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FEDERAL TRADE COMMISSION

COMPETITION AND CONSUMER PROTECTION  
IN THE 21ST CENTURY

Monday, March 25, 2019

9:00 a.m.

FTC Headquarters  
600 Pennsylvania Avenue, NW  
Washington, D.C.

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FEDERAL TRADE COMMISSION

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1 WELCOME AND INTRODUCTORY REMARKS

2 (8:58 a.m.)

3 MS. ASKIN: Good morning, everyone. I'm  
4 Molly Askin. I'm an attorney in the Office of  
5 International Affairs here at the FTC. I want to  
6 extend a warm thanks to all of you here in the room in  
7 person and also to all of you who are joining us via  
8 the webcast today.

9 Before we officially kick off, I just have a  
10 few announcements to make, in particular for those of  
11 us in the room. First, it's a reminder with that beep  
12 to silence cell phones and any other devices that  
13 could disrupt us today. Another reminder, as many of  
14 you have just experienced, the security at the first  
15 level, if you do choose to leave the building for  
16 lunch, you will have to go back through that process  
17 to reenter the building for the afternoon. Finally,  
18 restrooms are just out the door: men's room out the  
19 door to the left; women's room is past the elevators  
20 and also to the left.

21 If there happens to be an emergency while  
22 we're in the room today, please leave the building  
23 orderly and follow the instructions that you will  
24 hear. If we need to remain in the building during an  
25 emergency, there will be announcements over the public

1 announcement system in regards to what we should be  
2 doing. If we need to exit the building, for example  
3 if there's a fire, please use the stairs and proceed  
4 across the street to 7th and Constitution Avenue.

5 If you notice any suspicious activity when  
6 you're in the building or around it today, please  
7 notify a security official. Any actions that are  
8 taken that attempt or actually do interfere with the  
9 conduct of this event or the audience's ability to  
10 observe the event, including attempts to speak with  
11 speakers while they are engaged in panels or giving  
12 remarks, will not be permitted. If you do engage in  
13 such behavior you, will be asked to leave. If you  
14 refuse to leave voluntarily, you may be escorted from  
15 the building.

16 Finally, FTC Commissioners and staff cannot  
17 accept documents during the event. While this event  
18 is the focus of public comments, those need to be  
19 submitted online and cannot be submitted in paper copy  
20 to FTC staff or Commissioners.

21 Also, as you've noticed and has already  
22 begun, the event is being webcast, recorded, and also  
23 there will be photographs taken throughout the day.  
24 By participating and remaining in the room, you agree  
25 that your image and anything you say can be posted

1 indefinitely at FTC.gov, at regulations.gov, or on one  
2 of the Commission's publicly available social media  
3 sites.

4 As you entered this room, you saw that  
5 question cards were available during the panel  
6 discussions today. Audience members are invited to  
7 provide questions to the panelists. Those are to be  
8 written on the comment cards and will be collected  
9 before having handed to moderators and repeated by the  
10 moderators to the panelists.

11 That is the end of these announcements, and  
12 I'm very happy to introduce Randy Tritell for our  
13 official opening remarks. Thank you.

14 MR. TRITELL: Good morning. I'm Randy  
15 Tritell, Director of Federal Trade Commission's Office  
16 of International Affairs. Well, Molly's told you all  
17 the important stuff, but I am delighted to welcome you  
18 to the 11th of the FTC's hearings on Competition and  
19 Consumer Protection in the 21st Century, this hearing,  
20 cosponsored by the George Washington University Law  
21 School.

22 Welcome to our audience here at the FTC, out  
23 in webstream-land and to those who are watching the  
24 recording or reading the transcript of the  
25 proceedings. This session is a fitting heir to the

1 hearings on which Chairman Simons modeled this --  
2 sorry, Chairman Pitofsky initiated -- modeled this  
3 initiative. Twenty-four years ago, Chairman Pitofsky  
4 anticipated the major role that globalization and  
5 technological change would play in shaping the FTC's  
6 priorities and enforcement agenda.

7 This hearing, dedicated to the international  
8 aspects of the Commission's missions, reflects the  
9 important role that the international dimension of the  
10 FTC's competition, consumer protection, and data  
11 privacy work are to accomplishing our goals. It  
12 wasn't too long ago that I might be asked why the FTC  
13 even has an office dedicated to international affairs.

14 Well, I don't get asked those questions  
15 anymore as our stakeholders can see how intertwined  
16 the FTC's activities are with global developments.  
17 They see how the FTC cooperates deeply with  
18 international counterparts on cross-border merger and  
19 conduct investigations to ensure consistent outcomes.  
20 They see how we use our authority under the U.S. SAFE  
21 WEB Act to work with consumer agencies, regulators,  
22 and criminal authorities to shut down foreign-based  
23 frauds and return money to victims. They see how we  
24 engage in multilateral organizations to promote fair  
25 investigations and sound enforcement.

1           We already have had significant  
2 international input into several of our hearings. So  
3 what are we seeking to accomplish over these two days?  
4 Well, we have in mind several objectives, one of which  
5 is simply to reflect the Commission's keen interest in  
6 hearing from our colleagues around the world, but let  
7 me focus on two important goals.

8           One is to obtain focused international input  
9 on the main topics of these hearings. This hearing  
10 session is an opportunity for us to learn from  
11 countries and different regions, from different legal,  
12 economic, and political systems and stages of  
13 development on many of the digital economy and other  
14 issues that are the overall focus of these hearings.

15           Second, it's an opportunity for the FTC to  
16 hear from the international community on how the  
17 Commission is doing its job, where it is succeeding,  
18 how it can be improved, and how we can best position  
19 the agency to anticipate and deal with future  
20 developments. Do we have the right tools? Are we  
21 focused on the right issues? Are we advocating our  
22 views effectively? Are our current structure and  
23 priorities well suited to deal with the issues that  
24 are likely to confront us?

25           In this sense, we are following in the



1 footsteps of the FTC 100 Project conducted by Bill  
2 Kovacic, our esteemed Former Commissioner and Chairman  
3 from whom you will hear very shortly. To address  
4 these issues, we are very fortunate to have with us a  
5 stellar faculty hailing from 17 nations on six  
6 continents. I look forward to hearing from all of our  
7 speakers, as well as from all of you and your  
8 colleagues, from whom we welcome written comments  
9 through May 31.

10 In my now 20 years back at the Commission, I  
11 have seen a continuing deep commitment to support the  
12 FTC's international work on the part of successive  
13 Chairs and Commissioners across administrations. That  
14 tradition continues today under the leadership of Joe  
15 Simons. Reflecting that commitment, Joe is with us  
16 now to share some opening thoughts with you.

17 Taking to heart the adage, who needs no  
18 introduction, it is now my pleasure and honor to turn  
19 the floor over to the Chairman of the Federal Trade  
20 Commission, Joe Simons.

21 (Applause.)

22

23

24

25

## 1 INTRODUCTORY REMARKS

2 CHAIRMAN SIMONS: Well, good morning,  
3 everyone. I think that I was actually one of those  
4 people that Randy was talking about early on who  
5 wondered why we needed to have an Office of  
6 International Affairs. In fact, when I was the Bureau  
7 Director, I think I probably said that to Randy  
8 expressly.

9 Anyway, good morning, and welcome to our  
10 two-day exploration of the FTC's role in a changing  
11 world. This is the 11th session in our hearings on  
12 Competition and Consumer Protection in the 21st  
13 Century. In previous sessions, we considered the  
14 effects of globalization on American consumers and the  
15 FTC's mission. Today and tomorrow, we will take a  
16 deeper look at how globalization and international  
17 developments affect the FTC's enforcement priorities  
18 and its policies.

19 The FTC's 1995 hearings, led by then-  
20 Chairman Robert Pitofsky, undertook a similar inquiry.  
21 Since then, we have seen significant changes to the  
22 international landscape. Many jurisdictions have  
23 either adopted or substantially updated their  
24 competition, consumer protection, and data privacy  
25 laws. The number of active enforcement agencies has

1 increased incredibly over this time period. We have  
2 seen huge growth in the number of international and  
3 regional organizations and networks in which policies  
4 are debated and best practices are shared.

5 Today, markets are more interconnected and  
6 consumers are more global and mobile. Our task at the  
7 FTC is to understand and respond to these changes, as  
8 we work to promote competition and protect American  
9 consumers. Right after I speak today, we have a real  
10 treat, and he's sitting right in the first row right  
11 there. Our esteemed Former Chairman, Bill Kovacic,  
12 will discuss the history of these international  
13 developments, and Bill is one of the world's top  
14 experts on this topic, having played a pivotal role in  
15 these developments himself, and I am absolutely  
16 confident you will enjoy hearing from him shortly.

