects. And if you read the court in a pleasant mood, that's what they're urging when it comes to two sided markets as well. So I'll leave it at that for now, but thanks.

ALDEN ABBOTT: OK, thanks very much. You've heard the responses to questions from the first panel. I'd like to briefly touch again on consumer welfare standard, which has been discussed in various matters. Does it make sense to talk about the consumer welfare standard as the dominant guiding lodestar for US antitrust? Anybody have any additional things to add to what's already been said?

BILL KOVACIC: So I guess I will in some sense maybe question the premise, which is sometimes I think this debate over the consumer welfare standard obscures larger issues. And part of that's because the more I hear it talked about, the less I know what it means. Are we talking about the way Judge Bork said it or the way Judge Posner or the way Professor Hovenkamp-- and this matters.

And so then people are talking at cross winds. Are we talking about how the consumer welfare standard in theory is used or how it applies in practice in cases? Those are two very different questions. And so I could go back to the way I'm-- so I think a better question is, where I started, which is how do we decide whether or not the anti-trust laws are affecting competition. Because if one thing, I think the antitrust laws, when properly defined and interpreted, they're good at stopping the unjustified accumulation or abuse of monopoly power.

And I think that question is focused and can be answered, and I think the evidence weighs heavily that the answer is no. But I do want to end with one part about the consumer welfare standards. Also I think it also leads to confusion. So there's a big debate right now-- if you have a merger, for example, that creates monopsony power and lowers wages, is that covered by the consumer welfare standard? And people argue over this.

I think answer should be absolutely. You're creating market power and reducing competition and creating dead weight loss. I don't understand how that is not encompassed by the antitrust laws. But the very fact that we've spent 40 years talking about the consumer welfare standard means, for a long time, people like me-- maybe I'm a group of one-- that's what we just thought about consumers.

And so back in 2008 or 2009, Peter Carsonson came into my office where I was an attorney advisor and he tried to tell me about the problems about buyer power, about labor monopsony.

And you know what? He was right, and I should have listened to him. And I didn't. And I think it's important-- it's part of these proceedings, which is something Commissioner Slaughter talked about-- is an honest self-assessment, particularly for those of us who are in government of what we did right and what we did wrong.

So I'll just leave it there, but that consumer welfare standard, I think that debate actually obfuscates the real issues often more than illuminates them.

BOBBY WILLIG: Alden.

ALDEN ABBOTT: Yes, Bobby.

BOBBY WILLIG: Yo, thank you. I'm a little confused about that phrase-- I mean, consumer welfare is a good pair of words. And to me, if it means neglecting monopsony issues and worker welfare in labor markets, then it's a misnomer because it's the wrong term then. I think both sets of guidelines, 1990 to 2010, there's a small paragraph that says all of the analysis in these guidelines, which is written as if it's about the product market side, . should be applied as well to the buyers side when it comes to monopsony power.

So at least in the guidelines, there is the right respect shown for worrying about mergers effects on buy side markets. And I would like to see the phrase consumer welfare be extended to the other side of the market with the same full force. And if it doesn't do that, then I agree with those who think there's a failure of embracing the consumer welfare standard too narrowly.

On the other hand, if consumer welfare and worker welfare mean let's not pay attention to the accretion of more jobs as a good thing because the economy needs more jobs, well then I applaud holding us to a consumer welfare and worker welfare standard because I think that is a misuse of antitrust, a misuse of economic policy. If it means let's not pay attention to political influence and doing merger analysis, I applaud that as well. Let's stick to the welfare standard.

[INAUDIBLE] worrying about inequality-- well, more about that later, but monopsony definitely is an appropriate challenge to equality because the inequality that results from monopsony power is the bad kind of inequality, holding people down instead of the good side, applauding it when people enrich themselves by providing better products and better productivity. So I'm confused about the term, but those are my feelings about it.

ALDEN ABBOTT: So interesting-- an observation, and I've heard it from others as well. I think that the term consumer welfare standard may mean different things to different people and perhaps therefore is not terribly helpful to the debate. Does anybody have any final thoughts on that?

BILL KOVACIC: Alden.

ALDEN ABBOTT: Yes, Bill.

BILL KOVACIC: I think if you took from Bobby's comment, you would have a good set of specifications that I think clarify what a very useful definition of the term would mean. And your emphasis Bobby on how concerns about monopsony have indeed featured in earlier policy guidance-- they're there, along with the cautions about what a notion of worker welfare might mean if you included it to protect and freeze in place all employment possibilities that exists now and shield them from changes that might take place in the face of a merger.

As you know, one discussion today about taking on worker welfare and employment effects suggests that that should be front and center, a consideration in a whole range of cases. I mean, here's an argument that's made in a common cartel case. Relatively small businesses, they get together to rotate bids or to set output levels, and a defense that they would raise would be, we are trying to make sure that all of our small businesses can stay in business and that there is a relatively even flow of work across the span of the sector.

And who are we doing it for? We're doing it for our workers. At this point in a DOJ criminal case, that defense would be stricken as irrelevant, and the Supreme Court has said a number of times, we don't take that into account. If you took on that argument, you'd fundamentally change the examination of cartel cases. You would change the prohibition on cartels to take into account defenses based, for example, on employment effects or other effects as well.

I'd add to Bobby's list, again, an emphasis of what's dropped out of sight, and that is the larger concern about SEMs as an end in itself and the way, since the 1970s, the Supreme Court has abandoned the language of the egalitarian antitrust as expressed perhaps best in Alcoa.

Imagine how the American Express case might have been litigated differently. Dennis puts in his testimony. His colleagues advance all of the efficiency arguments related to the transaction, and the department stands up and says, Judge Leon, I want you to read the last page of the Brown Shoe merger decision from 1962-- here it is-- where the court acknowledges that there can be real benefits economically from vertical integration and vertical mergers.

And the court says we acknowledge those-- then comes the famous phrase-- but we can not overlook the clear intent that Congress had in 1950 to preserve a more egalitarian business environment and, at the cost of some efficiencies, to disregard the benefits that we've just described. The department might have stood up and said, your honor, we want all of the efficiency arguments stricken. Brown Shoe is still binding. The Supreme Court has never repudiated this in a merger case. Maybe its point of view has been questioned.

But if the department wanted to go all in to prevail in the case, they might have said, we bring you back to what the Supreme Court had to say about efficiencies as a defense and about the preservation of other values. All of this discussion about efficiencies is beside the point. And as a matter of jurisprudence, that wouldn't have been a crazy argument to make. It would have repudiated a lot of government policy making sense.

But the bare terms of the text are right there, and the DOJ could have said, I just want to remind you, in the hierarchy of authority in the United States, the Supreme Court is at the top of the pyramid. You, Mr. USDJ, you're at the bottom. You are obliged to follow them. Would Brown

Shoe have knocked out all of that evidence? That view of the aims of the antitrust laws has changed dramatically.

