FTC Hearing #1: Competition and Consumer Protection in the 21st Century
September 13, 2018
Segment 1
Transcript

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BILL TREANOR: Well, good morning, everyone. I'm Bill Treanor, the dean of Georgetown Law. And it's my honor and my pleasure to introduce this first set of FTC hearings on competition and consumer protection of the 21st century. And we at Georgetown Law are pleased to be host to this event.

And I think it's very fitting that we're here. Georgetown Law's connection to antitrust and consumer protection is longstanding and very deep. Dean Robert Pitofsky served as Bureau director, commissioner-1 (i)-2 (one)4 wnd 21st2 (m)-nd air of the FTC over his long, distinguished care

Numerous agency leaders have been graduates of Georgetown Law, most recently, our current FTC chair Joe Simons, who we'll be hearing from shortly, also commissioner nominee Christine Wilson, former DOJ assistant attorney general Christine Varnum, so Monique Fortenberry is deputy executive director of the FTC. We're very proud of having educated so many of the leaders of the FTC.

And among our current faculty, David Vladeck, who's at the end of our panel today, was director of the Bureau of Consumer Protection. Howard Shelanski was director of the Bureau of Economics. Professor Steve Salant was both a senior official in the FTC's Bureau of Economics and a mentor to Chairman Simon and Christine Wilson.

Actually Chair and I were just talking about how his time at Georgetown Law had really prepared him in every way for the career that you had. So we're just very proud. And it's appropriate- and it's particularly appropriate, I think, because, in some way, these hearings are intended to follow the path that was set by the FTC's global competition and innovation hearings,

most prominent antitrust conferences outside of the ABA spring meeting, will take place in this room in about two weeks.

So thank you all for coming. I want to congratulate the FTC for its initiative and hard work in

We intend to continue that same tradition with these hearings. We are very fortunate to have a large group of highly respected participants representing a diverse range of views including academics, practitioners, enforcement officials, and representatives from public interest groups.

And I am proud that we are opening the hearings at Georgetown University Law Center where Chairman Pitofsky spent much of his career when he was not otherwise at the FTC and where I received my initial antitrust education, to a significant extent, from Professor Pitofsky.

So today I want to talk about why the commission is holding these hearings. Almost 30 years ago, I came to the FTC the first of my three times at the tail end of the commission's adoption of a significantly revised approach to antitrust enforcement. This change, which began in 1981 and was implemented, to a large extent, by Tim Muris, who is two or three people to my left here this change, which began in 1981, reflected new learning that had begun to influence Supreme Court antitrust doctrine.

It was primarily driven by the scholarship of academics, the most prominent, Phil Areeda, Don Turner, Frank Easterbrook, Richard Posner, and Robert Bork, were associated with either Harvard University or the University of Chicago. They applied microeconomic principles to antitrust questions and paid attention to empirical work, which led them to conclude that a lot of the pre1970s antitrust case law was inconsistent with rational, procompetitive, an economically beneficial behavior.

By the time I left the agency for the first time in 1989, application of microeconomic principles and economic models was routine and encouraged. Notwithstanding some initial criticism, the Clinton administration's antitrust leadership, including Bob Pitofsky, Anne Binghaman, and Joel Klein, largely adhered to these same principles.

So when I returned to the commission as director of the Bureau of Competition in 2001, there was substantial support for, and acceptance of, the antitrust reforms that had been initiated 20 or so years prior. In other words, there was a general consensus on how we ought to think about antitrust enforcement and policy.

But now, at the beginning of my third stint at the commission, things have shifted. The broad antitrust consensus that has existed within the antitrust community in a relatively stable form for about 25 years is being challenged in at least two ways.

of either agency, but certainly is one who has been considered the head either, maybe even both agencies' head in the past.

Jan is a partner at Hogan Lovells. And finally, but by no means least, professor Vladeck who served as director of the Bureau of Consumer Protection just a few short years ago and, of course, is a professor here at Georgetown. So with that, I'm going to turn it over to Jason and just remind everybody, if they questions, raise your hand, pass your questions over to some of my colleagues who are collecting question cards.

JASON FURMAN: Thank you so much. And I thought Chairman Simon's remarks were perfect in three respects. One is you want somebody to be open minded coming to this question because thinking really is evolving very rapidly. Second, he had a really excellent capsule history of antitrust and thinking. And third, I think he made it clear that he was deferring completely to economists in how he was proceeding on this matter.

I'm a little bit of an interloper on this panel. I think I'm one of the only economists. And anyone that knows any economics would know I'm even more of an interloper than that because my main focus has been on macroeconomic issues, labor market issues, inequality, not on industrial organization and antitrust narrowly defined.

When I was chairing the Council of Economic Advisors, I came to this issue partly out of what I'll now admit was paranoia. There was a crime that had been committed and we were looking for suspects. The crime was low productivity growth and high inequality, something clearly going wrong in the economy, productivity growth being about a percentage point lower over the last decade than it had been previously.

At the same time, high levels of inequality continued to move higher. And those were the two factors that were underlying the slowdown of the growth in income for the typical families. That, I think, is the central challenge for economic policy.

So what can you do to raise productivity growth to reduce inequality? And we're looking around at a lot of different suspects. And just to be clear, there is more than one cause of this set of phenomenon. But one thing we alighted on was antitrust. And part of what motivated it was a few sub-facts under those two big ones. And let me just list a few of them.