17 But before we get to Bill, let me touch on  
18 two core areas of our international program:  
19 enforcement and policy cooperation. Starting today is  
20 international enforcement cooperation, today's  
21 session. In a quarter century, since the Pitofsky  
22 hearings, the FTC has been involved in an ever-  
23 increasing number of competition and consumer  
24 protection matters with an international dimension.  
25 We have often cooperated with enforcement agencies

1 outside the US, which has resulted in better outcomes  
2 for competition and for consumers.

3 That's why, as Randy mentioned, the FTC  
4 under successive chairs has focused on developing  
5 strong relationships with our counterparts abroad and  
6 expanding our cooperation tools. For example, in  
7 2006, Congress enacted the US SAFE WEB Act. The Act  
8 enables effective enforcement cooperation and consumer  
9 protection cases by providing the FTC with cross-  
10 border enforcement tools in four key areas --  
11 information sharing, investigative assistance, cross-  
12 border jurisdictional authority, and enforcement  
13 relationships.

14 We have used this authority in a wide range  
15 of cases, from internet pyramid schemes and  
16 sweepstakes telemarketing schemes to complex  
17 advertising and privacy investigations. The US SAFE  
18 WEB Act has been an incredible success. Under the  
19 Act, the FTC has responded to 130 information-sharing  
20 requests from more than 30 foreign enforcement  
21 agencies. We have issued more than 115 civil  
22 investigative demands in over 50 investigations on  
23 behalf of foreign agencies.

24 These efforts have advanced FTC enforcement  
25 and often supported the actions of foreign

1 counterparts in ways that have protected US consumers.  
2 For example, in a matter announced this month, the FTC  
3 reached a \$30 million settlement with the operators of  
4 a sweepstakes scam that targeted, to a significant  
5 degree, seniors. We received significant assistance  
6 from foreign counterparts, including Canada and the  
7 United Kingdom, using our SAFE WEB authority to share  
8 information.

9 The US SAFE WEB Act is due to sunset again  
10 in 2020, and we are urging Congress to reauthorize  
11 this important authority, but this time without a  
12 sunset provision. Bilateral and multilateral  
13 arrangements, including memoranda of understanding,  
14 also facilitate cooperation. Today, I am pleased to  
15 announce that we are signing such an MOU with the UK  
16 Competition and Markets Authority on consumer  
17 protection matters.

18 The MOU provides for enhanced information-  
19 sharing and enforcement cooperation. The MOU moves  
20 both agencies towards streamlined sharing of  
21 investigative and complaint data, simplifies requests  
22 for investigative assistance and makes it easier to  
23 engage in joint consumer protection investigations.  
24 At the same time, it provides strong, clear  
25 confidentiality and data safeguards for the

1 information that we exchange. I know that CMA Chair,  
2 Lord Tyrie, and his Executive Director Andrea  
3 Coscelli, join me in committing to work together under  
4 the MOU to provide benefits for consumers in both of  
5 our countries.

6 Turning to our competition enforcement  
7 cooperation, we are literally cooperating daily with  
8 our foreign counterparts on mergers and conduct cases  
9 under common review. For example, as part of our  
10 recent review of the Praxair-Linde merger, the FTC  
11 staff cooperated with the staff of 10 foreign  
12 competition agencies to analyze the proposed  
13 transaction and potential remedies. And we see  
14 continued opportunities for expanded antitrust  
15 enforcement cooperation going forward.

16 Across our missions, we work closely with  
17 foreign counterparts through agency-to-agency networks  
18 that facilitate enforcement cooperation and the  
19 development of best practices. Two key examples are  
20 the International Competition Network, the ICN, and  
21 the International Consumer Protection and Enforcement  
22 Network, ICPEN. The ICN provides 130-plus competition  
23 member agencies a specialized venue for maintaining  
24 regular contacts and addressing practical enforcement  
25 and policy issues.

1           For example, its framework for merger  
2 cooperation serves as the basis for many agencies to  
3 engage in enforcement cooperation. Similarly, ICPEN  
4 gives its 60 consumer protection agency members a  
5 forum for exchanging enforcement-related best  
6 practices and engaging in practical cooperation.  
7 ICPEN members can access econsumer.gov, an eight-  
8 language complaint website and information-sharing  
9 project, sponsored by more than 35 consumer agencies.

10           Today's session will focus on a wide range  
11 of tools -- statutory authority, best practices, MOUs,  
12 and international networks that we use to accomplish  
13 our enforcement cooperation. We will also examine  
14 cross-border enforcement and policy issues raised by  
15 emerging technologies such as artificial intelligence.

16           Tomorrow, we will turn to policy  
17 cooperation. As with enforcement cooperation, we have  
18 witnessed a significant expansion in the ways the FTC  
19 engages in policy discussions with our counterpart  
20 agencies. Our cooperation on policy matters has  
21 fostered trust-based relations, open communications  
22 between agencies, and served to facilitate effective  
23 and predictable enforcement cooperation as well.

24           In addition to regular bilateral discussions  
25 with our counterparts, the FTC is proud to play a

1 leading role in multilateral organizations such as the  
2 OECD, UNCTAD, and APEC. Through these organizations  
3 and the networks I mentioned earlier, the FTC has  
4 participated in developing important international  
5 best practices such as the ICN's recommended practices  
6 regarding merger notification and review and the OECD  
7 Council recommendation on consumer protection and e-  
8 commerce.

9           During tomorrow's hearings, we will turn a  
10 critical eye toward the FTC's work in these bodies and  
11 discuss the strengths and weaknesses of policy  
12 approaches based on soft law. We will also look at  
13 the impact of different legal regimes and cultures on  
14 policy and enforcement. Our panels will look at other  
15 effective ways for agencies to cooperate on policy.

16           Through our Technical Assistance Program,  
17 for example, the FTC engages with newer counterpart  
18 agencies, sharing our expertise and our experience.  
19 The FTC's International Fellows Program, authorized by  
20 the SAFE WEB Act, complements the agency's technical  
21 assistance. Over the past 12 years, the FTC has  
22 hosted 83 fellows from 34 jurisdictions around the  
23 world.

24           As part of these hearings, we intend to  
25 explore whether there is more the FTC could and should



1 be doing to promote sound consumer protection,  
2 privacy, and competition policy internationally. The  
3 final panel will focus on the FTC's international  
4 engagement in the changing global world, providing an  
5 opportunity for input on the most important  
6 enforcement international policy issues that the FTC  
7 faces today.

8           Before I conclude, I want to welcome the  
9 many agency heads and other representatives from our  
10 sister agencies and international organizations who  
11 are joining us for these hearings. I also want to  
12 thank, of course, our cosponsor, the George Washington  
13 University Competition Law Center. I also would like  
14 to recognize the efforts of the staff of the FTC, in  
15 particular the Office of International Affairs, the  
16 Office of Policy Planning, the Office of Public  
17 Affairs, and the Office of the Executive Director.

18           My fellow Commissioners and I are extremely  
19 grateful to all the people who have contributed to  
20 producing this impressive event, including especially  
21 our speakers. Thank you all for attending, and I hope  
22 you enjoy the show.

23                           (Applause.)

24

25

1                   SETTING THE INTERNATIONAL SCENE

2                   MS. ASKIN: Thank you, Chairman Simons. I  
3 now have the pleasure to introduce Bill Kovacic,  
4 Director of the Competition Law Center at GW, Global  
5 Competition Law Professor at GW. In addition, he has  
6 enforcement experience. We heard Joe mention your  
7 time here at the FTC, both as Commissioner and  
8 Chairman. Bill also serves as a nonexecutive director  
9 at the UK's Competition and Markets Authority.

10                  MR. KOVACIC: Thank you. Thank you very  
11 much, Molly. The GW Law School is enormously grateful  
12 to Chairman Simons for the opportunity to cochair this  
13 session, and we're profoundly grateful for the  
14 opportunity to begin the program today.

15                  To get us started, I want to address three  
16 topics. I want to talk about the major ways in which  
17 the world competition policy, data protection, and  
18 consumer protection have changed since the mid 1990s  
19 when Bob Pitofsky convened his famous set of hearings.  
20 Second, I would like to talk about how the FTC has  
21 adapted to these changes and to describe its  
22 engagement with foreign institutions, including  
23 partner agencies around the world. And then, third,  
24 to think about some possible adjustments to the FTC's  
25 tools and practices that might enable it to better

1 address these adjustments going ahead.