DIANA MOSS: Alden, can I just add one comment on the consumer welfare standard? So the reason why we're up here talking about consumer welfare and the community has been entrenched in discussing consumer welfare for the last two or three years is because there was some very public statements made early on that consumer welfare only goes to price effects. That's just wrong. It's wrong. It's a misinterpretation or a misunderstanding of what the standard does.

The standard is actually quite flexible and appropriate in many cases. It goes to price effects, non-price affects, quality, variety. It could go to choice. It could go to innovation. It can be applied at any market anywhere in the supply chain-- in output market, in input market, the labor market. It can address a great deal of scope along the supply chain and depths within markets in terms of price and non-price dimensions of competition.

The problem is this-- that the consumer welfare standard has been interpreted in a cramped way in many cases, and it has also been interpreted in a very static way, which goes to my earlier point about the need to consider more dynamic effects using a consumer welfare standard and looking at the effects of successive mergers and creating concentration and harming consumers over a longer period of time. And there are a lot of other examples that go to the dynamic use of the standard as opposed to the static use.

ALDEN ABBOTT: Thanks for that. Let's jump forward and get to the issue of presumptions. On the last panel, we talked a little bit about this issue of structured presumptions, the limits of antitrust, and structured rules. We have on the panel today someone who has a long experience as a practitioner and as an enforcer at the FTC. Perhaps Debbie Feinstein, do you have any thoughts on presumptions?

DEBBIE FEINSTEIN: Sure, and I think it covers some of the issues that we have been talking about. Is there a presumption that vertical transactions are pro-competitive? In the sense that there's certainly a recognition that there can be efficiencies from them, it's something that people look at. But when we come to any particular vertical transaction, when I was at the agency, there wasn't a presumption that it was pro-competitive and we had to overcome that presumption in order to bring the a

It was, look, lots of vertical transactions are unproblematic. That's fine. We're not looking at lots of them. We're looking at the one before us. And we're going to look very hard at whether or not this is actually pro-competitive. Diana said, should there be a rule that we require parties to prove up their efficiencies. There is a rule that we require parties to prove up their efficiencies. The agencies look very, very hard at that issue.

And when you look at how the courts have treated it, the courts have totally bought into the notion that efficiencies better be real in merger cases and they better be passed on so that the notion that we're somehow missing d it just puzzles me.

DIANA MOSS: Hey, Debbie, can I just interrupt for a sec? I want to clarify that. When I say prove up efficiencies, I don't mean in the merger investigation context. I mean, when the company's consummate their deal, then they can prove up their claimed efficiencies that they actually materialized in their business practices. That was what I meant.

DEBBIE FEINSTEIN: Yeah, and that's something that we do by looking at the next transaction. Another point to be made is I am all for merger retrospectives. The agency's do mini merger retrospectives all the time just in the course of their work. So I can think of an example of a particularly controversial case that occurred before I got there. I'm not going to say which one. There was a lot of consternation about whether or not the merger should have been challenged, and there were a mix of opinions on it.

Fast forward to the time I got to the agency, and the same industry was before us. And we were very prepared to hear that we had gotten it wrong last time, and we're talking about, OK, if we hear that we've gotten it wrong last time, what are we going to do about it. Are we going to go back and challenge that? What are we going to do not only about the case before us, but the case that we had?

And what we heard is customer after customer saying, we told you we thought that it was going to be good for us. It's been better for us than we thought it was going to be. Shocked us. We didn't expect that. And they said, and we can show you. Let us show you what our contracts in our terms looked like beforehand and what they look like now. And we learned that, OK, we had gotten it right at a time when I wasn't there. They had gotten it right beforehand.

So the notion that the agency isn't reflective or isn't able to figure out whether or not efficiencies are occurring, whether or not past transactions are a problem doesn't mean that they get it right every time, but it does go to this notion of is there this constant learning.

Finally, one other point, just to weigh in on the consumer welfare standard and the worker welfare standard, worker welfare is one issue that arises out of monopsony, but there are lots of others that are counter to at least short term consumer welfare right because there are lots of monopsony problems where it's a wealth transfer. It doesn't affect the output. And to block something like that might lead to not having a pass down of price prices that would go to consumers.

Is that a problem, is that not a problem is an issue worth discussing, but the notion that monopsony is only about worker effects on monopsony isn't right, and you have to think about all of monopsony if you're going to incorporate all of that into the consumer welfare standard.

ALDEN ABBOTT: Bill, any thoughts on presumptions?

BILL KOVACIC: I echo Debbie's observations about how actively over time I see the agencies working to shape those in the right way. I go back to Bobby's observation about merger guidelines. In many ways, merger guidelines have been a soft law device to change presumptions, and you see the dramatic change over time in the way in which those have been

cast-- in their own way, 1982, then again in 1992, 2010-- each a major adjustment in the way in which things were formulated.

And that reflects to me a constant effort to upgrade the existing product by taking on new theories, new learning, but to provide a very manageable framework in which it can be applied. And I'd say the broad adoption and emulation of that document, those documents over time, is a testament globally to how well the agencies have done that.

I can think of other areas in which the same kind of reflection and adjustment has taken place. California Dunnel put a big hole in the framework of the rule of reason. That was a serious setback. What was the institutional response at the FTC? To reclaim that ground. How? By choosing cases and thinking about cases as vehicles for moving the boundaries that have been set. The first vehicle was PolyGram. A second parallel vehicle was Schering. The third vehicle was Realcomp.

When you take the amalgam of those over time, you have a formula for-- call it the quick look, call it inherently suspect-- you have a way for ordering the examination of evidence and data that allows you to sort out behavior that arguably has detrimental effects and condemn it without looking at the universe and all it contains. So I think the agencies have been attuned to doing that.

I would underscore, though, that it doesn't happen simply by accident. And if there are areas in which you want to move the boundaries, the stakes of the law to take account of existing doctrine or to incorporate new thoughts, that has to be a program of conscious effort where you sit down and ask where would we like to move the fence, how do we do it. That should be a common conversation between at least the department and the commission, to decide what those boundaries are, and to think about choosing cases that enable you to do it.

In short, it has to be a conscious process of evolution and change, very conscious in guidelines, very conscious in a number of routine merger decisions, certainly conscious in the case of PolyGram, Schering, and Realcomp. It doesn't happen by accident, and it starts by thinking out where you think you have to make adjustments and looking for the specific instances in which you can do that.

ALDEN ABBOTT: Mike, do you have anything to add on presumptions?

