



Office of the Chair

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**Keynote Remarks of Lina M. Khan  
International Competition Network  
Berlin, Germany**

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It's such a delight and honor to be here with you all. Thanks so much to Andreas for his leadership and for everyone involved in planning this year's meeting. It's been wonderful to meet so many of you for the first time in person and to witness first-hand the richness of the ICN discussions.

As you know, competition law in the United States is currently in the midst of a broad and sweeping reassessment. The significance of this reassessment is perhaps best embodied by President Biden's issuance last summer of an Executive Order on Promoting Competition in the American Economy.<sup>1</sup> In this Executive Order, the President explained that broad government inaction has allowed far too many markets to become uncompetitive, with consolidation and concentration now widespread across our economy, resulting in higher prices, lower wages, declining entrepreneurship, growing inequality, and a less vibrant democracy.<sup>2</sup> In remarks announcing the Executive Order, the President said this state of affairs was the result of a choice made 40 years ago to follow "the misguided philosophy of people like Robert Bork."<sup>3</sup> In other words, not only did the President note that declining competition was now a systemic, not isolated, feature of our economy—he also expressly attributed this problem to a set of ideas and policy decisions.

Perhaps more mundanely, though no less significant, this Executive Order charged a whole set of federal agencies with deploying their tools and legal authorities with an eye to promoting competitive markets. There were 72 specific suggestions and directives, handing federal agencies across the government an action plan. In other words, this is an effort not just limited to the FTC and the Antitrust Division—but marks instead a whole-of-government

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<sup>1</sup> Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 2021). See also *FACT SHEET: Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE (July 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.

<sup>2</sup> Exec. Order No. 14,036 § 1.

<sup>3</sup> Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>.

approach, with agencies ranging from the Department of Agriculture to the Department of Transportation assigned with the task of using their tools to promote competition.

This is the backdrop against which competition enforcement in the United States is occurring today. The President's Executive Order is not the *driver* of reform, but it underscores a deep mandate for change and a commitment to creating the enabling environment for reform.

If we are successful with the course-correction, it will also invite us to consider opportunities to engage with the international community to develop tools responsive to the shifting consensus.

One immediate area where we could see this change in the near future is our approach to merger investigations. Merger investigations invite us to make a set of predictive assessments, and for decades we have relied on models that generally assumed markets are self-correcting and that erroneous enforcement is more costly than erroneous non-enforcement. Both the experience of the U.S. antitrust agencies and a growing set of empirical research is showing that these assumptions appear to have been at odds with market realities.

Merger enforcement is both our first-line defense against unlawful consolidation and the most cost-effective enforcement tool to guard against market structures that give rise to monopolization and tacit coordination. Since I arrived at the FTC, a significant portion of my efforts and energy has been devoted to examining how we can better harness our tools to check unlawful mergers.

In January, the FTC and DOJ launched a review of our merger guidelines.<sup>4</sup> We realize we need to approach merger review with a greater sense of humility when it comes to efficacy of our predictive models and frameworks. We need to acknowledge that our approach has missed too many transactions that ultimately did substantially lessen competition and spur undue consolidation—contributing to markets now suffering from a lack of dynamism.

We are not alone in revising merger guidelines. Many of you in this room have recently revised your guidelines, or are in the process of doing so now, and we are learning much from your experiences. In March, Jonathan and I hosted an Enforcers Summit where we heard from many of our domestic and international partners about your experiences and challenges in merger review.<sup>5</sup> These discussions were enormously informative for us, and we look forward to continuing to solicit your views and feedback as we move ahead.

While we are still developing the new guidelines, I want to share a few key aims and considerations.

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<sup>4</sup> Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

<sup>5</sup> *Enforcers Summit*, FED. TRADE COMM'N (Apr. 4, 2022), <https://www.ftc.gov/news-events/events/2022/04/enforcers-summit>.