One, a number of economists had documented that throughout the economy there was less churn and dynamism. Fewer businesses being created, fewer older businesses, larger businesses increasingly dominating the economy, fewer people moving from job to job, so a little bit more of a sclerosis than we'd like to think is the case for the US economy. There was, on terms of inequality -- I'm sorry -- reduction in investment, a trend down in investment. Partly that's a shift to intangibles, but not completely, and trying to understand that.

On the inequality side, there was a fall in the reduction -- I'm sorry -- a fall in the share of income going to labor, and finally, an increase in markups and a rise in the rate of return to capital relative to the safe rate of return and an increasingly skewed rate of return to capital with some very successful companies having persistently very high returns, much higher relative to the

median than they had before. So this was a fact pattern about aggregate data that made us look beneath the aggregates in terms of what was going on at the firm and the industry level.

Now one way to look at what's going on in the firm the industry level is to use aggregate industrial data and to divide up the economy into 10 industries, into 800 industries, and look within each one of those at what's going on in concentration. A number of people did that [INAUDIBLE] et al, Autor, et al. We did it at the Council of Economic Advisors, and you saw it in the press as well in places like The Economist.

Now we generally find that in about 75% of industries defined in this way concentration increased. Now as the antitrust community was quick to point out, there's some dispute as to whether it was 35 years ago people realized this was an idiotic procedure or 50 years ago that people realize this was an idiotic procedure but thaueed. N002 Tw 0 -1.1ud. gp1 (he)4 (E)-9 (c)4 (on4

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United Airlines, and Delta were three different companies when you realized they're all owned by the same companies. And you see that in a variety of data, including, remarkably, at a route by route level in terms of the pricing. So there's a wealth of micro-

competition enforcers have been more vigorous. They have more players in those industries than we do.

So I think the price issue matters. The price issue may be a lot smaller than some of the others I talked about. One is innovation, what this does to the incentives for business investment for R&D, for productivity growth. There's a longstanding debate between a review of Arrow and Schumpeter in economics about the impact of competition on innovation. But there's a number of ways in which it could be deleterious.

And then finally, inequality. And there's been, at the same time that there has been this increased thinking about these types of macro issues in competition, there also has been in labor markets as well. And that's grounded in the observation that every employment relationship has a bit of monopoly power and a bit of rent that's being divided between the two, because there's a cost of finding a new job and shifting a job.

And some market power matters a lot. If you have one hospital in town, it's a lot harder for a nurse to threaten to move to another hospital to get a pay raise. If you have two hospitals in town, it's much easier for the two of them to collude tacitly or even illegally to hold down the pay of nurses. Even in the fast food industry, there's evidence that anti-poaching and non-competes agreements have a deleterious impact on workers' bargaining power, help to hold down wages, and have been part of the reason that the labor share has been reduced.

So in summary, I think this evidence is coming from a variety of different places and a variety of different perspectives. If you're trying to ask a question about the economy as a whole, you're not going to have one definitive data source or one definitive study that's going to answer that question. You have to take a collage of views.

And I think that collage involves looking at the pattern of what we've seen in the data that I've talked about in terms of falling labor share, falling investment, rising markups, looking at the industry level and seeing whether those phenomenon are industry by industry tied to concentration, and they are; looking in a deeper, more careful way where we can, and we can. We've done that in a lot of different industries.

And then no single story comes out of this, but on balance and on average this does seem to add up to a reduction in competition, a reduction in dynamism, and one that I think that we need to be concerned about and think about what ways we need to update our policies to address if we want to have more investment, more dynamism, more productivity growth, less inequality, in

peacemaking of most concern lacks offsetting efficiencies, what antitrust lawyers call naked horizontal agreements. The FTC has pioneered development of the law here, especially am professions, generic drugs, and the process to analyze collaboration.

In rare instances, a single firm with market power can exclude competition to harm consumers. The 2001 Microsoft case probably the most famous recent example. Those kind of cases are important to any antitrust program. A particularly fruitful category of troubling single firm conduct involves misleading the government. Misuse of courts and government agencies is effective way, this rent seeking, to stifle competition.

Such strategies are not limited to single firms, of course. They're the cheap exclusion, which is a felicitous phrase that the people at the FTC have invented. Two antitrust immunities help protect this rent seeking, Noerr and state action. Some courts have broadly interpreted these immunities.

And for decades, 40 years in fact, the FTC has sought to circumscribe both with three Supreme Court victories in state action. On Noerr, the agency saved consumers billions of dollars at the gas pump in [INAUDIBLE] and provided large benefits for consumers for pharmaceutical consumers in Bristol Myers Squibb among many other successes. The vision for consumer protection is identical to that in antitrust.

When competition alone cannot defer dishonesty, private legal rights help. There's government

The first is the return of the paternalism of the '70s. The FTC of that era sought to become the second most powerful legislature. In one 15 month stretch, the FTC issued over a rule a month, seeking to transform entire industries along the vision of the then very young people in charge of the Bureau of Consumer Protection. As proposed, most of these rules were market supplanting with adverse consequences.

There was an exchange in the 1972 National Commission of Consumer Finance which is illustrative. And I'm not making this up. There was a debate about whether poor and middle class people should borrow money to buy color televisions. With some people saying they shouldn't do it, because they didn't need such luxuries, and other people defending their right to buy on credit color televisions. That, unfortunately, was illustrative.