2 My perspective today is based on really  
3 three activities: first, my work here as Molly and  
4 Chairman Simons mentioned at the FTC and in several  
5 earlier incarnations; second, my work with a number of  
6 new competition systems around the world; and, third,  
7 my experience with the Competition and Markets  
8 Authority in the United Kingdom, where I've served as  
9 and currently serve as a nonexecutive director. I  
10 don't speak on behalf of the CMA today, but my  
11 experience there deeply informs the way in which  
12 foreign jurisdictions see the United States and  
13 perceive the work of the FTC and shapes my views about  
14 how the FTC's role can be enhanced in the world going  
15 ahead.

16 Let's start with the past and look back.  
17 Both Randy and Chairman Simons have done this already.  
18 I'll just underscore a couple of developments that are  
19 certainly extraordinary to anyone of my age but I  
20 think would be extraordinary upon reflection to  
21 anyone. First is the adjustment in the number of new  
22 systems, and we'll take competition law as an example.  
23 In 1995, there were roughly 70 jurisdictions with  
24 competition laws. This itself was a dramatic jump  
25 from 1989, when there were, depending on how you count

1    them, about 30. Today we have more than 130. That's  
2    an extraordinary change in a short period of time.

3                   And for those of my age who would have  
4    predicted, say when they were finishing school a  
5    little while ago, that this would have happened during  
6    their lifetime, that would have been most improbable.  
7    A truly astonishing adjustment in the global scheme.

8                   Some of the jurisdictions that we regard  
9    today as enormously significant because of their  
10   activity, their influence in the global framework,  
11   either had extremely weak systems in place in 1995 or  
12   they had none at all. Those with nascent or older  
13   frameworks that were getting underway include India,  
14   Brazil, Mexico, South Africa, South Korea. You can't  
15   have a conversation about global competition policy  
16   today without accounting for the extraordinary work  
17   that these institutions have done.

18                   Others had no system at all, most notably  
19   China, but the extremely influential system in Asia,  
20   Singapore, had no competition law. And we've  
21   witnessed a dramatic increase in the number of cross-  
22   border alliances, international networks to promote  
23   the development and improvement of competition law to  
24   set international standards, to promote the  
25   conversation.

1           Simply to take Africa alone, the development  
2 of international enforcement bodies like COMESA, the  
3 development of soft law networks like the African  
4 Competition Forum, simply emblematic of what you see  
5 on continent by continent and the exceptional  
6 development of new institutions, both for enforcement  
7 but, as all our presenters have said so far today, for  
8 policy development.

9           The International Competition Network did  
10 not exist in 1995. ICPEN, which Chairman Simons has  
11 mentioned, was underway, but it was a very nascent  
12 organization, hadn't attained the level of prominence  
13 that it had now. All these things have taken place in  
14 the last 25 years.

15           Technological change, which was always  
16 present in the system, it's not new to our lives.  
17 It's a conceit of the modern age that these things  
18 have never happened before. You look at the first  
19 decade of the Federal Trade Commission and its dealing  
20 with upheaval from remarkable new transportation  
21 technologies like the automobile, the airplane,  
22 communications revolutions brought about by the  
23 telephone, the wireless -- no, that's a different  
24 wireless, but it was called the wireless at that time  
25 thanks to Mr. Marconi -- entertainment revolutions

1 called the moving picture and soon to be called the  
2 talking picture.

3 All of these things take place and you look  
4 at the agenda of the FTC in its first decade and it's  
5 filled with difficult efforts to wrestle with these  
6 changes. Those changes were no less remarkable to the  
7 citizens of this country at that time than all the  
8 changes we see today are to us. But I think we can  
9 assert that the absolute and relative rate of  
10 technological change is greater now and that's changed  
11 the mix of issues that have come to the top of the  
12 agenda.

13 The upheaval in information technology, for  
14 example, has lifted the prominence of privacy. A  
15 longstanding concern of policymaking in the low-tech  
16 days but now simply perhaps the preeminent regulatory  
17 issue of our time, most notably identified by the  
18 extraordinary regulatory developments we see around  
19 the world, significantly the European Union's adoption  
20 of the General Data Protection Regulation in the  
21 recent past.

22 Agencies have engaged in a remarkable  
23 process of innovation and adjustment in the face of  
24 all of these changes. We've seen major  
25 restructurings. The agency with which I'm a

1 nonexecutive director, the Competition and Markets  
2 Authority, is a good example. It took two predecessor  
3 institutions, combined them into one.

4 Country by country -- France, Spain,  
5 Portugal -- nation after nation have rethought the  
6 fundamental structure through which they offer policy  
7 and they have undertaken major upgrades in  
8 capabilities. And, quite significantly, I think a  
9 broad lesson we derive from international experience  
10 is that if you're not revisiting the adequacy of your  
11 framework every five years at a minimum, you're  
12 missing a good game and you're probably not doing your  
13 job properly because the array of changes in the world  
14 today dictate those changes.

15 If commercial institutions are going to be  
16 proficient at innovation and change, the public  
17 institutions entrusted with their oversight have to be  
18 no less inventive, no less dynamic, and we see in so  
19 many areas globally those changes taking place. We  
20 also see the adoption, quite important for the FTC, I  
21 think, of complex mandates for individual  
22 institutions.

23 If we take the 130-plus jurisdictions today  
24 that have competition laws, over half of them assign  
25 that institution something other than competition law.

1 It's a misnomer to describe them today as competition  
2 agency simpliciter. They actually are diversified  
3 policy conglomerates. And the most common adjunct to  
4 competition law in these jurisdictions is consumer  
5 protection.

6           And in the modern world, I think it is a  
7 decided advantage and obligation of jurisdictions like  
8 the FTC to consider the significance of this  
9 multidimensional role of a growing number of agencies  
10 and to consider perhaps as a priority how to work in  
11 particular with agencies with a similar configuration  
12 with the aim of exploiting the full value inherent in  
13 that multidimensional mandate and to use that as a  
14 basis for rolling out larger programs over time.

15           What's the significance of all of these  
16 changes? Well, the complexity of the framework has  
17 obviously grown -- many more institutions with  
18 mandates that make a difference around the world. And  
19 a growing number of jurisdictions which, through their  
20 individual initiative, have the capacity to set what  
21 amount to global standards. Any single nation in that  
22 framework has a keen interest in seeing those  
23 standards developed in a way that is good for citizens  
24 globally as well in our own parochial case for the  
25 citizens of the United States.



1           The complexity at one level might seem  
2     frightening, but it does have a striking advantage, to  
3     have so many jurisdictions and in so many instances  
4     exceedingly capable people working on trying to solve  
5     common problems provides a host of natural experiments  
6     from which we might derive conclusions about what  
7     might work better in the United States and, indeed,  
8     what the appropriate framework for global oversight  
9     might be. In short, a benefit of the complexity of  
10    activity, the bewildering activity that we see today,  
11    is a remarkable opportunity to measure and assess  
12    which kinds of practices might be well adopted on a  
13    global basis.

14           And you look at the experience of the US  
15    agencies, you notice how, in areas such as merger  
16    guidelines, the Department of Justice leniency  
17    program, the US agencies had no power to force anybody  
18    else to adopt these programs. They didn't. By  
19    persuasion, they gained broad adoption so that  
20    leniency and mandatory merger review with a vocabulary  
21    created in the DOJ 1982 guidelines, those are  
22    universal features of the way in which we work today,  
23    all by persuasion, all by adoption, by no element of  
24    compulsion.

25           So this is the framework that brings us to

1 the point, how's the FTC adapted to this? To a  
2 striking degree -- and I'm not a neutral observer  
3 here, I have pride in the way in which the agency has  
4 run and I'm a fond observer of so many initiatives  
5 that it's developed that you can count me as a faintly  
6 biased observer here, though always speaking the  
7 truth. So a bias that predisposes me to like what the  
8 FTC has done here but, of course, the truth seeker  
9 that I am, always completely accurate.

10 One thing that we identified that's  
11 extremely important here is the development of the  
12 Office of International Affairs. One of the most  
13 farsighted things that Debbie Majoras did during her  
14 tenure as chair is to foster the creation of that  
15 office, to assemble a number of different units within  
16 the agency and place them in a single place with Randy  
17 Tritell as its head.

