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The Future of Antitrust: New Challenges to the Consumer Welfare Paradigm and Legislative Proposals

John B. Nalbandian

Makan Delrahim

Gene Kimmelman

Maureen Ohlhausen

Rainer Wessely

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The Federalist Society Presents:

THE FUTURE OF ANTITRUST:
NEW CHALLENGES TO THE CONSUMER WELFARE
PARADIGM AND LEGISLATIVE PROPOSALS⁺

November 14, 2019
National Lawyers Convention
The Mayflower Hotel
Washington, D.C.

Featuring¹:

HON. MAKAN DELRAHIM
Assistant Attorney General, Antitrust Division, United States Department of
Justice

PROF. GENE KIMMELMAN
Professorial Lecturer in Law, George Washington University Law School

HON. MAUREEN OHLHAUSEN
Partner, Baker Botts

DR. RAINER WESSELY
Delegation of the European Union to the United States

MODERATOR: HON. JOHN B. NALBANDIAN
United States Court of Appeals, Sixth Circuit

⁺ On November 14, 2019, the Federalist Society's Corporations, Securities, & Antitrust Practice Group hosted a panel for the 2019 National Lawyers Convention at the Mayflower Hotel in Washington, DC. The panel discussed "The Future of Antitrust: New Challenges to the Consumer Welfare Paradigm and Legislative Proposals".

1. Please note that the Speakers have reviewed and edited this Transcript.

TRANSCRIPT

HON. JOHN B. NALBANDIAN: So, I want to welcome everybody on behalf of the Corporations, Securities & Antitrust Practice Group. My name is John Nalbandian. I'm a judge on the Sixth Circuit, and I'm moderating our panel today on The Future of Antitrust. I was a litigator in private practice, but I always felt like I was working for the corporate lawyers, so I think nothing has changed. But I want to thank The Federalist Society for inviting me back this year to moderate a panel again and to moderate a panel on antitrust again, and I take that as a compliment. I don't know if it was meant that way, but I take it that way.

In any event, last year, we talked about transparency and, specifically, whether greater transparency was a possible incremental solution to, at least, perceived issues that we have in antitrust. This year, suffice it to say, we're pushing the envelope, inviting our panelists, our distinguished panelists, if they so choose, to question, what I would say, is maybe the bedrock principle of modern antitrust, the corporate welfare standard first articulated by Robert Bork and others 40 or 50 years ago.² The idea behind the consumer welfare standard, of course, is that the goal of antitrust law should be to maximize consumer welfare and economic efficiency typically measured by lower prices and greater supply.³

As we all know, antitrust law is now a hot topic of discussion among not only academics and hipsters, but politicians as well, as reflected in both public statements and legislative proposals. As part of that discussion, the existing enforcement regime, including the consumer welfare standard itself, have been questioned by those who suggested focusing entirely on existing notions of consumer welfare may be misplaced, that innovation, worker interest fostering vibrant small business in the face of tech giants, and other societal values ought to be served by our antitrust laws and their enforcers. Indeed, some have suggested that our democracy itself is endangered by an ever-fewer number of companies who dominate vital sectors of our economy.

I expect that our panelists will address these questions in addition to a range of other topics, including, perhaps, merger enforcement priorities, including so-called killer acquisitions, market definitions, privacy and data regulations, antitrust remedies, and others—other topics, I'm sorry, from both the U.S. and E.U. perspective. In any event, let me get to our panel. The full and very impressive bios, of course, are found in the app—conference app—so I won't repeat all of it here but let me briefly introduce them. First up is Makan Delrahim, who serves as Assistant Attorney General for the Antitrust Division, although I suspect he'll inform us that he's probably speaking solely in his individual capacity today.

2. Herbert Hovenkamp, *Whatever did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 583–86 (2018) (discussing the importance of Robert Bork's work in shaping modern antitrust law).

3. *Id.* at 589.

HON. MAKAN DELRAHIM: No.

HON. JOHN B. NALBANDIAN: No? Official?

HON. MAKAN DELRAHIM: Well, sure.

HON. JOHN B. NALBANDIAN: His—

[Laughter.]

HON. MAKAN DELRAHIM: We're in the constitutional clear.

HON. JOHN B. NALBANDIAN: So, whatever he says, you can estop the government the next time you're in court, right?

HON. MAKAN DELRAHIM: We'll argue against that.

HON. JOHN B. NALBANDIAN: I'll overrule that.

[Laughter.]

HON. JOHN B. NALBANDIAN: His antitrust experience, of course, is vast, and vary serving as a partner in private practice, and as having various stints in the government at DOJ and for the Senate Judiciary Committee. Next, we have Gene Kimmelman. It's not often that we get someone on a panel who *The Washington Post* has referred to as both a "secret weapon and a consiglieri,"⁴ but he has been called both for the work that he did in the Antitrust Division during the Obama administration. He currently serves, among other things, as an adjunct law professor at GW, and is a senior advisor for the public interest group, Public Knowledge, and he also got his J.D. at my beloved University of Virginia, "Wa-hoo-wa."

Next, we have Maureen Ohlhausen. Maureen is a partner at Baker Botts here in D.C., where she serves as practice group chair for the Antitrust & Competition Law Group. She was formerly the acting chair and commissioner of the Federal Trade Commission. Suffice it to say, her antitrust experience is vast and unparalleled. She has published numerous articles, testified numerous times in Congress, and has received numerous awards, including the FTC's Robert Pitofsky Lifetime Achievement Award.

And finally, we have, for our European perspective, Dr. Rainer Wessely. He's a diplomat for the E.U. who is posted at the Delegation of the E.U. to the U.S., where he is Counselor for Competition and Justice Affairs. Before this, he served in Brussels as Assistant to Directors-General with D.G. Competition, the competition department within the E.C., and he has worked also in private practice, and did various other positions at D.G. Competition. He holds a Ph.D. in international trade law and an L.L.M. in European and international law. So, join me in welcoming our panel. And with that, I give you Mr. Delrahim.

HON. MAKAN DELRAHIM: Thank you so much, Your Honor. I very much thank you for inviting me here to The Federalist Society, in particular, Dean Reuter and other leaders of FedSoc [the Federalist Society], and congratulate you on organizing, yet, another fantastic National Lawyers Convention, and to

4. Cecilia Kang, *Obama's 'Secret Weapon' on Antitrust Leaves Justice*, WASHINGTON POST (July 9, 2012), https://www.washingtonpost.com/business/technology/obamas-secret-weapon-on-antitrust-leaves-justice-department/2012/07/09/gJQANAp7YW_story.html.

my co-panelists, who are—I can say, have been longtime friends in various parts of my antitrust life. And it’s an honor to be with them anywhere.

The subject of the panel, “The Future of Antitrust,” could not be more timely. Antitrust law, in many ways, as boring as it might be to some, again, appears to be at a crossroads. It has worked its way into the public consciousness and debate unlike any time since probably the *Microsoft* case⁵ in the late 1990s. The debate over antitrust law may be even louder today than it was then. And we now have presidential hopefuls campaigning on how they will change or enforce the antitrust laws. We’re also fortunate to have the first president in history who’s actually been a plaintiff in antitrust law of an antitrust case.