MICHAEL KADES: So I think it's more to distinguish agency practice and where the law is. So I entirely agree with both what Bill and Debbie are saying and about-- and I think Dennis said it last time about the importance of the agency, pushing back on rules and doing studies, trying to develop the right rules. At the same time, it's important to acknowledge-- the three cases Bill just mentioned were three cases that should have been easy to decide. There wasn't a real deficiency fence. There was not a market power defense.

And yet, let's take Schering-- and as disclosure, I worked on Sheering and I've worked lots of pay for delay cases. When the commission lost that at the Court of Appeals, it set off eight years where the predominant legal rule was that a patent holder in a pharmaceutical case can basically

pay as much money as it wants to its generic competitor as long as they agree to stay off no longer than the patent expires. For eight years, the commission had to spend massive resources to convince the judiciary that that should not be per se legal.

In that time period, there were hundreds of those settlements. Conservatively, the costs of those settlements probably were in the range of $30 to $50 billion to consumers. Finally, in 2013, when it got before Justice Breyer, he was, like, I don't understand, how is this so complicated. And he writes the decision, says, no, the rule of reason applies.

What's happened since then? There were all these concerns beforehand that, if you had a too stringent rule, settlements would go away, generic companies would be afraid to even challenge patents, and brand companies would stop doing R&D. This is all the standard Frank Easterbrook we are concerned about over enforcement not about under enforcement.

And what did we see post-activist? The number of patent settlements in the two years afterwards records both years. The number of paragraph IV filings has-- generics challenging patents-- has continued to go up. And this one I have not researched thoroughly, but I'm pretty confident no branded company has made a public statement to its investors that we have reduced in R&D because the Supreme Court and activist took away our right to pay off our potential competitors.

So the reason we have a 10 year battle with massive harm because we underestimated how bad the false negative would be, how bad under enforcement would be, and overestimated how bad over enforcement would be. And that's where I see the problem with antitrust law today, that the courts systematically make that decision wrong. And, yes, the agency does a great job pushing back, but that is expensive and those are resources, once used, can't be used anywhere else.

ALDEN ABBOTT: OK, very interesting. Let's move on to the question of rules, competition rules which, as we mentioned in the first panel, has been raised by Commissioner Chopra. One interesting issue-- somebody from the audience raised is this issue of so-called Chevron deference, judicial deference to agency interpretations of statutory ambiguities, which may be on the way out.

I don't know whether or how important that really is to the question, but do our panelists have any thoughts on competition rules? And let's start with Dianne.

DIANA MOSS: Thanks, Alden. So I think the jury is a little bit out on the advisability or the attractability of using rule makings, FTC rule makings to advance or codify rules that would bear directly on various competitive issues. I think one question is how could they even be done at the FCC level.

I'm a former federal regulator and probably went through three or four or five major rule makings at the FERC in a really short period of time. They are massive efforts, and then the industry needs a lot of guidance on how those rulemaking should be interpreted, what's guidance, what's not guidance. And it creates an administrability problem, as Bill Kovacic likes to say.

I think there are other ways, and I'm going to agree with Dennis Carlton here, on how the agencies can help shape and guide enforcement and provide transparency and input to the community, and that would be to use, to the full extent of their ability and their authority to conduct market studies-- the FTC certainly can do stuff like that-- to do merger retrospectives where they study, not only merger outcomes, but also the effects of remedies and the effectiveness of remedies. The FTC already does that. They've now done two studies on their divestiture remedies.

This is really important information that we're now in a position to really cull and consider when it comes to looking at the effectiveness of antitrust enforcement, particularly in merger enforcement looking back. I also think, as a more dramatic proposal, whether-- and I like Bill's idea. I'm going to agree with Bill Kovacic now-- that having the ability to do market analysis and an agency to take actions to address market distortions that arise from anti-competitive conduct where there are systematic problems or systemic problems, that is worth considering, absolutely worth considering. And as Bill pointed out, there are a number of other jurisdictions who have this authority and who have significant authority under those regimes to actually affect how markets are structured and how conduct in those markets occurred.

So one thing the FTC might want to do is put out an NOI or a query on what people think about doing rulemakings. I think there would be really important input from the antitrust community on the pros and cons, but more important the effectiveness of rulemakings and how rule makings would factor in to the enforcement process.

ALDEN ABBOTT: Bill Kovacic is a law professor. How do you think an appeals court might react to some rule interpreting unfair methods of competition and applying it to a particular practice?

BILL KOVACIC: I think in practice Chevron deference is a mirage. I think that you get the deference you earn and that, if you plan on tipping the court by walking in simply by saying we enjoy what the Europeans would call the margin of discretion, you're delusional. My view is that the courts defer when they are persuaded that deferring is a good idea.

So I would never bet a program on enjoying that element-- of that benefit of the doubt. How do you get them to agree? I think two ways. One is you do have to Marshal evidence to support whatever your initiative is, be it a rule if you do that, and the FTC has defended countless rules before the courts on the consumer protection side, or you have to create a brand that is convincing to them.

I am convinced that agencies have reputations. They do have brands. In part what they are doing when they go in is saying, on matters of doubt or uncertainty, we are the experts and the expertise is not imaginary or hypothetical. It is genuine. And how do you build that brand and that image so that, when you walk into the courtroom, there's a halo above your head before you say a word, it's doing all of the other things and using all of the other policy tools we've been talking about? It's doing empirical work.

So you put it before the court and say, much more than you, we've looked at this. We've done the kind of work that Michael and his colleagues helped do on generics-- it helped turn the tide a bit-- by gathering information and publishing data on what was happening with individual settlements. You hold and convene events like this where you ask the larger world, educate us about what's going on. You reflect on it. You publish articles, papers. You give speeches.

I think every time the agency, a member of the board goes to speak or a bureau director, you have to realize that you are either elevating or depressing the stock of the agency. Everything you do shapes the impression. Especially in this city with the court that we appear before here here, they form impressions of the agency on bases that go well beyond the appearance in specific cases.

So if you build that brand and that reputation and you support the individual initiatives that you're working on with significant evidence, I think you can persuade even a significant group of intervention skeptics, of regulatory skeptics, that you do indeed have the benefit of the doubt. But again, that is not an accidental or spontaneous process. That requires a conscious commitment by the institution to pick the matter, be it a rule or a case, that you think is a good vehicle to proceed with, to think, have we built the surrounding supporting evidence to gain support and are we doing things day in and day out that raise the brand and create a reputation for capacity and knowledge.

I think in a lot of ways, my experience here at the FTC-- the FTC has done that. But I think, to go ahead and take on more difficult challenges, if you wanted to set presumptions with respect to when a dominant enterprise can buy a promising new startup and you want to go beyond looking at the records and files of the company, if you want to create such a presumption, there the court's going to say, you have the power to do it. What's your evidence? And what evidence will we put on the table to do that? And that will be the big challenge.