This paternalism has returned with a vengeance in the CFPB. And by this I mean the Obama CFPB. Whatever one thinks about what is going on, the powers of the CFPB are there. They haven't been touched. When President Warren comes in a few years, if she or someone like her comes in, the incredible power of the CFPB-pinbl sh B-piyn1Tr sn-1 (R)i4 (ha)4 (n)-10 (ge)4 (t)-2 (hi)-

In the health care market, on the other hand, Fiona Scott Morton has written a very good paper where there are systematic mistakes. Now I believe that these markets are different, but I would hope these hearings and the FTC pay attention to those empirical issues.

The second P, populism, is reflected in calls, and Chairman Simon mentioned this, on the left and the right to use antitrust to dismantle the highly successful companies, or at least the so called tech companies, or at least regulate them as public utilities. These are misguided calls.

For one thing, what a tech or digital company is is hard to know. We have new technologies but they're being diffused through the economy. Moreover, these companies have different positions in the market. Some have big market shares. Some don't. Equally important, we've been down the populist road before with disastrous consequences. John Nectarline and I discussed some of this history in a new paper that John will discuss in detail later and let me talk about the highlights.

Before Walmart and Amazon, another company use the same kind of tools to become the largest retailer in the United States for over 40 years. This company was so important -- the company was the Great Atlantic and Pacific Tea company -- that the young John Updike used the company as the title and the setting for his iconic short story which every one of my generation had to read in tea

And the concentration levels were levels that no one today would regard as significant. The prominent example was four firms with 50% share.

This theory was sometimes married to a populous animus toward bigness, which led the commission to seek vertical disintegration of the then very unconcentrated oil industry. And through 1980, the FTC was pursuing deconcentration long after the majority of the economics profession had abandoned extreme versions of the market concentration doctrine. Well, let me conclude.

With the creation of the CFPB, the FTC has another federal agency performing each mission. The original CFPB model, mirroring the 1970s FTC, contrasts to the modern FTC. Perhaps the regulatory world runs in cycles, but one hopes that the FTC will not be in a future Groundhog Day where it awakes each morning to 1975.

In contrast, consider the current in antitrust, I'm sorry-- consider the impact of the current reformers who wish to return antitrust to focus less on consumers and more on protecting less efficient businesses. Imagine how the companies they would now punish would have fared in their desired legal environment. Once the newcomers had grown beyond a certain size, perhaps by the late 1990s, their lawyers would have counseled them to be cautious about expansion, innovation, and price cutting lest they face antitrust liability for disadvantaging their less efficient rivals.

Luckily, because this advice would have badly misstated antitrust law, lawyers did not give it. Let us pray for the sake of American consumers that such advice never becomes sound. Rather than condemn innovation, whether in the 1930s or today, we should applaud.

Companies like the so-called tech giants have been built from the ground up in the United States rather than in Europe or China largely because the US legal environment is stable, predictable and uniquely hospitable to vigorous paradigm shattering competition by all businesses. That legal environment is a hallmark of American exceptionalism. Long may it continue. Thank you.

[APPLAUSE]

BILAL SAYYED: OK. Thank you, Tim. And we'll turn to Jim Rill now.

JAMES RILL Thank you, Bilal. It's indeed an honor to be here in commemoration of the work that was done by Bob Pitofsky and leadership of the commission in 1995. And a particular honor to me. I go back to relationships with Bob to 1969 when he was basically the author of the first Kirkpatrick report on the Federal Trade Commission.

And we worked together in the ABA. And in 1992 he was a very important and direct consultant on the 1992 horizontal merger guidelines. So it's indeed an honor to be a participant in these programs.

I want to talk today about the developments in the antitrust world that's created by the globalization of antitrust, which I think is one of the most significant developments in the competition world in the last decade since the first Pitofsky hearings.

I think the most important thing we can see is it's been a cascade, a tsunami, of antitrust agencies across the world. In 1995 there was a handful of agencies that had antitrust. And some agencies that had an antitrust law -- Japan, a gift of 1946 -- really didn't enforce it.

Now we see something like 130 or more agencies with an antitrust regime. And those agencies that have had an antitrust regime are increasingly engaged in enforcement, often with very controversial results.

So what we need to think about, and what I think needs to be thought about at the Commission and the other antitrust agencies, is what is the response of the antitrust agencies to this global tsunami of antitrust agencies around the world?

And I don't want to suggest that that's a bad thing. I think it's a good thing -- properly-founded, properly-principled, properly-directed. Because I think a sound competition policy is essential to the operation of a market economy. So what have the agencies done, and what is the challenge facing them in the future?

The agencies were responsible -- particularly, the FTC and the Department of Justice --

Also, the ABA has presented -- soon to present -- a paper on the use of public policy issues in antitrust globally. That is, the extent to which non-antitrust factors, flying under the flag of antitrust, tend to adulterate -- that's my pejorative, not theirs, I expect. Tend to adulterate the efficacy and substantial foundation for antitrust enforcement.

The ICC -- International Chamber of Commerce -- has issued a report in this area. That is of significance, and extols, again, the need for global consensus of fair procedures.

So the private sector is active. Is it enough active? No. But increasingly active in this particular area.

So what are the challenges going forward? There are limits to the efficacy of soft guidance, of soft convergence. It's necessary, essential, but is it enough? Is it sufficient?

I answer to that is, you need to go beyond it. There is no structured mechanism right now for establishing, if you will, [INAUDIBLE] for evaluating the extent to which the guidance of the various international organizations and national organizations that I referenced are being actually implemented and followed in the nations around the world. Including sometimes, I might say, the United States.