At the Department of Justice, we have not shied away from this debate. Indeed, it is imperative that the Executive Branch speak clearly on behalf of the United States regarding the questions of antitrust policy, especially, when the debate involves foreign antitrust enforcers analyzing the same conduct. Over the past two years, where I’ve had the great privilege of serving as the Assistant Attorney General for Antitrust, I repeatedly hear the same question at conferences and events across the United States and overseas; it’s the following: is a consumer welfare standard capable of handling new threats to competition, especially, in the context of digital markets?

I’ve given the same answer each time: Yes. I believe the consumer welfare standard is flexible and adaptable enough for the 21st century and new business models, such as digital platforms. It’s incumbent on enforcers and courts to stay up to date with the latest economic thinking and understanding of new markets. This is critical to ensuring that the consumer welfare standard keep space with new technologies. This understanding of the consumer welfare standard, flexible and adaptable, is exactly how Judge Bork and other titans of the Chicago School Antitrust Revolution intended it.⁶

Judge Bork wrote the following in a new epilogue to the antitrust paradox 15 years after it was originally published:

Though the goal of antitrust statutes, as they now stand, should be constant, the economic rules that implement that goal should not. It has been understood from the beginning that the rules will and should alter as economic understanding progresses. Consistent with this understanding for over 40 years, the consumer welfare standard has served as a neutral principle for the administration of the antitrust laws. It focuses enforcers and courts on harm to competition and requires them to evaluate competitive effects.⁷

5. *United States v. Microsoft Corp.*, 253 F.3d 34 (2001).

6. Adam J. DiVencenzo, *Editor’s Note: Robert Bork, Originalism, and Bounded Antitrust*, 79 ANTITRUST L.J. 821, 823, 829 (2014).

7. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 430 (2d ed. 1993).

The consumer welfare standard is agnostic to considerations other than the actual competitive process drawing the line in this matter is crucial. Otherwise, enforcers or courts would be placed in the powerful and awkward position of deciding whether a pro-consumer practice nevertheless violates antitrust laws because it offends a non-competition value, such as free speech.

Justice Robert Jackson, another antitrust visionary, understood this concern well and emphasized the need for neutral principles of antitrust enforcement, 40 years before Judge Bork did, in a 1937 speech entitled “Should the Antitrust Laws be Revised?”⁸ Then-Assistant Attorney General Jackson argued, “What is needed is the establishment of a consistent national policy of monopoly control, intelligible to those expected to comply with it, and those expected to enforce it.”⁹ Jackson warned that the only probable alternative to a consistent national policy, favoring competition, is government control of industry.¹⁰

What does the future hold for consumer welfare standard? That’s up to us. No policy, no matter how sound, is immune to calls for change. Throughout history, when reformers fail in the legislative arena, they will turn to existing laws and regulations and try to manipulate them in ways never previously seen. I won’t mention specific examples, but we have seen this playbook when federal courts interpret or, more accurately, rewrite the law in head scratching ways and when agencies issue new regulations that strain the statutory text. Some reformers now seek to bring this playbook to the domain of antitrust law, which, if read broadly, could wield tremendous power over the economy. Unbridled, this power could do significant damage to the economic impulses that drive innovation, gains, and efficiency, and other pro-competitive outcomes for consumers.

Antitrust law may be particularly vulnerable to hasty change given its common law status and evolution in light of advancements and economic thinking. We will see in our lifetimes whether the pendulum will swing back and unravel the progress the field has made. What can practitioners, academics, judges, and enforcers do if they want to preserve the consumer welfare standard? First and foremost, we should not be complacent. Many deride the latest reform movement as “hipster” antitrust because advocates for abandoning the consumer welfare standard invoked a decades-old trust-busting era that we now consider antiquated and economically misguided. Labeling one’s opponents only go so far.

Winning the economic debate goes further, but not far enough. The modern antitrust reform movement is less concerned about economic soundness than it is about results. That means we must demonstrate to observers that we will pursue effective results whenever we find anticompetitive conduct. We must be

8. See, Robert H. Jackson, *Should the Antitrust Laws Be Revised?*, 71 U.S. L. REV. 575 (1937).

9. *Id.* at 576.

10. *Id.*

vigilant to ensure that the biggest companies are minding the guardrails of competition. If we don't act swiftly and certainly, then we risk looking impotent next to those who would punish monopolists just for being big. That approach, of course, is an axe where a scalpel is needed. If we don't use our scalpel, we shouldn't be surprised to see the reformers sharpening their axes.

Second, and more importantly, I believe that the consumer welfare standard will survive in the winds of change if we prove that it actually works. Antitrust law must live up to its promise of protecting competition and consumers. That requires enforcers to think creatively and act vigorously. In particular, enforcers must answer critics of the consumer welfare standard who wrongly assert that it is concerned only with price effects. That has never been the case. For decades, the courts have interpreted the Sherman Act¹¹ and the Clayton Act¹² as recognizing harms to competition in the form of lower output, decreased innovation, and reduction in quality and consumer choice.

Indeed, the harms asserted by the government in the *Microsoft* case¹³ took the form of reduced innovation and consumer choice. The D.C. Circuit recently affirmed this innovation-centric approach in the *AT&T-Time Warner* opinion.¹⁴ Despite the district court's factual findings in that case, the circuit court's opinion was favorable to future antitrust enforcement actions in several respects.¹⁵ Among others, the court recognized that harm to competition extends "beyond higher prices for consumers, including decreased product quality and reduced innovation."¹⁶ The court's legal analysis will help us when we bring our next case alleging non-price effects as a competitive harm.

To be sure, price effects are easiest to quantify and may be an effective way to appeal to a skeptical judge or jury. They are not, however, the exhaustive means of proving an antitrust violation. Instead, we should focus our energy on an understanding the broader set of effects that may result from anticompetitive behavior or transactions. Ultimately, I believe the antitrust law and consumer welfare standard will survive the winds of proposed reform in much the same way that Judge Bork envisioned it. It's up to us, however, to keep the foundation steady through a vigorous action to protect competition and the American consumer. I thank you and I look forward to the discussions.

HON. JOHN B. NALBANDIAN: Great. Thank you.

HON. MAKAN DELRAHIM: Thank you.

HON. JOHN B. NALBANDIAN: Gene Kimmelman.

PROF. GENE KIMMELMAN: Thank you, Your Honor. And thank you and for inviting me. It's a pleasure being here, and I always enjoy the opportunity

11. The Sherman Antitrust Act, 15 U.S.C. §§ 1–38 (1890).

12. The Clayton Antitrust Act, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (1914).

13. *United States v. Microsoft Corp.*, 253 F.3d 34 (2001).

14. *United States v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

15. *Id.* at 1045.

16. *Id.*

to see if I can agree with my Assistant Attorney General as much as possible, and in this case it's actually quite easy to do so. We fundamentally do agree. I think I can identify almost everything I was going to say in what the Assistant Attorney General just described about the benefits of using neutral principles and applying a standard rigorously, impartially, and thoroughly, and I'll come back to that. The one thing I'll disagree with is, I would not be so negative in description of the reformers. I believe they raise a lot of important issues about things that are problems in our society. But I think we'd probably agree they don't belong in the antitrust analytics. They probably belong in other policy discussions. So, I want to come back to that.

What I think is most important in thinking about the consumer welfare standard is whether it really does stand up to what we're experiencing in the digital marketplace. And I hope that it can, and I think the Assistant Attorney General has identified the elements of it that can be effectively applied, looking at quality, looking at innovation, looking carefully at data as a part of the calculus. But I have some skepticism, and that's why I want to come back to some of the other policies, and here's why: I think what we're experiencing, when we look at the Facebooks, the Googles, the Amazons, and the Apples of the world, is that in the digital marketplace, the network effects are enormous.