And you might want to start with a smaller prototype matter rather than the rule that changes the universe and everything it contains to show that you can do it because the FTC arguably has never done it.

ALDEN ABBOTT: Anybody have anything to add on rulemaking?

DEBBIE FEINSTEIN: Yeah, I just think what Bill's saying is the carthorse issue. The commission could have done a rule making on reverse patent settlements. I know there was discussion within the building of doing it-- not when I was there, but because people in the building asked me what I thought. And you have to pick the right time to do it. You have to have had enough experience, enough empirical studies, and enough examples where you've studied them, but not so many that you've already gone to the Supreme Court and you're basically in a situation where you're overturning the Supreme Court decision by rule making because I don't think that would be well received.

So it's intriguing in principle how you would ever actually do it because you have to have looked at a number of cases, and you've either brought those cases and won them, in which case why do you need rule making because you're obviously having good success, or you've lost those cases.

And if you're losing the case on the facts, how are you going to convince the court on the facts that they ought to abide by your rulemaking? So I just see a practical issue that it's hard for me to figure out how you overcome.

BOBBY WILLIG: I would like to vote in favor of, not rule makings now, but more guidelines in the areas of conduct-- exclusionary conduct, two sided market, n sided markets, section II, section V conduct generally. I think the economic profession is ready to contribute to that. I think the IO field is ready because we have a plethora of interesting theories, and we've gone partway toward looking for empirical evidence, signs that an exercise of intervention is needed or is not needed. And it's a tough job, but it's the job that I think we might all be ready to do.

And it's necessary for business guidance. It's a good idea for staff guidance. It's a good idea to elevate the credibility of the agencies in this very murky area. And I think it is a murky area still.

BILL KOVACIC: I'd say amen to that. That is, you look at the tremendous soft law influence that merger guidelines have had, I think you can replicate that in other areas. It happened with the 1995 DOJ FTC intellectual property guidelines. There's an obvious feedback effect into the courts. Again, even courts that are skeptics about intervention but are faced with hard problems are interested in proposed solutions. They have no obligation of course to take on the solutions suggested or the framework suggested in the guidelines, but you can look at a number of significant areas where that would be useful.

The agencies tried it with competitor coordination, made some progress, but there was some sensitivity about saying too much about matters that were in the courts. So they hesitated. But you could imagine a number of areas where I think guidelines as a form of soft rulemaking can have tremendous, tremendous effect, and to sit down and decide, where could we make the most impact in doing that.

BOBBY WILLIG: And interagency cooperation, as you were speaking for before, Bill.

MICHAEL KADES: So I just wanted to maybe echo a little bit what both Bill and Debbie were saying. I mean, in some sense, the answer to your question is utilitarian, and is there a rule out there that the FTC can do that is better than the enforcement option. And I think it's important to remember that, in rule making, the FTC is going to have a lot of discretion.

It's not just that they can ban things. They can set burdens of proof. They can set presumptions. Does that rule have the right evidentiary basis that's going to be persuasive? And here, the FTC has the ability to do a 6B study to force that. But are there going to be risks? Yes. But as someone who spent a long time litigating antitrust cases, those have big risks too. And therefore, it's not a good enough reason to not consider a tool just because there will be risks.

BILL KOVACIC: I'll give you my example of a missed opportunity to do this with respect to conduct, and that was resale price maintenance. Legion takes place. Legion says that there are instances in which vertical restraints, resale price maintenance could be harmful. We started an initial effort internally to say, can't the Federal Trade Commission elaborate this. That is, might there be a place here to do some guidelines? We had a set of hearings, a limited set of hearings,

and then the thought was, can we draft guidelines, our guidelines about how the legion screens and the legion factors might be applied going ahead.

Sadly, disappointingly, that fell through the cracks. That did not galvanize the interests of the entire board to proceed with that. But if you thought for a moment, who might be good to provide that elaboration. That ideally I think would have been the Federal Trade Commission to do that. And thus, what have the two federal agencies done in the field of resale price maintenance since Legion, which was a while ago?

Chris Varney issued a speech when she was at the Department of Justice in her first year, and the FTC issued an order modification approval in Nine West, an RPM case. Otherwise, nothing. That's an area where the agency might have gone ahead with guidelines, might have thought, let's bring the vertical restraints case that tests what Legion should mean. Instead, there's been nothing there.

Now I realize that RPM is not, certainly by the discussion that we've had today and perhaps before, does not seem to be the salient issue that's firing the imagination of the larger competition community. But it is stunning that, since Legion, that has been the sum of the response of the two agencies. That is an area where the FTC and DOJ could have said, what do we think that high ground is for RPM and where might we go looking for cases.

BOBBY WILLIG: I have a slide that does that.

BILL KOVACIC: Pardon.

BOBBY WILLIG: I'll send it to you.

ALDEN ABBOTT: OK, unless everyone has something to add, first panel we discussed AmEx briefly. There did not seem to be any support for the majority opinion in AmEx. Does anyone want to support the majority opinion in AmEx?

BOBBY WILLIG: I do. My support for the decision is the support for the idea of-- I just came to this word preparing for this-- holistic analysis. So we've got lots of different practices, vertical practices. And I think the AmEx practice is broadly in that category. And some element of that practice appears superficially to be anti-competitive or noncompetitive, like anti-steering. That cuts off one form of competition at the cash register.

I think about an RPM. That cuts off a certain form of competition. I think about territorial exclusives, that those had their day in terms of debate. They do eliminate some forms of competition. There's endless varieties of vertical restraints that have some elements of curtailing competition, which also have well-known positive effects on the entire ability of that brand or of that offering to be competitive in the broader marketplace.

And we're used to that in a lot of domains, and reading the Supreme Court decision, I wouldn't have written it quite that way. And our guidelines wouldn't write it exactly that way, and I wouldn't put quite so much emphasis on the two sided nature of the market because I agree that

that's an easy slogan to throw around. But in my ideal guidelines, I would say, the thing that makes the two sided market something that must be taken into account, is that the good side and the bad side are inextricably linked. And we talked about that in terms of merger guidelines and efficiencies.

If it is the finding of the agency or of the court that the good and the bad really have to go together and you can't have the good without the bad, then the requisite analysis is holistic. And we shouldn't be very quick to say, oh, I see a bad thing about this, and then the burden shifts to the other side to point out the good. I think it's the agency's responsibility and the court's responsibility to take a holistic view of the practice good and bad. And with a smile on my face, I would say a pleasant interpretation of the AmEx decision is a push in that direction.

ALDEN ABBOTT: Mike.