A goal of paramount significance is ensuring that our frameworks are accurately reflecting contemporary commercial realities. There is a concern that prior guidelines may have frozen in place certain economic and descriptive theories about markets that may be outdated, and so we must revise our theories and models to fit new facts and evidence. Matching our analysis to contemporary business strategy requires that our tools be dynamic and holistic rather than static and atomistic. Accordingly, we've prioritized seeking comment and input from a broad set of market participants and experts—including those who have lived through the first-hand effects of mergers and acquisitions.<sup>6</sup>

A second key goal is ensuring that the guidelines are faithful to our statutory mandate. The U.S. Congress was unequivocal that merger enforcement is intended to stop, in their incipiency, trends toward concentration. Congress also named the 1950 Amendments to the Clayton Act the “Anti-Merger Act.” We are revisiting our guidelines to ensure they are aligned with controlling legal precedent as well as with the text, structure, and history of our laws. We intend to fully hew to the law, including by applying the incipiency standard and examining whether a deal “may tend to create a monopoly.”

Guidelines are designed to provide clarity, and we intend for our revisions to improve administrability and predictability. We are considering greater reliance on strong presumptions while reviewing the 2010 HHI levels and examining empirical work, including work showing that structural measures of competition can be highly probative.<sup>7</sup> We are also identifying additional factors that may be predictive of future harm, including direct evidence of competitive effects and industry trends and patterns of consolidation.

Three substantive areas that are particularly in focus are digital markets, labor markets, and non-horizontal mergers.

It's clear that the guidelines must better account for certain features of digital markets—including zero-price dynamics, the competitive significance of data, and the network externalities that can swiftly lead markets to tip.

It's also clear that the guidelines must better explain how we will analyze whether a merger unlawfully reduces competition in labor markets. A host of empirical research has shown that labor markets are highly concentrated, with the U.S. Treasury recently estimating that a lack of competition may be costing workers up to 20% of their wages. We should incorporate insights from this new learning.<sup>8</sup>

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<sup>6</sup> Press Release, Fed. Trade Comm'n, FTC and Justice Department Launch Listening Forums on Firsthand Effects of Mergers and Acquisitions (Mar. 17, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-justice-department-launch-listening-forums-firsthand-effects-mergers-acquisitions>.

<sup>7</sup> The Supreme Court has instructed us that a merger which produces a firm controlling an “undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.” *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963).

<sup>8</sup> U.S. DEP'T OF TREASURY, THE STATE OF LABOR MARKET COMPETITION, at ii (Mar. 2022).

Lastly, we are looking to sharpen our insights on non-horizontal mergers, including deals that might be described as ecosystem-driven, concentric, or conglomerate. While the U.S. antitrust agencies energetically grappled with some of these dynamics during the era of industrial-era conglomerates in the 1960s and 70s, we must update that thinking for the current economy. We must examine how a range of strategies and effects, including extension strategies and portfolio effects, may warrant enforcement action.

We are now in the process of reviewing the thousands of comments we have received and the input we have gathered through a series of listening forums. We are aiming to issue draft guidelines in the coming months and a final document by the end of the year.

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The U.S. agencies are on the front lines of a broad reassessment of the effectiveness of our competition tools and our approach to law enforcement. Reforms, potentially significant ones, are ahead. The U.S., of course, is far from alone in seeing the need for a course correction, and in certain regards our reforms may bring us in closer alignment with other jurisdictions. Given that we are here at ICN, it is worth considering how we, as an international community, can or should react to the shifting consensus.

A key goal of the ICN is to promote best practices. While these are a non-binding form of “soft law,” these “recommended practices” have in certain instances been widely adopted by ICN members. The Recommended Practices for Merger Notification and Review Procedures, for example, are a particular area where we saw broad adoption.

ICN also has a whole body of prescriptive work—on unilateral conduct, for example, as well as on merger analysis and merger process—that is regularly referred to as the “gold standard.” How do we ensure that these “best practices” adapt with new learning and changes in consensus?

One of the key benefits of ICN is that continued experimentation and testing of new techniques allows us to identify superior practices on an ongoing basis.<sup>9</sup> The relative agility of ICN makes it a prime venue for ensuring that the international community’s recommendations are evolving with the times and keeping pace with both market realities and shifting conceptions of best practices.

I will look forward to engaging with you all in this shared mission. We are fortunate to have this terrific international community, and I am incredibly optimistic about what we can achieve collectively.

Thank you.

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<sup>9</sup> See generally, William E. Kovacic & Hugh Hollman, *The International Competition Network: Its Past, Current, and Future Role*, 20 MINN. J. INT’L L. 274 (2011).