People want to be on the same social network. There are a lot of benefits to it on both sides of that. People want to use the same apps and services, like Search. We see natural direct and indirect network effects here. We see companies that have made enormous investments with enormous upfront capital cost, then reaping the benefits of declining marginal cost over time. Economies of scale develop naturally with the structure of the way the digital marketplace is unfolding. But what I think is different than the railroads, the telephone companies, cable, and others is we're now experiencing a power in data through monetization of data to a magnitude and velocity that we've never experienced before in our society.

Data has always been valuable, but now there's so much more that can be done with it, and there's so much more of it available at low cost. It has also provided a lot of economies of scope to these companies. So, what I see is companies that have gotten ahead through whatever means. Hopefully, if any of it is illegal, my colleagues here, who are enforcers, will actually prevent that from continuing and put an end to it. But a lot of it can be through the natural economics of the marketplace.

And what that has led to is, I think, a legitimate concern about the difficulty of entry: you need massive scale to enter. You need a lot of capital, and you need to be able to expand rather quickly against companies with declining costs. Very difficult to do. I think we're not seeing the venture capital coming in to support that. Those are, I think, legitimate concerns in the market. And they may be tipping towards a few or even one player in certain segments.

So, these are important concerns that I think need to be addressed, and antitrust can address them through the consumer welfare standard, when it is

applied effectively and thoroughly. The abuses, the “putting your thumb on the scale” to take advantage of the competitive advantages some of the dominant firms may have to abuse the competitive process can be somewhat dealt with under that standard. But, if we want a society in a digital marketplace with as much innovation as possible and to push the envelope on as much competition as possible, I’m not sure antitrust can do enough. But, the world doesn’t stop there. We’ve faced this before. In almost every other industrial sector, we have, for a variety of reasons, almost always also developed other policy tools that are sector-specific to an industry, whether it’s agriculture, or healthcare, or securities, telecommunications.

And I think that’s what we need to consider here. I do not ask the Assistant Attorney General to do it. I do not ask the Federal Trade Commission to do it. They’re bound by their current statutes. But, I do think this is the job of Congress, and I think it’s also the job of Congress when you have issues like democracy, issues of disinformation, issues of abuse of power. These can be indirectly affected through antitrust, but, when you have those important issues on the table, it’s the job of Congress to have an open debate about how to make sure that we protect the pillars of our democratic society.

So, here’s my, I think, best example of how we’ve done this before. Many of you recall, the last time we broke up a company was the Ma Bell, the AT&T monopoly, in 1984. There was a long series of both regulatory failures, regulatory capture at certain points, and inability of regulation to work, that led to the Justice Department intervening in the Reagan administration. But I believe that what really made that work in a sustainable way, from that time until today, was the fact that we could interconnect all the telephone companies that were separated in a seamless, low-friction manner. That was done through—not the breakup, not through Judge Harold Greene; it was done through the Federal Communications Commission. The fact that when you pick up your phone, and you decide you don’t like the current carrier you have, and you want to go somewhere else, you don’t have to give up your phone number—number portability. The ability to do that was the Federal Communications Commission.

There are a number of things that we have relied on, other policy tools that I would call pro-competition policies that augment antitrust, that are not in conflict with, but they’re also, usually, not the kinds of remedies that are easily administrable through antitrust enforcement. So, in these digital markets, I think we need to look to whether—or this is what I would like Congress to consider: whether we need the kind of things like portability of numbers. Here, it might be data portability with data protections. The ability to connect networks: interoperability. Should you be able to go from Snap to Facebook without having to go into their ecosystem but have some open protocols that enable you to communicate with Facebook friends without being on Facebook? Would that be useful? Would that be beneficial? I think these are important policy discussions.

Discrimination. The Assistant Attorney General mentioned the *AT&T-Time Warner*¹⁷ case—a valiant effort. But the Federal Communications Commission has also used nondiscrimination to prevent cable companies from blocking satellite companies from entering the market and expanding in the market. You call that, to me, pro-competitive standards that augment what antitrust does. These are the kinds of things I would like to see Congress discuss so that the role of our antitrust enforcers, in using the consumer welfare standard well and effectively, can actually generate more competition in the digital marketplace. Thank you.

HON. JOHN B. NALBANDIAN: Thank you. Maureen Ohlhausen.

HON. MAUREEN OHLHAUSEN: Well, thank you. Thanks to The Federalist Society for having me. I'm a last-minute addition to the panel, and so I'm actually going to take the liberty of not looking forward. I know this is about the future of antitrust, but I think an important thing before we look forward to saying where it should go. And my co-panelists have already raised some very important points I look forward to discussing, but I also wanted to tie this to the foundations of antitrust, and to our market system, and to our government system.

As the U.S. Supreme Court has explained, the heart of our national economic policy has long been the faith and the value of competition. And I think right now there are some questioning about whether this should be the central value, whether—what competition is, and what's the government's role in fostering, or protecting, or replacing competition. The Supreme Court further described the antitrust laws as being important to the preservation of economic freedom and our free enterprise system as important to that as the Bill of Rights is to the protection of our fundamental personal freedoms.

Protecting and promoting competition is an important job, and it's one that's related to another foundational principle of our government, which is the protection of individual liberty. And today, I just want to take a few minutes to examine this link between competition and liberty, and, specifically, through the lens of The Federalist Society principles, which are that the state exists to preserve freedom, that the separation of government powers is central to our constitution, and that it's emphatically the province and duty of the judiciary to say what the law is and not what it should be.

A fundamental question is, what is competition and why does that matter? At first blush, competition may seem like a relatively straightforward concept because we all know a competitive market when we see it. And Adam Smith described it as a market where goods and services are sold at their natural prices.¹⁸ Now, two of America's leading industrial economists, Dennis Carlton and Jeffrey Perloff, have described the indicia of a market operating under

17. *Id.*

18. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, 73–74 (R.H. Campbell & A.S. Skinner eds., LibraryClassics 1981) (1776).

perfect competition as having homogenous output, perfect information among buyers and sellers, no transaction cost, price taking by buyers and sellers, and no externalities.¹⁹

But these indicia don't explain what competition is any more than saying it's a sunny day explains what weather is. Instead these observations give a snapshot of an ideal outcome rather than the process that tends toward that particular outcome. Too often the output of the competitive process—whether that's low prices, or wider choice, or greater innovation—gets confused with the process itself. Competition is the activity of individuals pursuing their economic self-interest by convincing others to buy the good or service that they sell.

Now, of course, buyers are also pursuing their self-interest. And the exchange between a buyer and seller leaves both better off, even though each one is pursuing his or her own interest. As Adam Smith explained, it's not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner but from their regard to their own interest.²⁰ And—I'm a big Adam Smith fan—as Smith further explained, it's the vigorous pursuit of a person's individual interest that naturally, or rather, necessarily leads him to prefer that employment, which is most advantageous to society.²¹

As a modern commentator has observed, the entrepreneur has a central role as the agent of change who prods and pulls the market in new directions. Thanks to the liberty-preserving protections of limited government and individual rights, we are free to pursue our self-interests or to pursue happiness, as the founding fathers who eloquently stated. Individuals exercising liberty in the pursuit of self-fulfillment and prosperity, collectively, give rise to competition, and, while entrepreneurs pursue their own welfare-maximizing endeavors, the invisible hand of the competitive market steers the producers in directions that maximize social welfare or consumer welfare.