BILL KOVACIC: I mean, I'm glad that Bobby spoke up here because I think this is exactly what's gone wrong with the anti-trust laws. Let's be clear on where the Supreme Court came down. They came down and saying the government failed to prove market power because they didn't do the entire analysis, including showing an output effect. My question is, when the government had proved all that-- what would be left to the antitrust-- what defense is left. They approved both their prices went up and hoped it went down. What's left to that case? But apparently the Supreme Court thinks there's still something the defendants could raise.

Second, American Express through its non steering restricted merchant's accounting for 90% of all credit card transactions from engaged in steering. And the Supreme Court, at the end of the day said, we don't really think that's a market effect because that's what your market power determination is. So we can argue about whether their steering provision was good or bad. American Express didn't argue about that because they knew they were going to lose. So they found a way to argue a failure to prove monopoly power.

And I think anyone who is not deeply versed in complicated economics and an antitrust technocrat would look at that decision say, that's wrong. This is not a case about whether American Express was able to eliminate a form of competition from the marketplace. Check, it did that. It's about whether that type of restraint should be allowed or not.

DIANA MOSS: Can it can I just add to what Michael is saying? And one observation from AmEx is that it really in the worst form creates a new rule for when to consider a two sided market in an antitrust case. And I mean, this doesn't negate the possibility that in fact we have two sided markets in many instances. But the opinion sets up an impossibly vague test, which is, well, we'll consider two sided markets when the tipping effects are strong. And we'll consider one sided markets when the tipping effects are weak.

Those are the kinds of rules that are almost impossible for antitrust enforcers and courts to investigate, to adjudicate, and to come to some sort of consistent outcome. And thats what the courts are all about, is creating some sort of consistent outcome. So the economists I think are going to have to do a lot of work figuring out, well, what's a strong tipping effect and what's a

weak tipping effect, particularly in the context of creating the assumption or the presumption that it should be defined as a two sided market versus a one sided market.

This decision has not done antitrust any good, any good whatsoever, other than acknowledging the fact that in some industries we have two sided markets. And eventually antitrust will have to deal with that. But given that vagueness and impossibility of applying that rule without creating a whole another set of debates, I don't think the extensibility or the portability of the AmEx outcome to other two sided market cases is going to go very far.

ALDEN ABBOTT: Anyone else? OK, let's jump now to IP antitrust trust. We've already heard a little bit on pay for delay, but there are obviously other issues which were raised, that first panel, the so-called San Central patent issues about the refusals to license or alleged holdups. But there are other issues as well, including mergers and contracts in high technology markets, which may involve intangible intellectual property.

And does anybody have any general comments as to whether the state of antitrust law right now is dealing more or less well or adequately with the challenges of intellectual property transactions or are changes needed? And if changes are needed, in what specific areas? What about Bobby?

BOBBY WILLIG: Thanks. So I have a peculiar idea. And this is a great forum to air it. The whole pay for delay area, which as we've all said, is very complicated and hasn't been handled very well by the community-- and if you read activists, talk about criteria that don't really exist in terms of the administrability. Well, large payments-- what the heck does that mean?

The idea that I have is that most of those cases start with patent litigation. So there's a court that's involved in resolving the patent issues. Then, there's a settlement of that case with lots of side effects. Why shouldn't there be a public interest standard for that settlement that's the court that's adjudicating the patent litigation should have to look at the settlement and decide whether that settlement is in the public interest or not?

And there could be open hearings on that question, and the FTC could spend whatever time it chooses to taking a position on that. And the parties could take a position on that. But why not adjudicate that in the same court that was hearing the patent litigation? Because you might think that that judge already has a sense about the facts surrounding the dispute and the strength of the patent and so forth. So I just wanted to throw that out when they have the FTC people around here.

On these SEP issues-- I was really interested in hearing Dennis on this morning. He was saying he'd like to see more of those disputes settled at the level of the SSO, the Standard Setting Organization. And that's an appealing idea to me except that I know that the SSOs are populated when they're working well by all sides of the market, users as well as producers of the technology. And it's hard to see how the SSO could wind up in the adjudicative role when it comes to whether or not the SEP is performing up to the standards.

But I would like to see the SSOs take a more detailed look at what FRAND means to them and their context and actually be pushed to lay out those criteria in a more complete way. I've seen some SSOs do that and others say, oh, well FRAND is the solution without having any idea what that means. And I personally would like to see FRAND standards take more recognition of the absence of the applicability of a commodity market to the idea of the way royalties and prices ought to work and to take more account of the idea that, look, this is all about recovering or the prospect of recovering the fixed cost of the R&D.

And so what we mean by discrimination or nondiscrimination should take the need for differential pricing into account, and non-linear pricing, in ways that are more sophisticated and more attuned to the economics of those kinds of markets. And I'd like to see SSOs take that on before we get to the role of the antitrust agencies, which should not be cut off. But I'd like to see the SSOs take a stab at it first.

ALDEN ABBOTT: Mike, any reaction?

BILL KOVACIC: I agree with everything Bobby said on pay for delay. No. First of all, I don't think I said and I don't think people of the FTC think pay for delay is all that complicated. In fact, when you come across any anti-competitive activity, the modeling is very strong that the incentives will always drive to anti-competitive results.

So, two, I don't think people agree. I don't agree that activists is that hard to understand, and I think the proof's in the pudding. Like I said, activists occurred, the number of settlements went up dramatically. But the number of potential pay for delay settlements within the next few years dropped dramatically. And I think part of that is due to the Supreme Court, and I think part of that is due to this very strong settlement that the FTC got in the Cephalon case, where they went back in and got disgorgement and sent a signal that engaging in this kind of activity is going to be unprofitable.

I don't think it's the role of the FTC to have to police every single patent settlement, and I would like just to add on this point-- I mean, I've heard a lot about the FTC should be doing lots of studies, should be apparently judging every single patent settlement in court. Are we planning to increase the FTC's budget by 100-fold? I mean, part of the issue is, every time when someone says the FTC needs to study an issue more, where is that those resources coming from?

And then finally, just on innovation, I just want to add, one of the things I think that gets missed in the innovation debate is that competition can drive innovation, and so I think it's interesting maybe right now or it's today at the Surel conference, the big industrial organization conference in Northwestern-- one of the papers being discussed is a paper called "Killer Acquisitions," fascinating paper that seems to suggest that pharmaceutical companies are consistently buying potential competitors and shelving innovation.

And that suggests that maybe there is another whole area of merger enforcement that we need to be much more concerned about. But I have to say, again, the courts, that's not the kind of theory I think a court is going to be particularly attracted to. And so we'll probably have to go through what Bill Kovacic says is a decade of studying it and spending lots of time. And maybe by the

time I retire, then somebody else can explain how that battle was worthy but shouldn't have taken so long.