18 I don't have, perhaps, a current accurate  
19 count, but my guess is that the total number of people  
20 dedicated to that office now exceeds 20 and perhaps  
21 25, roughly in that neighborhood. Ponder that for a  
22 moment. In 1979, when I was a young person and I had  
23 my first exposure to the Federal Trade Commission as a  
24 case handler, the total amount of FTC effort dedicated  
25 to international liaison was one half of one work

1 year. That's basically one half of one person's time  
2 in 1979.

3 In its place, you now have the extraordinary  
4 infrastructure. In a way, it's always made me nervous  
5 because I feared a legislative overseer or another  
6 might say why are we doing this? Well, Randy and the  
7 Chairman have described why we do this. This was a  
8 farsighted decision to build an infrastructure that  
9 would be indispensable over time to functioning in  
10 this new world of complexity. And in a farsighted  
11 way, Debbie Majoras and her successors gave support to  
12 that effort so that, at the moment, it's unsurpassed  
13 as an institution for doing work in this area.

14 There are a number of international offices  
15 that do superb work. I see one of them at the CMA,  
16 but when I think of the FTC, I think of the story that  
17 I saw in the newspaper during a visit to St.  
18 Petersburg where the curator of the Hermitage Museum  
19 is asked, do you have the best collection of art in  
20 the world? He hesitates and says, well, it's a hard  
21 question to answer, a lot of museums have a good  
22 collection. And then he pauses and says, I can assure  
23 you of one thing, we are not the second. And when you  
24 look at the FTC's OIA team, it is certainly not  
25 second.

1           Another key element that's developed over  
2 that time, and again, this is truly generated from the  
3 staff level up in a thoughtful way and supported by  
4 the agency, is SAFE WEB. SAFE WEB created an  
5 indispensable element of the infrastructure that  
6 supports international cooperation today, both for the  
7 purpose of information sharing and crucially its  
8 bilateral information sharing. It's the FTC saying  
9 help us abroad and we commit ourselves to help you  
10 here, too, and that promise has been fulfilled.

11           But I would underscore one other item that  
12 Chairman Simons mentioned, and that is the  
13 international fellows program. One of the best ways  
14 to educate others about what happens here and to build  
15 the human glue that holds together international  
16 relations are exchange programs. And in a remarkable  
17 way, the FTC has brought foreign visitors to the FTC,  
18 and with very few restrictions, has allowed them to  
19 see everything that takes place here -- attend  
20 meetings, go to case-handling meetings, watch the  
21 development of the individual case and the policy that  
22 goes along with it.

23           If you want to build an environment that has  
24 the trust that is indispensable to the deeper level of  
25 cooperation that will facilitate better work on cases,

1 better policy development, it starts, first and  
2 foremost, with human relationships, not simply  
3 protocols or other ways of doing work. It is the  
4 human relationships that cause people to trust each  
5 other.

6 This is a long-term growth. This is a  
7 decided investment in the future, but that investment  
8 in building those relationships through the fellows  
9 program, among others, is an act of faith and  
10 commitment in the future that creates the environment  
11 in which you ultimately get a better result and the  
12 basis for sharing information and cooperating more  
13 broadly.

14 Then there are the building of the bilateral  
15 relationships already referred to by Randy and  
16 Chairman Simons, the one-on-one engagement and  
17 discussion over time that, again, is essential if  
18 you're going to have a program that promotes the  
19 development of common approaches, understanding of  
20 where differences arise, and the gradual progress  
21 towards a common result.

22 The contributions to the networks -- the  
23 ICN, the OECD, UNCTAD, ICPEN -- were it not for the  
24 work of the individual agencies, including the FTC,  
25 this couldn't possibly have happened. The ICN may be

1 a virtual network, but the work is real. And the only  
2 way the work takes place is through human beings  
3 committing themselves to do it. I look at the work  
4 that Commissioner Boswell and his colleagues at the  
5 Bureau in Canada did. Had it not been for Canada  
6 providing a virtual secretary, there would be no ICN  
7 over time. And to look, and I'm aware of the  
8 dedication of effort at the FTC by its professional  
9 staff, by the Office of International Affairs, I will  
10 further add that if the Canadian Bureau is one pillar  
11 indispensable to the ICN, the FTC is a supporting  
12 buttress that was equally important to keeping the ICN  
13 working and successful. That was a real and  
14 farsighted commitment.

15 Technical assistance, to sum up the style,  
16 the concern, I think, when Americans go abroad is that  
17 they're loud, they're dogmatic, doctrinaire. They're  
18 occasionally right, but they're never in doubt --

19 (Laughter.)

20 MR. KOVACIC: -- so that you worry about  
21 exactly what course they're taking and what they have  
22 to say. The Technical Assistance Program I've seen  
23 going back to its origin, by contrast, thoughtful,  
24 sustaining. What's been the role of advisors? Like  
25 the wait staff in the restaurant. We give you a menu.

1 Here are the choices that we have here. Then comes  
2 the moment where someone asks, well, what's good? And  
3 then there's the opportunity to say what do you like?  
4 What do you want? I can describe for you what might  
5 be good, and then to give you a view of what happens,  
6 but the listening and the advisory process has been  
7 thoughtful and sustaining.

8 I look at the work, for example, done in the  
9 Baltics, which I visit on a regular basis to see the  
10 three members of the EU who have competition agencies  
11 there. And I'm struck by how people my age in those  
12 agencies come to me and ask me about how well FTC and  
13 DOJ staff people that they worked with are doing. I  
14 can't give you a rigorous proof for this, but I think  
15 a crucial force in the development of so many agencies  
16 around the world was the advice and guidance that FTC  
17 and DOJ officials provided. That was a farsighted  
18 effort.

19 In a modern example, that is the work that  
20 the FTC has done in conjunction with Canada, the  
21 European Union, Germany, OECD, and UNCTAD. Footnote,  
22 that's a remarkable constellation of common effort  
23 that has not always characterized technical assistance  
24 but it happened here. One reason that a first-rate  
25 management team and leadership group at the Ukraine

1 Antimonopoly Commission has a fighting chance to  
2 succeed in exceedingly difficult circumstances is that  
3 technical assistance over time. And it's not having  
4 someone bring their PowerPoint slides up and run  
5 through them, being cautious if they might be to take  
6 the name of the previous city which they gave them off  
7 the slide. I saw a presenter in Latin America give a  
8 slide that said welcome to Singapore, not a sort of  
9 stale, "blow the dust off your notes from the last to  
10 talk," but hands-on guidance to case handlers about  
11 how you actually do the job.

12           And if you purport to talk about merger  
13 control and you've never worked on a merger, they  
14 should chase you out of the room and, instead, the  
15 habit has been in technical assistance to provide the  
16 right person to give the right advice at the right  
17 moment.

18           And, last, I think we've seen as part of the  
19 interaction, we've seen better disclosure, and there's  
20 been a decided process of learning from abroad. In  
21 matters such as Carnival Cruise Lines, I think the FTC  
22 through its engagement with the European Union came to  
23 see that when you close a significant matter, you  
24 ought to say why. When you issue a second request,  
25 when you issue a subpoena, when you use compulsory



1 process, you ought to explain why you decided not to  
2 take further steps.

3 And the habit, not in every case to be sure,  
4 but in a growing number of prominent matters to say  
5 why the FTC had decided not to act takes root in this  
6 period, and that's a process of very helpful learning.

7 Well, some thoughts about the future. I  
8 want to put things in three baskets: what the FTC can  
9 do on its own, what the FTC can do with the  
10 cooperation of other institutions, and, last, how the  
11 Congress has to help out.

12 First, what can the FTC do on its own? I  
13 think a valuable part of these proceedings is the  
14 opportunity for the FTC, in talking to other  
15 institutions around the world, to take stock of its  
16 own capabilities. It has a scalable mandate that is  
17 unique among US institutions and, I would assert,  
18 among institutions globally. It has three policy  
19 domains, which increasingly become important in  
20 resolving difficult problems -- antitrust, consumer  
21 protection, and privacy. It has distinctive  
22 information-gathering tools and, yes, is an  
23 adjudication body as well.

24 Does the United States have a specialized  
25 trade regulation court? The answer is it does, and

1 it's in this building. So how can this constellation  
2 of activities be applied in a way that offer better  
3 policy results? As a starting point, I'd sustain the  
4 existing level of commitment to the Office of  
5 International Affairs and things international. It's  
6 not just the work of OIA, but it's all of the FTC  
7 specialists that can draw in to support projects over  
8 time.