Market competition should determine the winners and losers. And competition, like liberty, isn't for the meek, and it requires grit, and determination, and stamina, and its creative destruction is the dynamic cycle that, while uncertain for the competitor, motivates the entrepreneur and gives rise to new inventions that benefit society.

What is the role of government in protecting competition? Now, I don't think that government creates or drives competition. I think government instead provides a framework in which competition can thrive. As Milton Friedman described, the purpose of government in a free economy is to do what markets cannot do.²² That is to serve as an umpire and do things like create money and

19. Malcom B. Coate & Jeffrey H. Fischer, *Daubert, Science, and Modern Game Theory: Implications for Merger Analysis*, 20 S. CT. ECON. REV. 125, 153 n.117 (2012).

20. Smith, *supra* note 17, 26–27.

21. *Id.* at 348.

22. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 31 (1982).

build infrastructure. The role of government is not to dictate the outcomes of the market process.

I agree with this description of the role of government as the umpire, and it should make sure that competitors fairly compete on the merits, and, at least, for competition law, it should not dictate outcomes, but it should be sure that the sides are not agreeing to shave points, or prevent better players from playing, or colluding, or combining teams to undermine the nature of the contest. I also think we need to keep in mind the difference between competition and regulation, and some of the things Gene already mentioned, I think, may be regulatory goals worth pursuing, but I wouldn't put forward our competition laws as the way to pursue those. I look forward to our discussion and thank you for having me.

HON. JOHN B. NALBANDIAN: Great. Thank you. Dr. Wessely.

DR. RAINER WESSELY: Thank you. Thank you so much to The Federalist Society for inviting me to this panel for this exciting topic and to this very beautiful venue. If you talk about the future of a policy, it's always good to know who your policymakers are, and that can be a bit tricky sometimes. I will have to start with the usual disclaimer that I cannot speak on behalf of the Commission. I can only speak in my personal capacity. Today is the 14th of November 2019 and back in Brussels an exciting and important day. I will come to that in a moment.

So, we had European elections earlier in May this year, and I would've expected and thought that by today, and when I accepted the invitation to speak today, I would have more clarity on who the new commissioners would be. We have a new Commission President-elect—Ursula von der Leyen—but, unfortunately, we don't have a E.U. Commission in place yet. It was actually to take duty 1st of November two weeks ago.

However, as many of you will be aware, we are just now still in between two E.U. Commissions: the outgoing Juncker Commission and the incoming von der Leyen Commission. Most of the newly designated commissioners have already successfully gone through their hearings in front of the European Parliament. Some of them have been rejected, and some of our Member States had to nominate new commissioners. This is why today is a very exciting day because we are having the last hearings in front of the Parliament for the three outstanding commissioners.

Some of the reports that I've seen are extremely critical about this process. They see that this is a dangerous setback for European policymaking. On the other hand, I think it shows that the democratic system is working, and the checks and balances that are in place to protect European citizens are actually working. And to complicate things, we received, yesterday evening, a letter from the U.K., and were informed that the U.K. does not have the intention to nominate a commissioner for the new upcoming commission. So, we have to deal with this also. So, touching wood, I hope that with the hearings going on

today, we will have an E.U. Commission rather soon in place, and, potentially, as early as of 1st December this year.

With a new Commission, there comes new energy, there comes new steer, and there's always a certain degree of change. And I think we are looking forward to seeing what this change will be in terms of antitrust and antitrust enforcement. However, we already know, something that is almost certain, that the new commissioner for competition will be a very familiar one. We will have Margrethe Vestager serving in a second term, and she will occupy not only the role as Commissioner for Competition, but she will even be in an extended and expanded role as Executive Vice-President for the digital age to make Europe fit for the digital future.²³

I will not go into detail of what this role actually entails, just to mention a bit of what she has promised and said in her hearings. She has committed herself to present a new European strategy for artificial intelligence within the first 100 days of being in office.²⁴ She will coordinate the work on a new digital services act, which will, amongst other [things], deal with the liability of platforms, that will be heavily inspired by her work as Competition Commissioner.²⁵ She will look into the best ways to facilitate access and exchange of data and big data for innovation.²⁶ She will look into an industrial strategy and a strategy for SMEs in the digital age, and she will work on international solutions for digital taxation.²⁷

While listening to all of this, you might wonder what the other commissioners will be doing. So looking at where we are today, and certainly from a European perspective, it is an excellent moment to take stock of what we have done over the last four, five years in the outgoing mandate, and I think we would all agree that it has been a very exciting period in terms of antitrust enforcement.

One thing that I would certainly anticipate, at this point in time, is that we will see with the new commissioner being the old commissioner a certain degree of stability and continuity in our enforcement efforts. I hope that we will be able to build on a number of lessons that we have learned during the last five years, and I think three of them are particularly relevant for today's debate.

The first one is that we have conducted, in the last mandate, a sector inquiry into e-commerce. We did that between 2015 and 2017, and we have learned a

23. THE COMMISSIONERS: MARGRETHE VESTAGER, https://ec.europa.eu/commission/commissioners/2019-2024/vestager_en (last visited March 25, 2020).

24. *Von der Leyen's Real 100-Day Challenge*, POLITICO (Dec. 1, 2019, 9:25 AM), <https://www.politico.eu/article/ursula-von-der-leyen-european-commission-first-100-days-timeline/>.

25. *Hearing of Margrethe Vestager Executive Vice-President-Designate of the European Commission (Europe Fit for the Digital Age) 5-7* (Oct. 8, 2019) (remarks of Margrethe Vestager, Commissioner-designate), <https://www.europarl.europa.eu/resources/library/media/20191009RES63801/20191009RES63801.pdf>.

26. *Id.* at 22 (remarks of Margrethe Vestager, Commissioner-designate).

27. *Id.* at 6-16 (remarks of Margrethe Vestager, Commissioner-designate).

lot about vertical relationships. The sector inquiry was actually meant to tackle various barriers to ecommerce within Europe, but it allowed us to understand these markets much better. Actually, using sector inquiries is a very powerful tool, and I wonder whether we will not see an announcement of a new sector inquiry rather soon and early within the new commission mandate.

The second source of knowledge we will certainly derive from is all the antitrust enforcement that we have done over the last years in the digital sphere, and I think most particular the cases that we did against Amazon in the *e-Books*²⁸ case, which was a settlement where we addressed Amazon's most-favored nation clauses. Our cases against Google, all three of them, *Google Search*,²⁹ *Android*,³⁰ and *AdSense*,³¹ and our case against *Qualcomm*³² in the exclusivity case.

And I am looking forward to not only learning from the experience that we get from the investigations that we did during this time but also, and, in particular, from all the remedies discussions that we had with these companies in the last month and years, and, certainly, also from the judgments. As many of you will know, all of these, or most of these cases are still pending in front of European courts.

And the third source of information will come from the report that we have received—or better, that Commissioner Vestager has received—from her special advisors. She had asked three advisors to look into enforcement in the digital age, and the report lays out the context of competition enforcement into platforms and the relevance of data and innovation.

In addition to that, I'm looking very much forward to also learn from the experience that we will see on this side of the Atlantic with a lot going on, let it be, at the DOJ, at the FTC, the investigations led by the state attorneys general, or even by Congress.