DIANA MOSS: Can I just add one more thing on this issue? I do a lot of work in agricultural biotechnology, and what we're seeing in ag biotech with patented transgenic seed, crop seed, is a lot of what we saw in pharma with patenting second generation drugs, or second generation seed in this case, making very minor modifications to the product, repatenting it, and then forcing consumers-- in the case of seed, farmers-- onto the new product, the newly patented products.

So what do you call it? Product hopping, hard switches, soft switches. It's raising a really serious background issue in the patent system, and I think calls for a serious relook at how patents are issued and potentially questions for patent reform. But this is one area, because of the very important close intersection between IP and competition law and how patents can be used to shape or control competition to exclude rivals, particularly new entrants, I am stunned, in talking on conferences and with people, at how little the antitrust community is conversant with patent law and, conversely, how inconversant the patent community is about antitrust law.

And so there needs to be some effort-- and I think the FTC is a great venue for doing this-- of bringing those two groups together because it's part of a multitool tool kit where you've got antitrust and you have patent law, IP law. And these folks need to sit down and talk together about how policy is made, on the patent side, can potentially affect outcomes in antitrust enforcement.

BILL KOVACIC: Alden.

ALDEN ABBOTT: Bill.

BILL KOVACIC: I'd like to follow on Diana's comment. 15 years ago, the FTC had that conversation. 15 years ago, the FTC devoted a tremendous amount of effort, along with the Department of Justice, to doing a basic examination of the right screening process. It convened proceedings like this, starting late in 2001, early 2002, examined testimony and presentations by a large number of experts in the field.

And the purpose of the undertaking was to identify root causes. There was a concern that competition law too often, especially in the form of abuse of dominance cases, monopolization cases, was following behind to correct problems that basically originated in the right screening process. Recall Dennis' comment about how the scrutiny and the quality of the right screening process is essential to the proper functioning of the IP regime.

The FTC, the patent office as well, and DOJ collectively convened these proceedings. The FTC ultimately ended up writing a report in 2003 called "To Promote Innovation," and it recommended a host of changes to the right screening process. A number of them have been taken on. Others have shown up in citations in Supreme Court decisions, which reflect a modification and adjustment of the interpretation of the existing patent laws.

This was a major investment in a couple of good practices-- looking at root causes, soliciting this larger range of perspectives, and seeing how a tool other than simply antitrust enforcement might be applied. I hate to offer, especially with Michael's caution, glib recommendations to the FTC about other things you ought to be doing.

But 15 years after this study, it wouldn't be a bad time to come back on this question and ask, are we happy with the way that things have unfolded. A lot of that expertise already exists in house. It's present. It's available. I would add, too, that I'm not sure in the larger community that the FTC gets any credit for that. That is, how does the community evaluate the performance of the agencies? Well, how many cases did you bring? How many cases? How many cases did you win? How many cases did you bring?

This was an effort to achieve the kind of longer, deeper policy results that could not be achieved with the case, but will never show up on the score sheet as a litigation event. This was an effort to move the needle elsewhere. I would suggest that the competition law community is mainly captured by flashy objects called big cases, and this kind of investment in research and development and policy change is not widely respected. But arguably, this is where a major investment had to be made.

I think it was a great investment at the time. It wouldn't be a bad time to come back on it 15 years later and ask, have things moved in the right screening process in the way that one hoped that they would. And by the way, I think this is an example of how the agencies were really interested in dynamic innovation related changes going back quite a while ago. This was a recognition that innovation really maters.

ALDEN ABBOTT: Let et, e jump forward-- quickly, another topic considered by the first panel-- did you have anything to add, Debbie?

DEBBIE FEINSTEIN: No, I was just pointing out something.

ALDEN ABBOTT: OK, so was privacy, issues about big data, privacy, data security, data protection, which are being examined under consumer protection law. There's more and more talk in some quarters about applying antitrust law to these issues, particularly involving big platforms. Does antitrust have a role? And if so, what roadblocks, if any exist, to applying antitrust fruitfully in these areas? Who would like to start?

BOBBY WILLIG: I have perspective on this, too simple I'm sure. But it seems to me it's pretty obvious these days that datasets and collections of information are important business assets. They're special assets. They have consumer protection issues surrounding them, which really ought to be worked by the FTC and others. But in the anti-trust context, these are assets, and antitrust has treatment's of assets.

When we look at combinations, vertical or horizontal, we worry about the use of assets and how they could be used more competitively because of a business combination. And those same concerns are applicable when those assets are data and collections of information. So I think we

should use our regular principles on the antitrust side and be ready to apply them to those particular and peculiar assets.

DIANA MOSS: Can I just back it up one step behind what Professor Willig just said? And that is to throw out the idea that we need to give some more thought to what tool in the toolkit is-- where does the privacy problem really reside? What kind of problem is it? And then what are the tools-- if it's a multi-tool problem, then we can then think about how to deploy antitrust or regulation or other tools to address it.

So if you think really from first principles, privacy could be an economic-- it could be a market failure. It could be asymmetric information, for example. The platforms have way more information on you through their data collection and processing capabilities using artificial intelligence than does the hapless consumer. If that's the case, then that may be a call for economic regulation. I'm not saying it is, but it's one frame in which to consider the problem.

Another way to think about it is as a social regulation problem. We just think of privacy as a basic protection, like health and safety, and we want to have basic protections in place to protect consumers. Once we exhaust all those possibilities or frame out those possible theories, then we get to antitrust. Absolutely, data can be an asset. It can be a strategic competitive asset.

So we have to consider data sets, but more important, it's the value added through data processing capability, I think is where the real action will be, because data processing capability is where the value add in the supply chain is. And that's where a lot of the strategic value is going to be in assessing the competitive effects around the consolidation of horizontal data sets in a horizontal merger, for example, or vertical combinations.

So I think we're going to have to step through this bigger analysis of, well, what is the privacy problem. It's likely to be a combination of a regulatory issue but also an antitrust issue. But given the framework we have in place, I think we have the tools for antitrust to consider data to be an asset in any type of combination or a conduct case, for example, using data to exclude or frustrate rivals from access to the market.

ALDEN ABBOTT: Debbie, do you have some thoughts?

DEBBIE FEINSTEIN: Yeah, just a couple of things. One, I'm not sure why privacy is a competition issue. HIPPAA isn't a competition statute. We know how to deal with privacy issues quite well. We can do it through consumer protection. We can do it through statutes. I'm still puzzled. It could be a form of non-price competition on which two companies compete and which could be lost. I haven't seen that case yet.

Usually the concern is one company's good on privacy, the other company is bad on privacy. And the merger of them, the bad on privacy one might take over. I still don't see how that's a competition issue. That's like saying a merger might defeat my favorite flavor of ice cream, but unless there are entry barriers to companies who do the same thing-- because we're assuming that there's not a competition issue that we're dealing with. It is just companies who do two

completely different things. Unless there's some barrier to entry that I'm missing, I really struggle to see why that's a competition issue.