We see actions in China involving a merger by Coca-Cola, which has questionable economic foundation. The denial of a transaction involving an XP, which had been approved by every other agency in the world on grounds that are difficult to discern any kind of link to sound antitrust.

We see in Korea an expanded reach for extraterritoriality in an area where there may be no effect whatever on consumer welfare in Korea. We see in Taiwan enforcement actions with no printed, published, and maybe not even any practiced, sound standards for due process.

But that may be easier said than done with respect to passing federal legislation, particularly in an election year. So in the near term, and in the absence of a uniform federal standard, what type of guidance and policy leadership can the agency provide that can be helpful to the national and global discussion on the costs and the benefits of more prescriptively regulating business practices?

And the third thing from the comments underscored a point that this agency has always faced. Where to focus its enforcement efforts? What shall be the priorities given finite and limited resources? And with lots of shiny objects and headlines to choose from, the agency has most advanced its consumer protection mission when it is focused on business practices causing real harm.

Financial and physical harm have rightly had the agency's attention. But importantly, given the role of technology in our lives, the agency, under the acting Chairman Ohlhausen, has also explored how informational injury can cause real harm. And how the agency can measure such harm and seek to deter and to remedy unlawful business practices with such results.

Doing more with less also might involve all aspects of the Commission's in-house expertise with more visible collaboration with the Bureaus of Competition and Economics. Indeed, the unfairness prong of Section 5 requires that Competition be taken into account. And more transparency on this involvement in the competition analysis and consumer protection cases would provide helpful guidance to businesses, which in turn will help consumers.

The last theme that was raised that I'll touch on by the comments, and which played an important role in the Pitofsky report as well, is how important the FTC supporting and incentivizing company participation in meaningful self-regulatory programs is. They're not a substitute for government oversight. But they can enhance the agency's consumer protection mission with a lot less cost.

History has shown that self-regulation is more nimble and able to move more quickly to address innovation and technology changes. And when the FTC promotes the use of self-regulation and incentivizes companies to embrace such standards, industry responds time and time again. And consumers benefit directly from this carrot, rather than stick, approach, incentivizing rather than purely focusing on punitive deterrence.

So I will keep my comments shorter. Leads me to the concluding remarks that with the rapid changes that were happening and all the discussion around technology, we're largely discussing many of the same types of issues that were discussed in some form at the last set of hearings in 1995.

And as we hear from many voices during these hearings, I can say from my personal experience working with start-ups, working with large companies, new entrants, those that have been around for decades, most companies are motivated to do the right thing while also remaining competitively viable.

Straightforward laws that do not pick winners or losers, clear regulatory guidance, and vigorous support of self-regulation enables companies to achieve those goals without unnecessarily fencing in opportunity or innovation. And for the fraudsters and competitors that are bent on causing consumer harm, the FTC has its existing tools to address that. Thank you.

[APPLAUSE]

BILAL SAYYED: OK, well, Alysa thank you. And thank you for getting us almost back on schedule. As my friends know, being off schedule just a few minutes would be a major achievement in my life.

[LAUGHTER]

So anyway, we're going to take about a 10-minute break. So let's come back here just slightly after 10:30. And we'll start up again.

BILAL SAYYED: OK, thank you. I just want to remind everybody that we do have some of my FTC colleagues collecting question cards. So if you have a question for the panel members, just write it on the card. Raise your hand. We'll pick it up. And we will try to get to it.

But before we turn to both a panel Q&A and audience Q&A, we're going to ask, separately, both Jan McDavid and David Vladeck to comment on what they've heard and honestly comment on whatever they'd like to comment on. But I'm sure it'll be germane. So I'll first turn it over to Jan. And then I'll turn it over to David when Jan is complete.

JANET MCDAVID: Thank you, Bilal. I want to applaud the Federal Trade Commission for again using its statutory authority to consider whether changes in our economy require adjustments in the enforcement priorities. Such hearings were part of the FTC's original statutory mandate and have been used very effectively throughout its history, most notably in the Pitofsky hearings that were discussed extensively this morning.

I'm honored to participate again, as I did in Pitofsky hearings, and I'm returning to my antitrust roots here at Georgetown. Because my antitrust career started my final semester in law school at Georgetown when I studied antitrust law with Bob Pitofsky.

Hearings provide the FTC an opportunity to step back and consider broad philosophical issues without the pressure of facts and time deadlines arising out of particular proceedings. That's a real luxury that most agencies don't have, and the FTC does. That kind of introspection allows the FTC to identify opportunities for improvement.

It also offers an opportunity for democratic participation, which is one of the objectives recently outlined by Commissioner Chopra in his paper last week. I speak here as a practitioner who advises clients every day on antitrust issues. And I share the FTC's view that competition produces the best, most innovative, lowest-priced products and services for consumers.

Most antitrust enforcement actually takes place in conference rooms in law firms and

and sound economic analysis, we would be applying amorphous concept of bigness and fairness. Some of which turned traditional principles on their heads, such as lower prices that don't have the underpinnings of a predatory pricing analysis. Or penalizing large, successful technology companies simply for being successful, because they created new products and services that consumers genuinely desired.

This could return us to the era of Von's Grocery, where the dissent lamented quote, "The court grounds its conclusion solely on the impressionistic assertion that the Los Angeles retail food industry is becoming concentrated, because the number of single store concerns has declined." This led Justice Stewart to complain that the sole consistency I can find in the antitrust laws is that the government always wins.

But even that wouldn't be true in a populist system, because ultimately we don't have an

So I generally agree with Alysa. And I'm going to try not to repeat the points that she made.