To sum up, all these actions and activities have allowed us to confirm, in principle, that the tools that we have are sharp enough to tackle the issues and phenomena that we see in a digital world, let it be data, let it be platforms. However, I think we also have to recognize that some of the new challenges need quick and very decisive responses. We need remedies that adapt to the

28. European Commission Press Release IP/17/1223, Antitrust: Commission Accepts Commitments from Amazon on e-books (May 4, 2017), https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1223.

29. European Union Press Release, IP/17/1784, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017).

30. European Union Press Release, IP/18/4581, Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine (July 18, 2018).

31. European Union Press Release, IP/19/1770, Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising (Mar. 20, 2019).

32. European Union Press Release, Antitrust: Commission fines Qualcomm €997 million for abuse of dominant market position (Jan. 1, 2018).

special characteristics of these markets, such as networks effects and data accumulation.

I think we see that these markets are not necessarily self-correcting. Our experience confirms that market concentration and dominance are not competition concerns, as such, as long as markets remain contestable so that we see competition for the market and dominant players play by the rules under pressure to compete and innovate for the ultimate benefit of consumers, so that we see competition within the markets.

And finally—and that I think mirrors very much what has been said before—we have seen, over time, and learned that not all of these phenomena are actually competition issues. Most of us, I hope, will agree that competition policy and law cannot possibly address all the problems arising from digitalization, where certain topics concern very precise and separate public policy objectives. We should use other means, such as regulation, and have well-designed regulation to tackle these concerns. Thank you very much.

HON. JOHN B. NALBANDIAN: Do any of you all have any comments on what you've heard? I guess, I'll start there.

HON. MAKAN DELRAHIM: I'm just sad to see that our confirmation process is going across the Atlantic Ocean to the European Union. It didn't used to work that way in the E.U.

HON. JOHN B. NALBANDIAN: Let me—

DR. RAINER WESSELY: It's not the first time.

HON. MAKAN DELRAHIM: It's not. Yeah.

HON. JOHN B. NALBANDIAN: Let me ask a question. Dr. Wessely talked a little bit about sector inquiry, and it's something that, I guess, I've associated with Europe more than the U.S. Is that something that would be more formal that we could use more formally in the U.S.? Is that something that the Department has looked at?

HON. MAKAN DELRAHIM: Well, this is something I'll speak in personal capacity since—no, as far as our position has been, the antitrust laws are perfectly capable of dealing with the competition issues. As far as sectoral regulation, it's been my belief that it should be, I think, the solution of last resort. I don't know—I agree with Gene on many things, but I don't know if healthcare and its regulation in this country, or frankly even telecom, have been models of competition or ultimately consumer benefit.

I think there's a lot of inefficiencies in a system where you have a regulatory system that could be captured. So, I hope we don't go there. That's not to say that we may not. Ultimately, if we fail to address some of the competition issues that we would identify, that could be an issue that we might have to resort to, but hopefully, it's an issue of last resort.

HON. MAUREEN OHLHAUSEN: I just wanted to mention that the Federal Trade Commission does have powers under its statute to do studies using compulsory process, and it's done it in areas such as Patent Assertion Entities

looking at the efficacy of merger remedies and things like that. And it's typically led to a report on these issues, sometimes with recommendations.

PROF. GENE KIMMELMAN: I hope the Assistant Attorney General is right that we don't need to get to the last resort, but I worry that even with the strongest antitrust enforcement, we have forces at play in the digital marketplace that really deserve congressional attention as to whether you're getting enough competition, you're getting enough innovation, you're getting enough entry in the markets. And I think it's a fair debate whether that last resort has more cost than benefits or benefits than cost. It could be done well, and it could be done poorly. But I think we need to have that debate as the enforcers are doing their jobs thoroughly and quickly to do what the antitrust laws can do.

HON. JOHN B. NALBANDIAN: Do you want to—

DR. RAINER WESSELY: Just to add one word on the sector inquiries: as such, I think they have been an extremely helpful tool in Europe, not only to learn about the sectors and to learn where we have to enforce, but they have also helped us to inform the regulatory debate. For example, when you look at our last e-commerce sector inquiry, the lessons that we took away, for example, that we found a lot of geo-blocking, that companies actually blocked access for customers from other Member States, which has led us to the adoption of geo-blocking regulation to prohibit certain of these practices. So, I think the benefit of the kind of inquiries is twofold: it's valuable for enforcement, but also to make a much better and informed decision on regulation through competition informed regulation.

HON. JOHN B. NALBANDIAN: Great. Let me ask another question—and I know a couple of you mentioned the big data issue, or the data collection issue and what's going on now with these big tech companies. I'd like to just maybe do a little deeper dive on that. Is there any role for antitrust law here with concerns with privacy and data collection, or is it completely something that's going to be outside of that realm?

HON. MAUREEN OHLHAUSEN: I'm sure Makan also has some views on this. Data is an important asset, and there's been lots of antitrust cases brought regarding combinations of specific data sets, particularly in mergers, right? You think about—and sometimes about consumer data, real estate records, credit data, things like that. It's not a strange idea to think that a data set, even about consumer data, might not be an important asset that could have implications for competition.

I think the question there is to apply those traditional, competitive, analytical tools to a competition analysis for data. Because I feel some of it's getting jumped over, which is the idea that one company has a lot of data, and it's useful, and that's a problem in itself. Or it's buying another company that might have a different type of data. Normally, we would think that combining two complimentary assets might well be considered an efficiency in a merger analysis. Is the fact that there might be privacy implications for that, how would

you take that into account in an antitrust analysis, I think, is one of the important questions.

If the companies are competing on privacy, and there's going to be a reduction in privacy, then, I think, that is something that is part of a traditional antitrust analysis. One of the other things that I'm finding is, are people asking the hard question of "Is that data, that the company has, so unique or so uniquely valuable, or is there really an entry barrier, or can you buy that data from other sources, like data brokers, or can you collect it more easily?" I think some of those questions are not getting the careful attention that they deserve.

One other thing that I do want to mention is privacy is a very important value, and it's just because it may not be something you would take into account separate from an antitrust analysis, doesn't mean that it's not important. I think you need to look at the tools for protecting privacy directly. When you look at, for example, the Bundeskartellamt brought a case against Facebook,³³ and said that Facebook's use of data, which the Bundeskartellamt presumably found violated the privacy laws, not that the Bundeskartellamt enforces them.³⁴ It said it was an antitrust competition violation and was imposing a remedy.

And on appeal, the intermediate court struck that down, and said you need to analyze whether there's a competition impact here.³⁵ I think that case—the Bundeskartellamt said it's going to appeal it. But I think that brought to the fore those very important modes of analysis that need to be brought to bear here. What law are you using? Is it the competition law? Is it the antitrust law, and when does antitrust law apply to data?

HON. JOHN B. NALBANDIAN: Big data.

HON. MAKAN DELRAHIM: So, I think Maureen covered—and I think there's not a whole lot of sunlight between us. The one thing I would say is that as we discuss data, we need to think about different types. Data is so multifaceted; we actually do a disservice to the public [inaudible 01:02:07] by just calling it data or big data. We had a big, I think, a constructive debate yesterday in the House Judiciary Committee on this issue, and are you looking at user data, are you looking at usage data, are you looking at what kind of data? Who's collecting it? How are they using it?

And certainly privacy, as I've said before, is a qualitative element of competition, and that's something companies can compete on. So actual competition between the two, assuming consumers want that, is a qualitative element appropriate for antitrust enforcement considerations. But we have to think about, what is happening with this data? What are they doing with it?