On big data, I mean, I just don't see the difference between big data and little data in terms of most of the competition issues. I can name you half a dozen cases where data was the issue, whether it be a horizontal case or a vertical case. The only thing that might be new is we might now be worried about conglomerate issues where companies don't compete, but they both have big stores of data and to the extent, as Dennis said, that that might lead to an entry barrier in something.

But then it just seems to me we define the market as the data and the company has got a monopoly over a certain kind of data. So I just think the tools are there. We just need to figure out where the cases are that actually require us to take action. But I don't see as much new under the sun as other people seem to. Maybe I'm missing something.

BILL KOVACIC: Alden.

ALDEN ABBOTT: Yes, Bill.

BILL KOVACIC: I agree with Diana and Debbie that the FTC does have all the tools. It's the one major authority that has the threefold mandate-- the privacy mandate, the consumer mandate, and the competition mandate. And I think the challenge really is, as Debbie was just saying, to think what's the right tool. Diana was talking about this as well, to pick the right one.

I want to underscore something that would be a bad practice, and that's used merger review to leverage concessions that arguably should come through separate privacy related matters. And there are great temptations to do that. Because merger control gives you leverage. You can't make them wait forever, but they can wait for a while.

And while they're there, you can pull out a list and say, by the way, while you're here, I've got some other things I'd like to talk to you about. And if you work these out with me, you go through the line faster. If you don't, get back in line with the others. There can be a real temptation to do that. There's a lot of pressure there has been applied in things like Google DoubleClick, Google AdMob.

There was enormous pressure from different advocacy groups to use the merger review as the occasion to impose privacy obligations that arguably would arise under a privacy regime. A real concern I would have about what's taking place in a number of European jurisdictions is they are using leverage to effectuate privacy related matters.

That could change with the GDPR, which relaxes the need to do that, because it puts a much more robust enforcement mechanism in place. But to use the fines associated with abusive dominance to say, I want you to make changes or I'll land on you with this. And you ask, well, where are the privacy regulators. What are they doing here?

The great benefit for the commission that is it has wonderful tools to work on this space, including information gathering and data collection analysis. The temptation to be resisted is to not be absolutely clear about which tool's being used and why and not to use merger review, which creates leverage to extract concessions. If a private firm used leverage like that, we'd be very upset about it.

ALDEN ABBOTT: Anything else? Very quickly, I think we have 10 and slept according to my watch. But I'd like very, very quickly touch on the vertical issue. I think you've heard a bit about that. Is there any support on the panel for a verdict called merger guidelines or new vertical restraints guidelines? It was suggested earlier. Do you think that would help the quality of antitrust enforcement in that area?

BOBBY WILLIG: I'm all for let's do it.

BILL KOVACIC: The vertical merger guidelines expiry date passed a long time ago, along with the best if used by date. It is an important, valuable, crucial moment to step forward and renovate those guidelines. And I would do the same with-- I think a previous speaker mentioned resale price maintanence. I would do the same there, too. That was a really good idea.

DIANA MOSS: AI is actually working on developing model vertical guidelines to the extent we can be helpful to the agencies and stimulate discussion in the community. I would add that any discussion of vertical guidelines, which is very appropriate in the wake of AT&T Time-Warner, and we'll see what happens in CVS-Aetna, which in my view poses even more serious-- poses the serious vertical concerns.

Part of any discussion about vertical guidelines, I think, should include a discussion of vertical presumptions much like we have the structural presumption in horizontal mergers and actually more recent support for the structural presumption in denying where the agency's challenging large mergers-- Cisco US Foods, Baker Hughes Halliburton, that was abandoned, the insurance mergers. So the structural presumption is back. We'll see what happens in sprint. T-Mobile.

But on the vertical side, part of the big question, I think, is the importance of setting the landscape in explaining why a vertical merger can be anti-competitive by looking at upstream and downstream market concentration depending on the theory of harm. So we're seeing extremely concentrated markets in many of the markets in which vertical mergers are occurring. I think it's high time for everyone to start thinking, not only about the guidelines, but about what a structural presumption would look like in a vertical context.

ALDEN ABBOTT: OK, I want to quickly switch gears so we get one quick question in from the audience to the whole panel. Do you have any doubt that a naked wage fixing or non poaching agreements should be per se illegal, even if it's clear that no harmful effects will be passed on to end consumers?

MICHAEL KADES: Before you answer that, could you just reread it?

ALDEN ABBOTT: Do you have any doubts-- so it's about wage fixing or no poaching agreements, even if there's no effect on consumer welfare. Obviously, there is an effect on the workers, should those agreements be per se illegal.

MICHAEL KADES: I mean, I'll go for it. Absolutely.

DEBBIE FEINSTEIN: Yes, yes.

MICHAEL KADES: I think the agencies have both shown in the current administrations to be applauded for looking at this issue in pushing cases in this area.

ALDEN ABBOTT: Very good.

BOBBY WILLIG: When we have a per se rule, we need a characterization step first. I'm always worried about the in-house training. So my employer teaches me a lot about the employer's own practices. I learned a lot about the business. And then I want to go to a competitor and use that same information against my first employer.

And presumably, that causes problems, and that causes all kinds of restraints in my employment contract. And so I'm a little bit worried about just an off handed approach that says, you can't have an employer who constrains the employment opportunities of their employees without worrying about that kind of thing. So maybe that's a characterization issue.

BILL KOVACIC: My presumption would be illegality. And with characterization, BMI always gives the defendant an opportunity to advance the plausible, cognizable efficiency justification. So if these cases are pursued, defendants have them and they come forward with them, BMI will give them a chance to talk about it.

ALDEN ABBOTT: OK, very good. In last few minutes, let me give each panelist an opportunity to make some comments, add anything to his or her prior comments, or make some general observations. Debbie.

DEBBIE FEINSTEIN: So I'd like to answer the last question that was asked of the last panel because I think it's the most important one, which is, where do we go from here, what should we do. I'd give the FTC clearer disgorgement authority. It best makes new law when it has the threat of a fine or monetary penalties because otherwise it's too easy for companies facing a complaint to say, all right, we don't want to go through a lawsuit with the FTC. We give.

And I've sat in the room plenty of times where it's like, dang, we really want to keep litigating this because we want to make the law on this issue clear. But when we've gotten all the relief that we can possibly get, that's a very hard thing to do if the threat of litigation were higher and therefore either we could get more benefit by getting disgorgement or parties would be more inclined to settle. Either one of those would have a better deterrent effect, enable the commission better to get redress for consumers, and/or force more cases into court. That could have some effect. And I think it's something worth thinking about.