It faces enforcement challenges. Yesterday there was a New York Times article about the New Mexico attorney general bringing a COPPA case and criticizing the FTC for not beating his office to the punch. Well, COPPA enforcement has been a thorn on the side of the agency since apps were developed.

The app developer market is highly diffuse. There are thousands of people making apps. Some in their parents' basement. And it's very hard, unless you're going to carpet bomb the industry, to have an enforcement regime that really works well. And now the agency has brought many, many COPPA cases. And has done so against high

collection. And we need to figure out how to protect consumers in this area of ubiquitous data collection. We don't have laws that really deal with this.

The aggregation of data is a real enticement to data thieves. Paul Ohm, who worked at the FTC

In fact, even some of the assumptions and arguments that people like Bork and Posner and others made, economists in IO have long known that they were quite fragile and based on very specific assumptions that weren't very robust. That the world was much more complicated, as you said, John. That people do take into account a broader set of considerations. But to some degree, economists need to do a better job of understanding this broader set of considerations, too.

So I think this is an evolving area as the chairman said at the very beginning of the remarks. I think that continued evolution is important. I think that if some of the macro evidence, data, and motivations that I said lends more impetus to that, I think that would be a welcome development and an important one.

But I still would then use that to motivate using micro, market-by-market techniques to think about cases, not some of those types of macro data. But I don't think that's irrelevant in motivating us to push further and think harder about in ways that, frankly, enforcement has gotten more lax. And that has had deleterious consequences for the economy.

BILAL SAYYED: Tim, it looks like you want to react.

TIMOTHY MURIS: Sure. Let me address the Chicago point about the sacred texts. Bruce Kobayashi and I published a paper subtitled, "Time to Let Go of the 20th Century."

JASON FURMAN: When did you publish it?

TIMOTHY MURIS: 2014. I think Bilal will send it to you. The way to think about Chicago is the way to think about the American revolutionaries . There was this revolutionary band of brothers. They were opposed to the old order.

And the old order was overthrown. But once it came to running a government, they split, like Adams and Jefferson. If you take a list, and we put this in the paper. Baxter, Bork, Bowman, Posner, and Stigler.

They either hadn't thought of, or they disagreed radically, on how to approach antitrust policy. Mergers, for example, those guys were all over the lot. From the most aggressive -- Posner. To the most restrictive -- Bork.

And the point was they just hadn't thought about it. And when they did, they disagreed. And so this idea, which is ripe in this populist literature, that there is this economic cult from the University of Chicago -- which dominates antitrust thinking -- is simply inaccurate.

BILAL SAYYED: Let's say any other reactions? Or anybody who would like to put questions?

JANET MCDAVID: I agree with Tim, but I also agree, Jason, that this has to be evolutionary. And we don't regard them as the tablets that came down with Moses. Economic theory has evolved.

We've had three iterations of the merger guidelines. And the ones we have in place now actually reflect how the agencies have been analyzing mergers for quite a long time. And they introduced new concepts such as unilateral effects analysis that weren't in the original versions. So we do evolve.

But I am very concerned about the inability to discern the consistent thread that I found when I was a young lawyer. And I'm very worried about how clients are going to have to handle this stuff.

And some of that's also, frankly, dependent on the courts. When you're bringing hospital cases and you're still losing hospital cases -- even when you have unanimous Commission voting for them. That means there's a set of thinking, some of which was shaped in the past. That needs to probably be modernized and updated to deal with changing research. Including issues like wages, which I think is an important one when thinking about hospitals.

TIMOTHY MURIS: Well, but the FTC is mostly winning, as the Chairman said. Mostly winning hospital mergers. And the problem was, there was this silly belief in the Elzinga-Hogarty test. And I went to Ken. And Ken testified.

He had two very simple propositions. He said, I can't believe anybody would apply that test to hospitals. And second, I can't believe anybody would pay me to say anything so obvious.

And those two propositions, believe it or not, helped carry the day. And two circuit courts very recently blessed the FTC's opinion. But, Jason, you're right in the sense that because these cases are decided out there by individual district court judges, the FTC actually had to overturn some of the district court judges in circuits.

But I think the FTC's way of looking at it is correct. And it mostly wins. But, obviously, in the world of individual judges you could get some hearings.

BILAL SAYYED: I know Jim has some comments.

JAMES RILLL: Just real quickly. I think what probably wasn't recognized very much in the change from the '82 guidelines to the '92 guidelines was the treatment of the structural paradigm. If you recall, in the '82 guidelines that the certain concentration level that the guidelines provided, there would be a likelihood to challenge.

In the '92 guideline we said, this is a presumption that's carried forward to further analysis. And we went into, then, the other factors including entry and the competitive nature of the marketplace. So I think it was a major change from the '82 to the '92 guidelines.

I think one of the interesting things about the 2010 guidelines -- under very creative, revision was probably in order. Is the distinction between the main analytical framework of the guidelines and the analytical framework when the Commission goes to court. The 2010 guidelines are very, very -- not to say critical -- but somewhat, almost dismissive of market definition issues as a proxy for the base for the analysis.

Shortly after those guidelines were [INAUDIBLE] analyzed, the commission went to court. And if you look at its brief in the Polypore case, it doesn't appear that the 2010 guidelines existed. They are very much the traditional analysis -- '82, '92 approach.