33. Case B6-22/16, Bundeskartellamt v. Facebook, 6 February 2019 (Germany).

34. *Germany: Bundeskartellamt Publishes English Version of the Facebook Decision*, CPI (July 11, 2019), <https://www.competitionpolicyinternational.com/germany-decision-of-facebook-proceeding-published/>.

35. Giuseppe Colangelo, *Facebook and the Bundeskartellamt's Winter of Discontent*, CPI (Sept. 23, 2019), <https://www.competitionpolicyinternational.com/facebook-and-bundeskartellamts-winter-of-discontent/>.

How are they collecting it? And there's other laws and, I think, public policies that are implicated, which all lead to—because of the network effects that Gene was talking about—some competitive concerns, but I think this is a healthy debate.

We have multiple privacy regimes in this country for healthcare information, for your financial records, for driver's licenses, for whatever, but we don't have a generalized one. And many of you may or may not know that if you have a cell phone, when you're sleeping, it is collecting data. It's sending about 10 pings every minute to certain companies that are collecting all of that information. It knows when you're asleep. It knows when you're in a car. It knows what floor you're on in a building. You have no idea that your phone is sending that information, and it's collecting all of that information about you. And all of that is being used to sell ads at a higher value to you. It raises really important policy issues for people who care about civil liberties; people who care about the actual bargain that goes on between a consumer and a company with a lot of power.

PROF. GENE KIMMELMAN: If I could just add, I mostly agree with what Maureen and the Assistant Attorney General have said. To put a finer point on Makan's last comment, I think we need to look at how power might be leveraged using that data. It's not just the quantity. I think Maureen's totally right. But, if we're looking at the monetization that is going on now in advertiser-supported services—the ability to get all of the information off of the phones, the ability to get it more quickly, the ability to get more precise combinations of things that define what our traits are for a particular purpose, not just necessarily eavesdrop on us—that could be creepy—but to be able to predict what you may want to buy, or want to use, or where you might want to go on vacation, or something else that's extremely valuable to advertisers, that's where the competitive issue, I think, is going to be most important to look at and understand how the consumer welfare standard can be refined to draw that into the analytics.

HON. MAUREEN OHLHAUSEN: Actually, I wanted to mention one other thing on the privacy and antitrust interface. Some of the things that Gene has mentioned and that Makan has mentioned, there is this understanding that data can be a very important aspect for competition. So, there are some voices saying “Oh, because it's such an important aspect of competition, what we're going to do is try to force companies to share the consumer data with other companies.”

And I think it's important to keep in mind, as we're also seeing these regulatory solutions or regimes being put forward to give consumers greater control over their data, and to restrict sharing of data, and to say, “Once you collect it, you can only use it for that purpose, and you can't share it; you can't use it in these other ways, or you've got to keep your lid on it,” it's creating this tension or there are these cross currents between privacy and antitrust.

And some of the solutions that are being floated in the antitrust world, and some in Europe, in particular, actually, I think, run very much counter to the consumer sovereignty views that are driving a lot of data privacy protections and

things like GDPR. There are some other things: GDPR has a data portability requirement, which could help reduce lock-in and could help foster some competition. It's not all one direction, but there are some important challenges, I think, to be addressed as these two areas come into collision.

DR. RAINER WESSELY: Perhaps quickly to add to that – thank you for highlighting the debate also in Europe. I certainly agree when it comes to mergers, and I think we have seen a lot of mergers where we have made data assessments. We treated data as currency, as assets, as barriers to entry, and as parameters of competition, and I think we found ways to deal elegantly with data questions.

I think what is newer is that we also analyze data in the context of antitrust. We have an ongoing investigation into Amazon, where one of the questions is how to assess Amazon as a platform with a dual function. So, Amazon is not only offering this platform to merchants to sell via the platform but it's also selling its product itself via the platform, and it's inherent in this double function that you have access to very sensitive data from your competitors, from your competitors downstream.

So, we're looking into the question of whether this access and the use of competitive sensitive information could be seen as potential antitrust violation. We have opened the investigation, it's still too early to make any statements here, but it is something that will keep us busy. We are looking in this type of dual role also in other cases. We are looking into that in Apple, looking into the Apple App store selling apps from competitors in competition to its' own Apple apps. We're also looking into that in our Facebook investigation, where we started asking questions about Facebook's marketplace.

So, all these cases are very much data-focused. I fully agree that it is too early, for the moment, to say that we need more intrusive data remedies, but I think we should at least have the debate, and when I look at the report from the special advisors, they have identified the access to accumulated data as one of the biggest problems in terms of market concentration. And I think we should have the debate, and we need the debate about in which abuse cases or in which merger cases we would actually have to have forced data access or shared access, and I would be surprised that this debate would not also come over the Atlantic and be debated here.

One final point on privacy: I was very surprised to learn yesterday, listening to the Congress hearing, that data privacy is seen as one of the drivers for more concentration. This is certainly something that we do not experience, and I think, and I fully agree, that we should keep the privacy debate and the antitrust debate separate.

HON. JOHN B. NALBANDIAN: Great. I do want to—we have some time for questions. So, if anybody's got questions, we've got a microphone over here and one over there. So, if anybody wants to make their way to the microphones, otherwise, I'm going to ask a question, another one. I'm curious about—and I had mentioned in my introductory remarks the idea of killer acquisitions, which

I view as kind of a redux of the old debate about whether monopolists stifle innovation or not. And, obviously, the idea is bigger companies are acquiring smaller companies that are maybe innovative, or have a certain segment of the market, and then just swallowing them up. Is that a unique problem? Is that something that we need to be concerned about? Do we have remedies for it? Should we care? Anyone?

HON. MAKAN DELRAHIM: Well, certainly, I think if you have a company with market power, that the documents show or is intending to take a look at a competitor that would challenge that power, that market power, and are acquiring that just to crush them. It's something that — like the character in *The Irishman*, if some of you have seen it, they are talking about Mr. Johnny Whispers, and said “It would be something we would be a little bit concerned about.”³⁶

HON. JOHN B. NALBANDIAN: What about a company though that is, say, a Google or something that has, let's say, market power in searches, but they acquire a YouTube or something. Maybe not in that a competitor but in just another tech company that's doing something interesting and innovative.

HON. MAKAN DELRAHIM: So, I think the burden would be on us to define the market that we're talking about, and is that going to be a new competitor that is going to challenge that? And without speaking about Google, I'll reference an old case, *Microsoft*,³⁷ just 20 years ago: the D.C. Circuit, what they found was what Microsoft was doing to the browser was trying to preserve its monopoly power in the operating system because of the indirect network effects of applications providers.³⁸ And the browser, for the first time, was going to disintermediate the application programmers from the operating system. So, you can now write to the browser and read it on any device, and that was a big threat to Microsoft. The documents showed their intent was to really crush that because it was going to hurt them. And so, I think, if we found a similar situation, that would be a problem.

PROF. GENE KIMMELMAN: If I could say, I think the Assistant Attorney General has it absolutely right. I think *Microsoft* would be the model, but I also want to say this is one of the hardest areas for enforcers to predict what is about to happen next in a market. Because, Judge, as you mentioned, sometimes it's not a direct competitor; it can be a complement; it can be someone vertical in the market. And what we know about digital markets is that apps can take off. They can get a lot of popularity. They become like platforms, and they could compete with the underlying dominant player.