The second thing is resources, resources, and resources. And I can say this now. I think the Bureau of Competition would have been horrified if they heard me say this when I was director. But when I was asked once, come up with a plan if I gave you another $2 million for the Bureau, I would have said, most of it should go to the Bureau of Economics and not to work on individual cases-- although it would be great. The agency needs more economists-- but to put a group together that could do more empirical studies using the 6B authority because I thought it was a very important thing to do.

ALDEN ABBOTT: Mike.

MICHAEL KADES: So in preparing for this panel and reading the comments, I keep thinking about this movie, which is somewhat timely, relevant because it's about World War I, which 100th anniversary will be [INAUDIBLE] attending these couple months, called Paths of Glory. So this movie takes place in two places. You have the this French infantry battalion on the front lines. They've been there forever. They charge up over the hill. They all die. Then they get reinforcements, and they go it again. Their whole life is about these five, six square feet of no man's land.

And at the end of the movie, Kirk Douglas-- so it's a great movie. You should go see it. He goes to Paris to plead for his troops, and he gets to Paris. And the French General's staff is having this huge ball, classic belle epoque. Everybody's happy. Everything's fine. And that juxtaposition is something I think that I feel is what's going on in antitrust laws, is that people are bringing up legitimate criticisms.

And there's a tendency to either say one of two things. One, well, no, no, antitrust actually can deal with that problem. Or two, we really need to study it even more. And I think that's a danger. And I think if you look, yes, the guidelines talked about mergers that harm workers wages. But until 2010, the agencies never looked at it. And that's not by way of criticizing the agencies. That just means there's learning to be had here.

In 2000, the Congress raised the level of HSR. There's another really important paper that's come out that suggested that the effect of that may have been to spur a bunch of anti-competitive mergers just below the HSR guidelines. And to Bill's point, I think it would be great if we had done something on RPM. But the problem is we were doing hospitals, we were doing pay for delay, we were doing IP. If we would make the law less lenient towards business conduct, the FTC would be able to do a better job on the more difficult issues.

BILL KOVACIC: I would like to see the FTC embrace, as it in the past-- there seems to be some notion that there was a golden era of antitrust when it was all great and that concentration was under control. That's a myth. When you look at the criticism recurring from the very beginning, the dominant focus of criticism has been, it has been a failure.

So if we talk about how we're doing now, the question is compared to what and compared to what period was it a lot better. I think there are a lot of terribly unrealistic assumptions given the experience and the commentary about it that you're going to have a wildly more robust program

than you have now, and it's going to be wildly more successful than it is when you put the experience in context. That said, that's the realism.

The ambition is to take the tools you have and do better, and there are distinctive tools here. As Debbie said, there are remedial refinements that could be useful. There's a better way to take the capability to do good research and analysis and bring it to bear on lots of these difficult issues and advance the doctrinal frontier. There's the possibility of using the administrative adjudication mechanism to do that.

And if that's not used robustly, the whole rationale for having a commission disappears, and then you can peel apart the agency and parcel out the pieces to the others so that-- the US has a specialized trade court. It's called the Federal Trade Commission. And that arguably should be an important forum for making the kinds of refinements that we're talking about here.

To do that effectively, my admin law suggestion is you have to change the Sunshine Act. The Sunshine Act disables the effectiveness of collaboration. I don't see how administrative adjudication, administrative decision making, collective decision making can succeed if that stays in place. And ultimately, you do have to go and get-- for dominant firm stuff-- you have to get people like Steve Breyer to change his mind. Barry Wright, joining [INAUDIBLE], as he did, Ocean State, Town of Concord. That's Harvard. Sorry.

DIANA MOSS: So one takeaway from this really good discussion today I think is that-- or one perspective is that, the antitrust laws are pretty adequate. They're flexible. They're durable. They've been around for a long time. They're not super specific. They've given significant latitude to adjust and morph over time or consider different situations over time.

And couple that with the fact that that consumer welfare standard, if and if and only if it is interpreted to the full extent of what the standard can capture in terms of price, non price effects-- so quality, innovation, choice, variety, all of these things-- and it is interpreted in a more dynamic context to avoid the pitfalls that we are now suffering from from a very static view or measurement or conception of consumer welfare.

If you put all that into place and then take it to the next major observation, which is the courts haven't done a good job of enforcing the antitrust laws. So we've got OK laws and we've got a good standard, but the courts aren't enforcing the laws and viewing the standard appropriately. So we now have a sick patient. We have a sick economy. We have sickness associated with declining competition as measured by any number of metrics-- high concentration, growing inequality gaps, lower rates of market entry. So we don't have a healthy situation here. Something clearly has gone wrong.

So whenever that happens, you don't keep feeding the patient the same medications that have not brought the patient to health. But instead you start considering other options, other policy options, other types of reforms. And in this case, reforms can be reforms light, well LIT, not reforms heavy, not junking the laws, not wholesale reforms, getting rid of the standard and putting in a public interest standard, but reforms that would be actually very effective.

And those reforms really cover the gamut on the use of the agencies and the agencies' resources, exploring section 5 for example, unfair methods of competition, looking at doing more robust studies, merger retrospectives, and learning from those types of studies, but also considering taking the extra step in considering, are we ready to think about more presumptions, different presumptions that can be embedded in how we go about looking at these cases.

But also thinking about requirements-- are we to the point where we should really be mandating the fact that a merged firm, once it consummates, should prove up and prove up its claims efficiencies, and say, hey, I actually got my efficiencies from my merger? I think enforcers should see that. Enforcers should also see the fact that cost savings were passed on-- actually passed on to consumers as we've seen in many-- judges opine in many merger cases.

So that's one way to view the whole picture in terms of where we are now. There's certainly lots of room for policy research and for legal and economic and institutional, multi-disciplinary research to move this along. But clearly, something has to change.

ALDEN ABBOTT: OK, Bobby.

BOBBY WILLIG: Yeah, well, I'm back on my theme of it's time to get serious about guidelines. And the reason I say that is, in the past, I think the economics community, when faced with a serious challenge, has more or less declined in part because our toolkit of theories of templates was much more limited than the outpouring of feelings that people have about things going wrong.

We didn't really have models that could stand up to those feelings of distress of business conduct. I think that's changed. I think now we have a very broad toolkit, maybe too broad for templates for how to think about the kinds of business practices that trouble the community. And it's time to sit down and shop through our library of theories and force ourselves, with the agencies and with the lawyers, to look for what the signs of evidence are appropriately used to call a particular template about bad practices into court, into intervention activity.

I don't think we've done that enough, but I think pushing ourselves to write guidelines that say this is the evidence that would make this theory be real and apply to that set of facts, put that forward, will help to shape business conduct and also helped to shape the activities, intervention activities of the agencies. And I think we're ready to do that now.

ALDEN ABBOTT: Great panel. Thank you, everyone. And I'll close by saying that's all, folks.