9 I would say there's room for better  
10 education abroad. I'm somewhat dispirited when I go  
11 to international meetings and engage in them to see  
12 the level of ignorance. I see about what the FTC does  
13 and how it operates and works. I think that a fuller  
14 effort in international fora to explain that -- the  
15 speeches, the papers through OECD, the engagement on  
16 working groups -- would be a way to make this story  
17 better known, to make clear, in other words, how the  
18 FTC functions and operates as a way of increasing  
19 understanding about how policy is made here.

20 So one recommendation is the fuller effort  
21 as an educator. I'm struck in discussions about  
22 privacy how a continuing refrain is the US doesn't  
23 have a privacy regime. Well, it does. It's not as  
24 complete and comprehensive, but it does, and in the  
25 places where it exists, it can bite you pretty hard if

1 you don't pay attention to it. I think that kind of  
2 education is an important focus of what the FTC might  
3 do in the future.

4           Second element, better disclosure, more  
5 closing statements. My dentist says at certain  
6 moments, this is going to hurt a little, this is going  
7 to hurt a little. Imagine where we would be in the  
8 public debate about dominant firm behavior if the  
9 FTC's statement in Google, the closing statement, had  
10 been more elaborate and coherent, a fuller discussion  
11 about what happened and why. And with the inadvertent  
12 disclosure of the other memos, might it have been a  
13 good idea just to put the whole lot out there? Put  
14 them all out there, read them all the memos, see where  
15 the recommendations were. Yes, you extract what has  
16 to be extracted, but you put them out there. You have  
17 a much more intelligent debate about the choice and  
18 decision that the agency made in that instance.  
19 Release them.

20           Better disclosure of broader strategy, using  
21 every opportunity to make clear what the overall  
22 purpose of the program is and how it's been designed  
23 over time. So fuller disclosure.

24           Technical assistance, I would expand the  
25 FTC's efforts to focus even more on what I would call

1 the elements of administrative law. One of the most  
2 important ingredients of good policy development that  
3 I learned in my time at the agency is the critical  
4 quality of a good administrative process, a good  
5 general counsel's office that handles conflicts of  
6 interests, a good mechanism for teaching ethics, a  
7 good mechanism for organizing the flow of information  
8 through the system. There's not an institution on  
9 earth that does not need that infrastructure in order  
10 to succeed. And the FTC is an extraordinary reservoir  
11 of knowhow about how to do those things and do them  
12 well.

13 And to build a structure without building  
14 them in from the front is a source of failure and,  
15 yes, as these proceedings are doing, I would continue  
16 my process of evaluation, especially by talking to our  
17 foreign counterparts and asking them how are we doing.  
18 Is this working well? What could be better? And to  
19 do that on a regular basis, and I think there's the  
20 trust and understanding that exists that in the right  
21 setting, at the right time you can get informative  
22 observations from those individuals.

23 What things require cooperation with other  
24 institutions? For this audience and for my  
25 colleagues, I turn back to a theme very briefly that

1 concerns me a lot is coherence between the Department  
2 of Justice and the FTC. There should be a routine  
3 process by which no head of the institution gives a  
4 speech without sharing a text with the other  
5 institution.

6 I plead guilty in this respect. I didn't do  
7 that when I was here. Tom Barnett, my dear colleague  
8 from the Department of Justice, I don't think Tom ever  
9 got a speech in advance from me. He certainly didn't  
10 get PowerPoints, probably because those were being  
11 prepared the night before at conference site. That's  
12 one reason. But even there, I didn't walk them over.  
13 I didn't say, Tom, let's have coffee, let me tell you  
14 about what I'm going to say, good, bad or indifferent.  
15 I didn't do that. How hard would that have been to  
16 do? Because a view that I think that persists  
17 internationally is who's speaking for the United  
18 States?

19 What is this? Five members of the Federal  
20 Trade Commission, three numbers, the head of the  
21 antitrust division? What is this constellation of  
22 participants, always starting with the caveat, I don't  
23 speak for the United States. Well, but of course you  
24 do, in some way. It's a basis for inferring what's  
25 going on. Would it not be possible for there to be a

1 collective effort by the two institutions to formulate  
2 an approach to say what are our themes overseas and  
3 how are you going to drive them home?

4           Second element, international cooperation.  
5 I think there is a benefit to building on a model that  
6 works so well with Canada. And I think about  
7 Commissioner Boswell and colleagues, the extent to  
8 which the US-Canada relationship was a prototype  
9 through building an effective cross-border approach to  
10 consumer protection, all of the work that went in,  
11 meeting after meeting, simply first to learn what the  
12 other configuration looked like, to learn who did  
13 what, how many FTC people knew in advance what the  
14 Royal Canadian Mounted Police had to do with this  
15 process or local police or the Bureau.

16           That was a process of learning. But over  
17 years, it became a foundation for an exceedingly well-  
18 functioning process of cooperation. I would take, as  
19 a starting point, the institutions that have a similar  
20 configuration, mandate, similar responsibilities. My  
21 list, the ACCC in Australia, the CMA in the UK, and a  
22 step in that direction, further step taken today, as  
23 Joe Simons mentioned, Canada, New Zealand, and  
24 Singapore.

25           What do they have in common? Yes, these are

1 all English-speaking peoples. They all have a common  
2 program, in many respects, many common roots, though  
3 variations. I'd put it this way, if you can't test  
4 and prototype programs with the Government of Canada,  
5 our beloved colleagues close by, if you can't do it  
6 with the ACCC, with the CMA, with New Zealand, with  
7 Singapore, if you can't build a common approach or  
8 understanding with those, and they all understand the  
9 special considerations that go into managing a  
10 multidimensional policy mandate, how are you going to  
11 do it with the rest of the world?

12 I'd devote a lot more effort to working with  
13 those to build prototypes that can be rolled out and  
14 developed more broadly elsewhere. I would work with  
15 my partners overseas in more detail on case  
16 reconstructions to look at commonly examined files and  
17 ask, after the fact, what happened? What evidence did  
18 we think was important? Why, if we did, did we come  
19 to different results?

20 For international organizations, for  
21 international cooperation, I'd think of the example  
22 that France and Germany had pioneered in data  
23 protection in the digital economy to doing studies  
24 together. Might the bureau in Canada and the FTC be  
25 engaged in that kind of common effort? Might the FTC

1 and the ACCC, the CMA, find projects that become  
2 useful, not simply for advancing the state of  
3 knowledge, but building the relationships that make  
4 cooperation more effective over time?

5           And last, domestic networks might be  
6 enhanced. A striking impression I have from my time  
7 abroad is how much different jurisdictions devote by  
8 way of effort and personnel to taking discrete  
9 elements of their framework and working together with  
10 them. The United Kingdom Competition Network, which  
11 joins up the CMA with a number of sectoral regulators;  
12 the European Competition Network, which the Europeans  
13 have used with great effect and success, and not just  
14 building a common understanding of what's happening  
15 but moving toward the direction of a common policy.

16           Is it not possible for the US to do  
17 something similar here on a way that provides more  
18 coherence and focus for what it does overseas?

19           Last, Congress, what must it do? It's got  
20 to renew SAFE WEB with no footnotes attached,  
21 unconditional, permanent renewal. New privacy law,  
22 comprehensive FTC mandate with no jurisdictional  
23 carveouts. It's impossible to engage effectively  
24 internationally if that change doesn't take place.

25           Foreign citizens, as FTC employees. I'd



1 reconsider the restriction. It's a global talent  
2 pool. And I say day in and day out in all my meetings  
3 at the CMA and elsewhere, it's an incredible global  
4 talent pool. To not be able to draw from it is simply  
5 ignoring an enormously valuable source of personnel.

6 And, last, I'd change the Sunshine Act so  
7 that the FTC Commissioners can consult and discuss in  
8 the same way that their counterparts do overseas, at  
9 least with respect to the formulation of strategy and  
10 policy over time.

11 To sum up, these hearings are a great  
12 opportunity for the FTC to assess its international  
13 strategy and, importantly, I think to reinforce the  
14 intuition that guided the formation of OIA and the  
15 building of the modern program. An agency has a  
16 choice every day to consumer invest. By consume, I  
17 mean you spend money on cases, you do regulations.  
18 Invest means you build the infrastructure that serves  
19 over time.