And that's certainly something we would want to see happen in a vibrant, innovative, competitive market. So, the prediction part is extremely hard. The

36. THE IRISHMAN (Netflix 2019).

37. *United States v. Microsoft Corp.*, 253 F.3d 34, 81 (2001) (“A court's evaluation of an attempted monopolization claim must include a definition of the relevant market.”).

38. *Id.* at 49–50.

documents maybe would show something. And, in antitrust, we also have a theory that if there's a series of events that all show indications of this type of intent to take out players who could compete, that that could be actionable as well. But they're very hard. So I'll then say the most controversial thing that nobody else will agree with, which is that again I believe in other sectors we've had, Congress has granted authority to agencies to also review transactions, again, often with much too vague a standard, sometimes not exactly at all an antitrust focus.

HON. MAKAN DELRAHIM: —Are you saying the public interest test is too vague?

PROF. GENE KIMMELMAN: I do believe it's too vague for what we're talking about here. I think if you're looking at the digital sector, there ought to be some kind of a pro-competition test as to whether companies—even the largest dominant players, not anybody, but the dominant players, can purchase even small players and put the burdens on the merging parties to actually show it is beneficial to the market. It yields more competition and does not have the burden on the government. I think that's a narrow set of situations. Because I'm not sure that antitrust can get at those. Certainly not the smallest transactions that are below reporting requirements without having to go back in later—consummated mergers. I think these are just really hard. But this is—again, it's a policy decision for Congress. Is it important enough to try to crank these markets open to those who are seeking to compete or potential competitors? I think it's worthy of a public debate.

HON. JOHN B. NALBANDIAN: Why don't we see if we've got a question over here?

QUESTIONER 1: Is there any role for antitrust law to play in preserving free speech on big-tech platforms online, such as Twitter?

HON. MAKAN DELRAHIM: Well, it's certainly a nuanced answer, but, if you have competitors, and a consumer would prefer to get a different kind of a speech, you would allow for that. If there's one company that controls it, then they call all the shots of the certain type of viewpoint. I could see that being an antitrust, not so much a violation based on the ideology proposed, but the fact that it's a qualitative element for us to consider is an important element.

HON. JOHN B. NALBANDIAN: Anyone else? Free speech. No. We've got one over here.

JOHN SHU: Thank you, Judge. And thanks to all the panelists. I'm John Shu from Orange County. Maureen, if you could, what would you like to see the Ninth Circuit do in the *Qualcomm* case,³⁹ and do you think it'll actually happen?

39. *FTC v. Qualcomm, Inc.*, 935 F.3d 752 (9th Cir. filed Aug. 23, 2019).

HON. MAUREEN OHLHAUSEN: Well, I don't want to say too much about it other than to say what I said in my dissent⁴⁰ when the FTC brought the action. I didn't think that there was a strong theory there. I'm concerned about the impact on property rights and respect for property rights, and particularly internationally, and how that will be interpreted. I was not displeased to see the panel, who granted the stay, site my dissenting opinion, and I look forward to seeing what the Ninth Circuit decides.

JOHN SHU: Thank you.

HON. JOHN B. NALBANDIAN: Over here.

QUESTIONER 3: Yeah. So, in the last couple of years, I think the Antitrust Division has had some interest in clarifying some of the contours of the state action immunity doctrine and submitted some statements of interest in cases in various courts. I was just wondering if any of you would be willing to speak to the status of those efforts.

HON. MAKAN DELRAHIM: Well, we've had, as you may know or might be referencing, we initiated a new amicus program to file in the various courts' private cases partly because the interpretation and development of the antitrust laws will affect our enforcement ability, and we would like to express our viewpoints without taking sides between the private parties. One of the areas we've looked has been when parties assert overly broad interpretation of various immunities, including the state action immunity.

And we have filed a number of amicus briefs and statements of interest in lower courts on those issues, including a no-poach agreement most recently between Duke and North Carolina,⁴¹ where the two parties had agreed not to hire each other's radiologists. We filed an amicus brief⁴² in that case, not only arguing for a certain standard but arguing against some assertions of state action immunity. And, of course, the FTC has actually challenged a number of cases, especially during Maureen's tenure there: *North Carolina Dental*⁴³ and few other matters. We've recently filed in other cases.

HON. JOHN B. NALBANDIAN: Great. I think this gentleman was next.

KYLE: Hi. I'm Kyle. I'm a law student from up north. And I have a general question for whoever would like to answer. At a general level, how do increasingly large multi-nationals and increasingly different antitrust regimes—we've heard some examples today—what problems or tensions do they principally cause, and are there any solutions that are on the horizon?

40. Maureen K. Ohlhausen, *Dissenting Statement of Commissioner Maureen K. Ohlhausen In the Matter of Qualcomm, Inc.* (Jan. 17, 2017), https://www.ftc.gov/system/files/documents/public_statements/1055143/170117qualcomm_mko_dissenting_statement.pdf.

41. *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2016 U.S. Dist. LEXIS 31337 (M.D.N.C. Feb. 12, 2016).

42. Statement of Interest of the United States of America at 1, *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2016 U.S. Dist. LEXIS 31337 (M.D.N.C. Feb. 12, 2016).

43. *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494 (2015).

HON. MAKAN DELRAHIM: I'll let Rainer explain the effort that we jointly did with the European Commission, and Canada, and a number of others, but, for the first time in history, I'm proud to say that we actually have a multilateral agreement on some aspects of antitrust. And this was on due process. It was an initiative about a year and a half ago. We worked closely with our friends in European Commission, Canada, Australia, Japan, multiple different types of legal systems to, at a minimum, have a lot of—in the process of enforcement to have the same, I think, recognized due process principles, like attorney-client privilege, like the right to counsel and a number of others, about 12, I think, principles in those agreement, which now have 72 agencies signed on to that. Now, I think the discussions continue. We all come from different regimes and different goals for some of the competition, but I think more and more we're converging a lot more on the substantive principles but procedurally as well.

KYLE: Thank you.

DR. RAINER WESSELY: Just to add, perhaps, the initiative was indeed very welcomed. We had to fine tune the framework, so we inserted it in the international competition network. I think, in the end, to the satisfaction of everybody, we were proud that we signed it as one of the first.

HON. MAKAN DELRAHIM: Thank you.

DR. RAINER WESSELY: And perhaps, to add, I think taking it from antitrust debate to merger enforcement, we already have a very good track record in cooperating extremely closely with the DOJ, with the FTC, not only on process and procedure, aligning our merger reviews, but in particular, also, when it comes to substance. We had really important decisions. Let's take *Bayer-Monsanto*,⁴⁴ for example, where we followed along and were able to obtain very good remedies, which worked on both sides of the Atlantic, so I think there is a lot more and fruitful common basis than sometimes perceived outside.

HON. MAKAN DELRAHIM: But it takes a lot of work, and it doesn't mean our work is done. We have to be diligent. We have 140 antitrust agencies. I joke sometimes: that's one of our greatest exports out of the United States. Any one agency can weaponize by misapplying the antitrust rules for whatever, and there's no international regime to retaliate against that. So, it requires a lot of discussion, a lot of engagement, and a lot of understanding with well-meaning people, which we have, and I think that's really important.

HON. JOHN B. NALBANDIAN: I think over here.

MAX FILLION: Hi. I'm Max Fillion with MLex. There's been some discussion about forced data access as a remedy for certain types of conduct, and Mr. Delrahim, I was wondering if this is something that the DOJ is considering and what types of conduct might spur a remedy like that?