So I think there is a distinction that one has to draw between what the agencies do and their analysis, which is, obviously, extremely important if you don't want to go to court. And the practice that the agencies put into their court pleadings, which are more traditional. Because I

think the judges have become comfortable in accepting the analytical framework of the '82 and '92 guideline approach. I think there's a distinction there that we have be aware of.

TIMOTHY MURIS: Bilal, if I could-- I don't want to forget the other mission. Actually, the FTC is a bigger Consumer Protection Agency in both dollars and people than it is antitrust. And if you ever go out as an official, and we've got some here, and do an interview. Unless there is a big antitrust case in the press, the questions are overwhelmingly going to be about consumer protection.

I think David is 100% right about not strictly nonmonetary protection. As a young scholar, I wrote couple of papers about how contract law protects subjective value. But I'm not at all sure you need to revise the unfairness guideline.

I think another speech would be useful because the FTC has protected that monetary- as David mentioned. The first security breach case that we brought it was when I was chairman- involved Eli Lilly. Where what happened was a contractor- not just poorly trained, an employee who wasn't trained at all- managed to send out a list to the world of 600 people who were taking Prozac.

And email addresses are very easily identifiable. A lot of people have their names, certainly their last names. And, obviously, we thought that was private information that ought to be protected.

And you could spin a case of monetary loss, but utility functions- when I talked about those economists who trained me, Gary Becker was one of them. And he was one of the first to put other things in utility functions.

And that's the way the FTC thinks. And David is right that the Commission ought to stress that. I think you can read that in the unfairness statement now, but certainly this

Because there are some cases that Tim, actually, raises questions about in that article. And the result was you said was hard to reconcile. The order was hard to reconcile with the complaint language. Cases like DesignerWare, [INAUDIBLE]. And that's because there was friction within the Commission.

And so we need some resolution of this issue. Because, increasingly, the harms that are caused through data breach, other forms of revelation of privacy information, are not necessarily economic in nature. And the unfairness statement should simply make that clear. Or the Commission should make it clear in some other way. So I don't disagree.

TIMOTHY MURIS: Well, I appreciate the fact that we had at least one reader. But I think maybe the solution is the next time the Commission brings a case like that is just to issue a public statement that interprets the unfairness doctrine.

JANET MCDAVID: Or perhaps in these hearings and the report that comes out.

TIMOTHY MURIS: Sure. Good. Another good suggestion.

BILAL SAYYED: Let me ask Alysa, who on this panel counsels clients the most directly on these issues, if she's got some thoughts on this area.

ALYSA HUTNIK: Well, one of the things that we hear from clients a lot are, what's the law, and what's the best practice? And in counseling clients, it's the interpretation of the cases and really focusing on this fundamental policy statements. And so where you have a statement on deception and a statement on unfairness from 1980 and '83, which are very helpful.

And we continually go back to that. I think to David's point, modernizing them even with current examples. Rather than adding the 75th, the 77th document that you need to put in an email to a client on what they need to address. I think with current types of challenges, both in advertising and data practices, et cetera.

BILAL SAYYED: Well, that leads right into a broader question. The Commission takes seriously its obligation to provide clear business guidance and consumer education. So I wonder if folks up here think there are other areas where new or updated policy statements or materials are needed.

Ties in as well to the idea of the self-regulatory model. Put that out maybe to David and Alysa initially. But, of course, that is just as potentially true on the antitrust side.

DAVID VLADECK: Yeah, let me just make a quick comment, which is the agency spends enormous amount of time on guidance documents. When I was there, the endorsement guides came out. The green guides, 300 pages of narrative.

These are really important documents. We understand why regulated parties need the kind of guidance that the agency can provide. But doing a good guidance document is an enormous undertaking.

And there are areas where the guidance needs to be updated. Native advertising is an issue that the agency is going to have to continue to grapple with. The green guides left a lot of questions unanswered, simply because there was no real consensus about what certain words mean, like renewable.

And so I think one core part of the agency's mission is providing the kind of guidance that Alysa is talking about, that her clients need. It is quite a formidable undertaking. But I do think it's part of the Commission's core mission.

ALYSA HUTNIK: And I would just say that while the reports are read by private practitioners, it's the business guides that clients use. The TSR business guidance. The green guides. Every one of those, I have some of those sections memorized, as do some of my clients.

And so I think taking concepts like the 2012 privacy reports, and taking the unfairness statement and really bringing it up to date, that would be relevant for the innovative clients that are thinking of how to use machine learning. And using AI. And using facial recognition.

And having it consolidated in some ways where the topics overlap. So that they can use that and not feel like they are targeted with gotcha enforcement down the line when they are trying to interpret necessarily flexible standards and to do the right thing.

DAVID VLADECK: And this gets back to the 6(b) question, which is, in order to issue some of these guidance documents. For example, the use of biometrics in the marketplace. I think the Commission might do well to commission a study to get a sense of how widespread these practices are. Where companies are going. What the immediate future looks like.

Because this is a topography that the Commission needs to understand. But I don't know whether it has the knowledge base today to issue a guidance document on these issues.

TIMOTHY MURIS: I completely agree about guidance. And the best guidance the Commission gives is in mergers. And an area where it's badly in need of guidance on the consumer side is data security. And there's enough investigations and cases -- there's over 50 cases and probably at least half that many serious investigations to do, maybe not a merger guide, but at least a commentary, which the agencies did in the 2006, '07 time frame.

And something that would be important would be to talk about, as examples -- when parties can be disguised -- when the agency didn't take action. That's really important information. Because the complaints have tended to be vaguer and vaguer over time. And data security guidance is badly needed.