20 John Fingleton at our FTC at 100 hearings  
21 said the problem with this is that the investment and  
22 infrastructure does not generate ribbon-cutting  
23 opportunities; it does not create the headline -- oh,  
24 we worked on SAFE WEB, thanks! Where's your big tech  
25 case? Well, we built a better infrastructure with the

1 International Fellows Program. Yes, yes, yes, yes,  
2 yes. The decision to build the infrastructure is  
3 important.

4 At the hearings, John said, the investment  
5 is important, we probably have to do more of it, but  
6 the difficulty is we cannot show in a tangible and  
7 concrete way how it has made things better. But I  
8 think our experience, over time, is that it certainly  
9 makes things better over time. It's indispensable in  
10 this multipolar, complex world that we have.

11 During her campaign, Hillary Clinton had a  
12 speech in which she talked about planting trees. And  
13 she said, "The mark of good public administration is  
14 the willingness to plant the trees whose shade you  
15 will never enjoy." And, in many respects, that's what  
16 the FTC has done. So good luck in taking care of the  
17 trees and in planting more seeds. Thank you.

18 (Applause.)

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1 BUILDING ENFORCEMENT COOPERATION FOR THE 21ST CENTURY

2 MS. ASKIN: Thank you, Bill.

3 I now have the pleasure of introducing our  
4 next speaker who we've heard mentioned many times  
5 today, Matt Boswell, who is Commissioner of  
6 Competition at the Competition Bureau Canada. We're  
7 especially looking forward to your remarks for a few  
8 reasons and hearing your perspectives.

9 One is similar to the FTC, your agency has a  
10 joint mission, a dual consumer protection and  
11 competition mission. You also have a fabulous amount  
12 of experience, if I can say so, with enforcement. So  
13 you've seen a variety of cases. You've seen the  
14 enforcement tools. And we transition now to lead-in  
15 to our first panel talking about enforcement  
16 cooperation tools. Your experiences with both  
17 consumer protection and competition enforcement  
18 matters I think will be excellent. Thank you.

19 MR. BOSWELL: Thank you very much, Molly,  
20 for that kind introduction. It's very difficult to  
21 follow Former Chairman Kovacic, and I've seen others  
22 do it around the world. He's an incredibly  
23 knowledgeable, engaging, thoughtful speaker. I  
24 actually just want to run out of here and go back to  
25 my office and start do some of the stuff he's

1 recommending, but I'll try and stay on track.

2 Thank you very much to the Federal Trade  
3 Commission for inviting me to join today's important  
4 discussion, and, of course, thanks to all of you for  
5 joining us today to talk about competition and  
6 consumer protection in the 21st Century.

7 So change, as we all know, is inevitable,  
8 and it's upon us. The rise of the digital economy in  
9 general and e-commerce in particular is a truly global  
10 phenomenon. More and more, the conduct we investigate  
11 is not constrained by borders, and when change  
12 happens, the question is not how do we feel about it;  
13 the question is how will we respond to it. Will we  
14 rise to the challenge? Will we seize the  
15 opportunities that come with it? These are questions  
16 that governments around the world are facing, and how  
17 we answer these questions will define our success  
18 going forward.

19 We at the Canadian Competition Bureau have a  
20 long history, as Former Chairman Kovacic pointed out,  
21 of cooperation with the FTC, as well as many other  
22 international competition authorities, but we must not  
23 rest on that foundation. We must continue to build on  
24 it and adapt to new realities.

25 During today's digital age, cooperation

1 between international competition authorities is more  
2 critical than ever before. We are in the midst of a  
3 transformative shift. For example, the giants of the  
4 taxi and accommodation industries don't actually own  
5 cars or property anymore. Instead, they are using  
6 technology to disrupt traditional business models and  
7 create digital platforms that connect users quickly  
8 and easily.

9 As the Canadian Minister of Innovation,  
10 Science and Economic Development has rightly pointed  
11 out, the digital economy is the economy. This is the  
12 backdrop of competition and consumer protection law  
13 enforcement in the 21st Century. Digital platforms  
14 are creating an economy built on collaboration, and if  
15 we want to keep pace, we'll need to continue to  
16 collaborate and find better ways to do so.

17 So today, I'd like to talk briefly about why  
18 international cooperation between authorities is so  
19 important. I'll discuss the benefits that it brings  
20 us and the tools we use to achieve it. I will end  
21 with some examples of cases where cooperation has been  
22 critical and we, in Canada, have benefitted  
23 tremendously. Plus, without preempting the panel, I  
24 will consider a few ways that we might improve in the  
25 future.

1           So to get us started, let's consider why  
2     it's so important that we cooperate. What are the  
3     drivers? The rise of the digital economy in general,  
4     and e-commerce in particular, as I've said, is a  
5     phenomenon globally. The number of digital buyers  
6     worldwide is expected to rise to over 2 billion by  
7     next year. That's approximately one-quarter of the  
8     world's population buying online. And there are a  
9     growing number of jurisdictions with competition laws  
10    and authorities and consumer protection laws, as  
11    Former Chairman Kovacic pointed out.

12           When the International Competition Network  
13    first launched in 2001, it only had members from 14  
14    different jurisdictions. Today, it has 146 members.  
15    We have moved from theoretical discussions of  
16    enforcement cooperation to our current reality of  
17    regular cooperation between authorities. Now, not  
18    surprisingly, for us in Canada, collaboration and  
19    cooperation with the US authorities is particularly  
20    important. It developed naturally, given our shared  
21    border and our close economic and trade ties.

22           The signing of the Canada-United States-  
23    Mexico Free Trade Agreement, or CUSFTA, as we call it  
24    in Canada last year was very important, and once in  
25    force it will serve to further strengthen our

1 commercial relationship and the relationship between  
2 the competition and consumer authorities.

3 So a coordinated approach to the challenges  
4 the current digital age raises for competition and  
5 consumer protection law is critical for enforcers, and  
6 when we do cooperate, there are many benefits for us  
7 to reap -- increased detection and deterrence of  
8 anticompetitive conduct, efficiencies for both  
9 agencies and the business community, the sharing of  
10 best practices resulting in more effective  
11 investigations and better protection for consumers,  
12 and minimized risk and uncertainty for businesses and  
13 agencies, because when agencies cooperate around the  
14 world, outcomes are more consistent.

15 And at the Bureau, that vital cooperation  
16 occurs on a broad spectrum, from extremely formal  
17 cooperation to informal avenues of working together.  
18 Informally, we exchange public information, theories  
19 of harm, and procedural information, such as the  
20 timing of investigative steps, and we conduct meetings  
21 and staff exchanges.

22 In contrast, formal cooperation can include  
23 mutual legal assistance and the sharing of documents,  
24 data, and confidential information. For instance,  
25 competition policy principles are commonplace in

1 Canada's free trade agreements that are being entered  
2 into in the modern day, like CUSMA I already referred  
3 to, and they ensure that the benefits of trade  
4 liberalization are not offset by anticompetitive  
5 conduct.

6 In criminal cases, mutual legal assistance  
7 treaties, or MLATs, are useful formal tools to gather  
8 evidence located in foreign jurisdictions. This  
9 formal cooperation allows enforcement agencies to  
10 share documents, affidavits, lend exhibits, and engage  
11 in search and seizure on one another's behalf. The  
12 Bureau has used the MLAT process to conduct searches  
13 in Canada on behalf of the United States Department of  
14 Justice Antitrust Division and to obtain important  
15 evidence from the United States for the advancement of  
16 our cases.

17 Where confidential information is shared  
18 outside of MLATs, we often obtain waivers from the  
19 parties. But even without waivers, Section 29 of the  
20 Canadian Competition Act lets us share confidential  
21 information with other agencies for the administration  
22 or enforcement of the Competition Act, and, of course,  
23 where we have assurances of confidentiality.

24 The Canada-US Cooperation Agreement signed  
25 in 1995 has served as a high-level framework for our



1 positive cooperative relationship. It sets out how  
2 the Bureau, the FTC, and the DOJ Antitrust Division  
3 will work together. We also have our Canada-US  
4 Positive Comity Agreement, allowing one country to  
5 defer to another in cases where conduct in one country  
6 creates anticompetitive effects in the other. And,  
7 more recently, we established our best practices on  
8 cooperation in merger investigations, which is a  
9 public document that provides guidance to the business  
10 and legal community. This was based on years of  
11 merger review collaboration between the Bureau and the  
12 US authorities.

13 We've put this best-practices document to  
14 good use. Recently, we worked with the FTC and the  
15 European Commission on the Linde-Praxair transaction,  
16 where we obtained multiple remedies. We also worked  
17 closely recently with the USDOJ on agricultural  
18 transactions, such as Bayer-Monsanto and Dow-DuPont.