HON. MAKAN DELRAHIM: Well, we'll have to see what types of conduct could do that. I think, as a general matter, when companies are gathering that type of information, the data, and have invested in it, we certainly don't want to

44. Case M.8084—Bayer/Monsanto, Comm'n Decision, 2018 O.J. (C 459).

have forced sharing. I think the Supreme Court has warned against those conditions under which you can do that, and it's the outlier within Section II, but it doesn't mean that it's not an appropriate remedy to use, certainly, in a merger context, where you have market power and review data as an asset and an input. If there are companies that have a certain kind of data, we would ask for structural relief and a divestiture of certain collection of data.

HON. JOHN B. NALBANDIAN: Anyone else? No.

PROF. GENE KIMMELMAN: I like that.

HON. JOHN B. NALBANDIAN: How about over here?

DEENA CALIUM: Thanks very much. I'm Deena Calium. I'm asking for myself, and I'm not a member of the press. Earlier this summer, we heard that the division announced a change to how it's going to consider compliance programs. Since we're talking about the future of antitrust and convergence, I'd be happy to hear from any panelists who care to comment on this topic, whether you think indeed the future of antitrust should be placing more emphasis in considering compliance programs and, perhaps, whether this is an area where we can see international convergence.

HON. MAKAN DELRAHIM: I think you mentioned the DOJ did that July 11th. We're very proud of that policy change. I think it's for the better. I don't know—Rainer—I don't know which other regimes factor that in. So not every 140 agency has a criminal element to their enforcement regime, and so it might be limited to who does that. But it is an important part to try to motivate as many companies to not only ensure that they're complying with the laws but put the appropriate mechanisms in to trigger when somebody may transgress.

DR. RAINER WESSELY: Well, I think it will not surprise you that Commissioner Vestager keeps repeating that she welcomes any effort by companies to be compliant.⁴⁵ But I think the line that we had in the past that we do not want to give benefit to compliance programs, if they are not working, is still the same. So, if we see that there has been an antitrust violation, or cartel, then we still think that there are good reasons not—let's say, for example—to give a fines reduction because there was a compliance program in place, which in the end has turned out not to work, so that is still our line.

HON. JOHN B. NALBANDIAN: Over here.

CRAIG RICHARDSON: Yeah. My name is Craig Richardson, and, General, I had the great honor of studying under one of your predecessors, antitrust Bill Baxter, who I think is part of the Baxter revolution, championed the concept that well understood microeconomic principles to guide—actually, more to the point: restrain—antitrust enforcement. It reflected a view that markets, free people in free markets, do a better job of allocating resources and promoting consumer welfare than central planners.

45. European Commission Press Release IP/19/1828, Antitrust: Commission Fines Nike €12.5 Million for Restricting Cross-Border Sales of Merchandising Products (March 25, 2019).

The Wall Street Journal, recently, in the last six months had a very long article about the breakdown of the bipartisan consensus that emerged from Bill Baxter about those well understood microeconomic principles and suggested there's a shift to political objection to bigness, really part of perhaps a broader critique that's going on right now about capitalism.⁴⁶ Really, this is a question for all the panelists, to what extent do you agree that shift is taking place before our eyes, and to what extent does that shift affect the discussion about data and high tech that you've just engaged in?

PROF. GENE KIMMELMAN: Well, I think that it is definitely a factor in the political environment and the policy environment around antitrust. I don't see any sign that antitrust enforcers are deviating from the general approach to the principles of the standards. But I think those issues of bigness are really oversimplified descriptions of experiences people are feeling in the digital marketplace, with a few companies tending to dominate. And we need to take legitimate concerns there and put them into the right policy discussion, I don't think it leads to any one necessary solution, but I don't believe it is in antitrust.

Antitrust should be sensitive to that to the extent it's about market power and dominance, but it doesn't mean that the public sector shouldn't be worried about whether a few companies are dominating across societies. So, I think our problem here is that too much emphasis is being put on antitrust, the moment someone says companies are big, rather than thinking about where in government do we discuss these issues where we have appropriate solutions.

HON. JOHN B. NALBANDIAN: Do you think that that—we're seeing a lot of people complaining about bigness, and is that why they're straight to antitrust as opposed to thinking about other solutions or regulatory formulations that it just seems like antitrust should be the solution because of the old trust busting, whatever it would be—the Sherman Act⁴⁷ understanding?

PROF. GENE KIMMELMAN: I certainly think that's part of it, but let me bring in one other element too, and that is that Congress today is not the most functional it's ever been in dealing with public policy discussions—and certainly in my experience of more than 35 years watching Congress. And, in the past, one would have seen committees that have jurisdiction over large companies have a lot more hearings to discuss “Is there something wrong in the marketplace? Has something gone awry? Do we need to worry about this?” And you would have a lot more discussion about a broad set of policy tools. I think with a vacuum there of less of that kind of conversation in Congress, people assume that because it's about size, it must be antitrust, and I think that's really misplaced.

46. John Bateman, *The Antitrust Threat to National Security*, THE WALL STREET JOURNAL, Oct. 23, 2019.

47. The Sherman Antitrust Act, 15 U.S.C. §§ 1–38 (1890).

HON. JOHN B. NALBANDIAN: Do you think that the Sherman Act⁴⁸ and the Clayton Act⁴⁹ are not what we would think of as modern legislation in the sense of being very hyper-technical detailed whatnot? Do we risk something if we go back and we ask Congress to get into the minutiae of this, and we go to the other end, or are we better off with the flexible, more open-ended statute?

PROF. GENE KIMMELMAN: Old isn't necessarily bad.

[Laughter.]

And, I think the flexibility has served us well. I think actually that the more important point related to that is: is the current jurisprudence interpreting those statutes in sync with how markets are actually functioning?

HON. JOHN B. NALBANDIAN: Blame the judges.

PROF. GENE KIMMELMAN: I didn't say that.

[Laughter.]

You could interpret it that way. Let's just say, I think, it would be appropriate for Congress to look back and see whether the laws have been applied effectively to get the biggest bang for your buck within the antitrust framework, not going outside of it. I think the issues outside of it ought to be dealt with, along with other policy tools.

HON. MAUREEN OHLHAUSEN: I was just going to mention also that I think—to Gene's point, as well—if there are competitive issues occurring, real competitive problems, that antitrust is supposed to address what the agencies haven't been able to address, because their tools haven't been finely tuned enough, I think that's an important area on which to focus. For example, going back a few years, the FTC and DOJ lost eight hospital merger challenges in a row, could not get a court to believe that the merger of these hospital systems was going to cause a competitive issue. There was good empirical work done that looked at a consummated merger, and said "Yes, these anticompetitive outcomes did occur."

And then the record, since then, has been much, much more success in challenging hospital mergers. I think that's an area where you can say, "Look, if there is something that we're missing," if we can go far enough back in acquiring nascent competitors to know back then that that [sic] was going to be the one that was going to upend the market dominant player who was purchasing them, if our tools can get to that point, then that would, I think, be an appropriate thing for antitrust to focus on because that's what antitrust is supposed to be doing. Its tools can improve over time and should improve.

HON. JOHN B. NALBANDIAN: Great. Any other comments? No. I don't think we have any other questions, so join me in thanking our panel.

48. *Id.*

49. The Clayton Antitrust Act, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (1914).