BILAL SAYYED: OK, well, let me ask if there's any reaction to that. If not, I'd turn to another topic. Well, this ties into a question we got from the audience. So I'll raise it in two ways.

And first, there's a common critique that the US has lost or is losing its leadership role in antitrust policy globally. That what we see developing outside the US is a model predicated on

the framework of the European Union or European countries. And that this is being adopted by some of the newer agencies in newer countries.

I'd make the same point, well maybe slightly different. It's a question. What can we learn from Europe, and is there a divergence, between the US and other agencies on the consumer protection side? So two-part question. Why have we lost our leadership? And then what can we learn from other agencies, both on the competition and consumer protection side.

JAMES RILL: Let me start out with the competition side. Because I don't think I've done much consumer protection work since we put Joe Camel out to stud. There is a challenge here in the global framework of competition agency.

I mentioned in my earlier remarks that a recent speech by Mario Monti, in effect, claiming that the European methods of antitrust, the European foundations 6.83 l Tc 0 Tin eons3 (t)-2 (he)klo4 (m)-

I think that the final point that the agencies need to be concerned about, the United States need to be concerned about, is the problem sometimes of an agency action being misused by a foreign agency to say, well, you're doing that, so we can do it. And there's a lot of copycat misuse of US agency.

We need to be conscious of the risk of that copycat. A recent article by Koren Wong-Ervin, Josh Wright, lists a number of areas where that's happened. Following up on some actually some

increasing returns to data, then I think we do need to be more worried. And I don't know which, so I apologize.

BILAL SAYYED: I'll use that as a plug. We are doing two days on big data at American University's Washington College of Law in early November. And two days on AI, artificial intelligence, and algorithms at Howard University's school of law in the middle of November. So maybe you can come back.

JASON FURMAN: I want to just be clear. Algorithmic collusion is a whole different issue from the--

BILAL SAYYED: Yes, Exactly. Although we are having some difficulty separating out the people who do one or the other. But anyway, we're going to devote a lot of time to it. One of the things the Pitofsky Report did was just to think about things that were going to come up over the next 5, 10, 15, 20 years. And that's part of what we're doing in that spa ce.

Jason, because you have to leave. I hope this doesn't put you on the spot, but I wanted to raise it, since you mentioned that you'll be doing some platform-related work. To go back merger law, and you may have less familiarity with the doctrine, but get your thoughts on this.

How should we think about acquisitions of new technologies by established players? Sometimes we use the term nascent competition or nascent competitors. But it's something we're going to spend at least an afternoon on. And maybe while you're here, you have some thoughts.

JASON FURMAN: Yeah, absolutely. And you're creating a real incentive to leave panels early. I think you should do it for now on. It's working out really well for me.

I think that's a really important issue. I think there's a longstanding view that everything in technology is evolving so quickly that there's no point enforcing anything. Because by the time you do, it's changed into some new competitor. And MySpace has disappeared or Internet Explorer has been dethroned, or whatever else.

I think there's something to that. I think there's a lot of irreversibility, too, though. It's easier to stop an acquisition now and change your mind five years from now and allow it, then it is to take a company that's already acquired and split it up. The second is basically impossible.

The first the, cost of making an error and not allowing the acquisition, may not be that high if you can change it later. So there's a little bit under uncertainty a literature in economics on the option value of waiting when you're making irreversible decisions. And allowing a merger is one.

I think you have to figure out how to think not just about market share but about the ecosystem as a whole. And if you are buying up something that could be a competitor later, then I think you're affecting the ecosystem. And something that prices, especially if there are no headline prices, isn't a useful guide to market share.

But it's competition for creating a type of market in an ecosystem. So I think that does require new thinking and probably under that option value of waiting, the uncertainty is an argument for more, not for less in those cases.

BILAL SAYYED: Let me ask if anyone has a reaction to that. We're going to have a whole afternoon of reaction time. Well, not to kick Jason off, but I want to thank Jason for coming.

And that interaction becomes very challenging. Also some of the platforms raise serious consumer protection issues. Because they are essentially bazaars selling multiple products on the same page.

And so questions about deception, who's responsible for the deception, arise with some frequency. So I think one unmet challenge on both sides of the building is what do we do about platforms. There's certain immunities based on content.

But that doesn't really resolve some of the consumer protection problems and some of the anti trust issues that arose, for example, in the Google investigation.

ALYSA HUTNIK: I would just add on the consumer protection side, we're talking about platforms and responsibilities. And David, I hear you earlier, in terms of talking about the limited resources for enforcement. Some of the things that we've seen is deputizing platforms to be responsible for those that they let into the bazaar.

And that may be all well and good, but there's a lot of interpretation and a lack of guidance on what is reasonable oversight and monitoring. What's scalable? And not doing a gotcha on that.

DAVID VLADECK: All fair questions.

ALYSA HUTNIK: If we go towards that point, what I would strongly encourage thoughtfulness over is, what are the standards to avoid third party monitoring? Whether it's a safe harbor. Whether it's other types of incentivizing, but clarity on those points.

BILAL SAYYED: Any other comments on that? Let me turn to a question that I'll direct it to everybody. It's a similar question.

So the question says that the former Chairman Muris mentioned imperfect information in contrast to behavioral economics. But it's standard economic models, imperfect information, causes transactions not to happen. It does not cause buyers to be fooled. So here's the question. Aren't buyers sometimes simply fooled? And should they be protected from being fooled?