19 But one transaction that stands out in my  
20 mind for cooperation and collaboration is the Staples-  
21 Office Depot merger in 2016. It exemplifies the deep  
22 and positive cooperation relationship that we have  
23 with the FTC. In that case, there was extensive  
24 sharing of data and evidence, including the FTC  
25 sharing their second request with us. We also

1 seconded a Canadian Department of Justice lawyer to  
2 the FTC litigation team and had Bureau officials  
3 attend the FTC injunction hearing.

4 As a result of this cooperation, the Bureau  
5 and the FTC were able to file simultaneous court  
6 challenges to the merger, and the parties ultimately  
7 abandoned the transaction. Going forward, I can  
8 assure you today that I will encourage Bureau merger  
9 staff to seize such opportunities for deep  
10 collaboration wherever possible.

11 On the abuse of dominance side, Google comes  
12 to mind as a great example of our cooperation as well.  
13 The Bureau launched an inquiry in 2013 under our  
14 abuse-of-dominance provisions to investigate Google's  
15 conduct related to online search and search  
16 advertising, as well as display advertising. During  
17 the course of our in-depth investigation, we worked  
18 with several international counterparts, including the  
19 FTC.

20 We concluded from a Canadian perspective  
21 that Google used anticompetitive clauses in its  
22 AdWords application programming interface terms and  
23 conditions. These clauses intend to exclude rivals  
24 and negatively affect advertisers. Google removed the  
25 clauses, as many of you will be familiar, and

1 committed to not reintroducing them or similar ones  
2 for a period of five years. These commitments were  
3 similar to those made here in the United States.  
4 Being able to readily review facts and evidence  
5 related to similar allegations against Google in the  
6 US context was of significant value to the Bureau's  
7 investigation.

8 On the cartel side, we have our Nishikawa  
9 case, which resulted in Canada agreeing to have the  
10 United States Department of Justice proceed and take a  
11 guilty plea in the auto parts investigation, even  
12 though there was an impact in Canada. This  
13 demonstrated our commitment to positive comity between  
14 our two nations, and it showed how we can collaborate  
15 for efficient, effective outcomes.

16 Let me turn to the area of deceptive  
17 marketing. Our legal framework and ability to assist  
18 and share information with our foreign counterparts  
19 has improved significantly in Canada with the  
20 enactment of Canada's Anti-Spam Law, or CASL, as we  
21 refer to it. CASL brought into force new express  
22 provisions allowing the Bureau to use our  
23 investigative powers under the Competition Act or the  
24 Criminal Code of Canada to assist foreign partners  
25 without us having to be conducting our own

1 investigation.

2           It grants these powers with the provision  
3 that information will only be used for that  
4 investigation or proceeding and will be kept  
5 confidential, similar to provisions in the US SAFE WEB  
6 Act. Although I am unable to get into the details,  
7 recently, in response to an FTC request, the Bureau  
8 shared information obtained through formal powers with  
9 the FTC to assist them in an investigation.

10           Similarly, the US SAFE WEB Act has been an  
11 incredibly valuable tool for gathering information in  
12 cross-border deceptive marketing cases. I know, and  
13 it's been mentioned several times this morning, the  
14 SAFE WEB Act is up for renewal soon, and I want to say  
15 unequivocally and on the record the Bureau supports  
16 that renewal, and we are pleased -- incredibly pleased  
17 -- with how we've been able to use this valuable tool.

18           The Bureau has used SAFE WEB requests to  
19 obtain information relevant to multiple Canadian  
20 investigations, as we did with the premium text  
21 messaging case, which was litigation against Canada's  
22 three largest wireless providers for conduct that was  
23 deceptive marketing practices. At our request, the  
24 FTC applied to the United States District Court for  
25 the District of Maryland for an order authorizing the

1     FTC to obtain oral and documentary discovery from a US  
2     company, Aegis Mobile.

3             Subsequently, the US District Court ordered  
4     Aegis to hand over documents to the FTC, enabling them  
5     to then share those records with the Bureau. This  
6     was, as I understand it, the first time an American  
7     court granted authorization to the FTC to conduct  
8     discovery of an American company to assist the Bureau.

9             These events, the tremendous efforts that  
10    the FTC went to on behalf of the Canadian Competition  
11    Bureau, were of incredible assistance to the Bureau in  
12    advancing our case, which we were then able to resolve  
13    by consent agreements with the three largest wireless  
14    providers. And it's one of the key reasons that we  
15    are so supportive of the renewal of the SAFE WEB Act.

16            The FTC and the Bureau are also involved in  
17    several cross-border regional partnerships related to  
18    combating mass marketing fraud, including the Toronto  
19    Strategic Partnership, the Alberta Partnership against  
20    Cross-Border Fraud, and the Pacific Partnership  
21    against Cross-Border Fraud. These working  
22    relationships, focused on sharing intelligence and  
23    cooperating in mass marketing fraud investigations,  
24    have frequently led to early collaboration between the  
25    Bureau and the FTC. However, communication on cross-

1 border enforcement outside of these partnerships could  
2 allow for even broader cooperation between the Bureau  
3 and the FTC. More cooperation at the working level  
4 and informal discussions on trends, intelligence,  
5 opportunities to coordinate investigations and  
6 dialogue early on in the investigative process could  
7 make formal information-sharing tools even more  
8 effective.

9 To that end, we have been participating in  
10 regular merger team leader meetings with our US  
11 partners since 2011. These team leader meetings were  
12 so successful that we've expanded them and have had  
13 similar meetings with team leaders on merger review  
14 with Brazil, Australia, China, the European Union, and  
15 the United Kingdom. We are looking forward to the  
16 first abuse of dominance or unilateral conduct team  
17 meetings with the FTC and DOJ this coming June.

18 Like the FTC, we also participate in  
19 international staff interchanges and host officials  
20 from countries around the world. We have had several  
21 successful outbound interchanges to the FTC over the  
22 years, and, of course, we would welcome the  
23 opportunity to host a member of the FTC at the Bureau  
24 going forward. We might suggest you don't come in the  
25 winter. It was actually snowing in Ottawa on Friday.

1           So this networking and the people-to-people  
2 linkages, such informal cooperation, builds rapport  
3 and eases international cooperation because  
4 relationships and trust really do matter. Cooperation  
5 among authorities is critical to finding common  
6 approaches to tackle global anticompetitive conduct,  
7 and through the various tools we have in place, we can  
8 continually reap the benefits of working together with  
9 our global partners, and "together" is the key word  
10 here.

11           As Henry Ford once said, if everyone is  
12 moving forward together, then success takes care of  
13 itself. That's true for us, too. Strong working  
14 relationships are a hallmark of a successful  
15 organization in our digital and globalized world, and  
16 competition and consumer protection authorities are no  
17 exception.

18           Now, let me end by once again thanking the  
19 FTC for hosting what I'm sure will be an interesting  
20 dialogue over the next two days, and I'm really  
21 looking forward to joining our panel discussion now.  
22 Thank you very much for your attention. Enjoy the  
23 hearings.

24           (Applause.)

25

1 BUILDING ENFORCEMENT COOPERATION

2 FOR THE 21ST CENTURY (PANEL)

3 MS. ASKIN: Thank you, Matt. We're happy to  
4 now kick off the first panel discussion, again focused  
5 on Building Enforcement Cooperation for the 21st  
6 Century. I'm Molly Askin, an attorney in the Office  
7 of International Affairs, and we're going to  
8 comoderate today with my colleague, Lauren Kapin,  
9 also from the Office of International Affairs.

10 One update to our programming, unfortunately  
11 our planned speaker, Edith Ramirez, is not going to be  
12 able to join us today.

13 MS. KAPIN: Silver lining, that means we are  
14 going to absolutely be on time now that we have this  
15 great cushion.

16 MS. ASKIN: That is true. So what I wanted  
17 to mention to kick off this panel follows along so  
18 many of the themes we've heard this morning. I think  
19 in Matt's comments, especially about Praxair and  
20 Staples, we heard about the depth of cooperation and  
21 how we can use our cooperation enforcement tools to  
22 work together and achieve consistent outcomes but also  
23 use those tools to have knowledge transfer between  
24 staff at different agencies that makes our enforcement  
25 efforts more robust.



1           To give a little bit of light to the breadth  
2 of cooperation, while we do work with certain partners  
3 at the deep level, we also work, with -- on many cases  
4 -- with competition enforcement agencies from many  
5 jurisdictions. So just to give a few data points, in  
6 the last eight years, depending on the year, we've  
7 cooperated in between 21 and 48 enforcement matters.  
8 It's a little bit different each year depending on the  
9 cases and the investigations that we're seeing. And  
10 in those cases, we have cooperated with between 12 and  
11 21 different competition agencies, and, again, those  
12 are just the competition cases.