I think that's both a consumer protection and in some ways a competition question, but I'll turn it over to David first.

DAVID VLADECK: I think the answer is yes. The Commission has struggled with what is a reasonable consumer and what percentage of consumers must be deceived by a message. But the mission of the Commission is to prevent deception in the marketplace.

And Tim and I may disagree at the margins about this, but I agree with Tim's fundamental point that the core mission of the agency is to protect against fraud. And the statute doesn't really use the word fraud, it uses deception. And in my view, that's always been the core mission of the agency.

The first cases the agency brought were consumer deception cases. They were the sale of silk, which was really cotton. And it was sold in C-L-K. And those were those were literally the first enforcement cases the Commission bought. So historically, that's been at the center of the agency's mission.

ALYSA HUTNIK: I would also just add to that we have to reconcile what's a reasonable consumer and a gullible consumer standard. And one of the other parts of the FTC's mission is consumer education. And particularly, as we go through the emerging market places and people are learning even about those marketplaces, consumer education plays a key role in that. That we don't dilute the reasonable person standard.

TIMOTHY MURIS: I agree with both of those points. And let me take the economic modeling part of that. It's almost 60 years since Ronald Coase's famous article. And the applications of that are all about transaction costs.

And shortly thereafter, George Stigler won his Nobel Prize, in significant part for discussing that advertising was an extremely powerful tool for the elimination of ignorance. Well, obviously, if there's ignorance, we're talking about a world with transaction costs. And that's the world in which you need an FTC enforcement as I was talking about.

And so this straw man in the popular press that economists talk about these automatons who only react -- consumers who with perfect knowledge who only react to price. That just hasn't been true in any sensible economic application to what the FTC does for decades.

BILAL SAYYED: OK, well thank you. Let me follow up on a point David made, as well, about a bureau of technology in the FTC. I'm going to depart a little bit from the question. But I ask first, what do the other panelists think about that?

Is it something that's relevant on both the antitrust side of the house, as well as the consumer protection side of the house? And what might it look like? And I raise that. Maybe it's a little unfair, because I didn't raise it earlier.

But David was a bureau director. Tim, as well as being chairman, was a bureau director. Now how do you set up these things for success? Really, that's maybe my question.

DAVID VLADECK: I defer to someone who's the chairman. I think that would be the chairman's mission. I think it would be important to retain some of the technology infrastructure in the bureaus.

Much of what the Bureau of Consumer Protection uses technologists for are forensics for investigations. But there is a lot of value to having access to skilled technicians for the policy issues that the agency is going to have to confront moving forward. Biometric identification, things like that. These are difficult technical questions.

TIMOTHY MURIS: The bureaus are complementary. They're not substitutes. As the only person ever to head both of them, they are significantly different. They're different in their personalities. They're different in the career paths.

And they are, in many ways, autonomous. And it's important—let me give you a anecdote. I wanted the Bureau of Consumer Protection to do more in working with criminal authorities. And I, unfortunately, insulted them and told them that they were too staff—satisfied.

Those were not the words I used. I regrouped, and after about a year they decided it was their idea. And they now have a very successful criminal liaison unit, which of course they take complete, 100% credit for, which is fine with me.

And it was a mistake on my part to criticize them in the first place. But it's a very—and organization. It reminds me of working in OMB in the old days, where you had people—I've who their career.

And it's not as transitory as the Bureau of Competition. But embedding in the Bureau like David says would be a very sensible way to go.

BILAL SAYYED: Anybody else? OK. I will answer one of the questions. There is a reference in that question to the Office of Technology Research and Investigation, or what we call OTEC, which does sit in BCP. The question is why is this unit insufficient to the—to get the job done now.

Without commenting too much on whether it's insufficient or what job they are focused on, it is a very small group. And more resources would probably be appreciated by the chair and by the commissioners and even by the Bureau directors.

So maybe I'll end with a question that I have. And it's a real question, given the difficulty of managing agencies. Do you think the FTC should have more resources to do its mission? And if you were to allocate those resources, how would you allocate them?

I'd like the private perspective as well—as folks who have not been at the agency, as well as folks who have been at the agency to maybe give some thoughts on that.

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need more. Certainly the division needed more resources at that time. Sensibly used and sensibly coordinated. The Commission I leave to the people who work there.

DAVID VLADECK: Yeah, I would argue for more resources. I understand Tim's argument. And I realize this is probably swimming against the tide. But since 2001 or 1981, Congress has added considerable workload to the agency. Changes in the marketplace have required the agency to do more work.

The Bureau of Consumer Protection, at its height when I was there, and I don't think we've had any resources to it, had fewer than 450 people. Including most of the people in the regions. People work extremely hard. They're incredibly dedicated. But there are lots of people with fingers in the dikes. And the water is just coming over the transom.

So I would urge the Commission to think about asking for an increase in resources. Of course, most of it should go to BCP, but I think the agency could well use a couple hundred more FTEs.

BILAL SAYYED: OK, well I we'll conclude right there. We were on target for 11:45, and I think that's where we are. Before we conclude, I'd like to thank a bunch of people.

First, I thank the panelists, including Jason, who had to leave. Very much for devoting some time and effort to this. I'd like to thank my colleagues in the office of policy planning who have been working very hard what will probably be about 20 days of sessions. And this is only 5% of the way through. Once we're done today

It's just a wonderful crew to work with. And I'm very proud to work with them. And I think I did the best job at the Commission. And, finally, thank, also, the staff of the Executive Director for