13           So you can see that, in certain cases, like  
14 Praxair-Linde, we've cooperated with over 10 different  
15 competition enforcement agencies, and there's also a  
16 range. So as we've seen the number of agencies we've  
17 worked with increase, there are a number of sort of  
18 repeat players, but in each year we're typically  
19 seeing agencies that we're cooperating with for the  
20 first time, but again relying on many of the same  
21 tools that we're able to use to cooperate with people  
22 we work with on a regular basis.

23           So that's a little bit of an idea from the  
24 competition side. I think Laureen is now going to  
25 share some perspectives from the consumer protection

1 and privacy enforcement side.

2 MS. KAPIN: Yes. My name is Laureen Kapin,  
3 and I'm an attorney with the Office of International  
4 Affairs, where I focus on consumer protection matters.  
5 And for me, the theme of our panel today and indeed  
6 these hearings this week are we're stronger together.  
7 And I wanted to give one case example to illustrate  
8 that and also reinforce the concept that Bill Kovacic  
9 spoke about, with Canada really as a prototype for the  
10 robust relationship we can have with our international  
11 partners and how that relationship can really lead to  
12 a stronger enforcement result because of those  
13 relationships.

14 So the example is regarding our Expense  
15 Management of America case, and that was a really  
16 sleazy debt-reduction scam that arose out of the  
17 financial crisis in 2008 that really targeted  
18 vulnerable consumers by making offers to try and get  
19 them debt relief for their mortgages or a better  
20 interest rate, again, something that really focused on  
21 people who were most vulnerable, who could least  
22 afford to lose money.

23 And in that case, we were able to work with  
24 the RCMP, the Royal Canadian Mounted Police. We know  
25 who they are because they help us a lot, and the

1 Canada Competition Bureau, among others, to get at  
2 money that was in Canada. We were able to get \$2  
3 million that belonged to the bad guys and gals behind  
4 this scam that was actually seized by the RCMP, but  
5 they alerted us to the fact that they had this money  
6 from these bad guys and gals they knew we were looking  
7 at, and we had an asset freeze in our case on the US  
8 side, and we were able to work with the Canada courts  
9 to basically say, we have this order, Canada court,  
10 can you please keep this money on ice until our case  
11 is over and if we have a judgment, then ship it over  
12 to us so we can give it to the victims?

13 That's not easy to do without a lot of  
14 really good cooperation from your foreign partners,  
15 without a good cooperation relationship with the  
16 Department of Justice's Office of Foreign Litigation  
17 who handles our litigation abroad. All those  
18 relationships worked to make sure that that money  
19 stayed put until our case was over and we got a  
20 judgment against these defendants.

21 And, bottom line, we were able to get nearly  
22 \$2 million refunded to victims on both sides of the  
23 border and in any other countries where the victims  
24 applied for redress in that matter. That's a result  
25 we could not have had but for the human glue -- I love

1 that phrase, and I will steal good phrases at any  
2 opportunity -- the human glue that we had created  
3 between the FTC and our international counterparts.  
4 So I just wanted to give that as a framework because  
5 it's a great example of how we're stronger together.

6 And with that, I think we're going to launch  
7 into our panel discussions. And I have the privilege  
8 of introducing Mr. Tom Barnett, who is a Partner at  
9 Covington & Burling and before that served as the  
10 Assistant Attorney General in charge of DOJ's  
11 Antitrust Division. So I thought I would turn it over  
12 to you for your remarks, and thank you for being here.

13 MR. BARNETT: Yeah. Thank you, Laureen and  
14 Molly. I very much appreciate the opportunity to be  
15 here. I will join in the commendation to have the FTC  
16 for holding these hearings. I do think it's important  
17 and one of the strengths of the agency that you all do  
18 this.

19 The theme of international cooperation is  
20 increasingly important. To, you know, borrow a few  
21 cliches, the world is shrinking and it keeps getting  
22 smaller, and, certainly, with the advent of the  
23 digital age, that just underscores and accentuates the  
24 importance of the various, I'll say, competition  
25 agencies, but I guess I should say competition,

1 consumer protection, and other agencies around the  
2 world from interacting in various ways.

3 I will start by saying that my good friend,  
4 Bill Kovacic, is still not sending me his speeches in  
5 advance.

6 (Laughter.)

7 MR. BARNETT: But, nonetheless, you're going  
8 to hear a lot of what he said echoed and reflected in  
9 what I'm about to say. And I think -- and, indeed,  
10 in, you know, some of what Matt was saying, and you'll  
11 probably hear a fair amount of repetition, which I  
12 think is not all bad. And I think that's because  
13 those of us who are involved in some of this are  
14 seeing and reacting to the same things.

15 And I will start by saying that there are  
16 different forms of cooperation. There's formal  
17 cooperation, there's been reference to various legal  
18 structures, organizations like the OECD, the ICN,  
19 UNCTAD, et cetera, et cetera, and then there is less  
20 formal coordination. I'm going to spend more of my  
21 time talking about the latter than the former. They  
22 each have their place.

23 I mean, formal cooperation -- and I'll use  
24 the OEC as an example, there is a benefit to having an  
25 organization that is a formal representative of each

1 government, and if that organization makes a  
2 statement, it carries particular weight. And while  
3 perhaps less relevant to the FTC, one of the things I  
4 remember is when the OECD adopted a resolution or a  
5 statement that says cartel enforcement should be a  
6 priority for competition agencies around the world,  
7 that carried weight. And there are a lot of things  
8 that led to many agencies around the world  
9 prioritizing cartel enforcement, but that was  
10 certainly one of them, and it helped reinforce the  
11 message.

12 On the other hand, formal cooperation has  
13 its costs and challenges. You know, the story about  
14 if we were trying to form -- and I say we, because I  
15 wasn't there at the time -- the International  
16 Competition Network, in a formal way, we might still  
17 be debating how big the table should be, what size the  
18 table should be. And you get some of those -- that  
19 reaction when people talk about, well, should we try  
20 and introduce competition into the whole WTO  
21 framework. I think that has its own set of  
22 complications that makes that kind of formal action  
23 very, very challenging.

24 And, you know, another sort of smaller  
25 example, when I was at the department there was a

1 discussion going on about -- not only with the FTC but  
2 our Canadian colleagues as well as some others, could  
3 we come up with a single form for a merger  
4 prenotification to try to reduce the burden to various  
5 parties, because there are lots of forms you have to  
6 file. After a lot of discussion, what we concluded  
7 was is what you would end up with is one form that had  
8 a different tab for each country that would  
9 essentially replicate each form.

10 The local requirements and information that  
11 are needed are local. I mean, there is some overlap,  
12 I get that. But as you probably would infer, we sort  
13 of dropped that effort and didn't continue going. And  
14 there is the risk when you are pursuing a more formal  
15 approach of what I would call the lowest common  
16 denominator, that, you know, various agencies,  
17 countries, have different situations. They may or may  
18 not be able to commit to a certain standard or action,  
19 and you end up having to, if you will, bring down the  
20 standard in order to get everyone on board.

21 On the other side of that, you have informal  
22 cooperation, and I'm a huge believer of it. You start  
23 with -- and I will echo what Bill said and I think  
24 some others have already said -- there is a value to  
25 that personal, human interaction that I think is hard

1 to overstate. You not only just knowing the person  
2 who's on the other end of the email or the phone call  
3 sort of can in some cases drop defensiveness, can  
4 increase understanding, can increase receptivity. And  
5 I believe that is true and valuable at both -- at the  
6 senior level and very much, as people have already  
7 alluded to, at the staff level.

8 I've said before, I will say it again, I  
9 think one of the biggest benefits of the International  
10 Competition Network, because it's broader than OECD,  
11 is you get senior people from various competition  
12 agencies around the world, particularly at the annual  
13 meeting. They interact at different times during the  
14 year, but they actually meet each other face to face.  
15 And that benefit alone, to me -- the ICN has done a  
16 lot of things well beyond that, but that benefit  
17 alone, I think, would justify most of the efforts that  
18 go into it.

19 And I can tell you, at least from my time  
20 when I was at the department, when specific issues  
21 came up, it actually did provide a contact stand,  
22 facilitated cooperation on some specific enforcement  
23 matters that might have been challenging if those  
24 relationships didn't exist. But I do want to  
25 reinforce what has already been said. I think it is



1 hard to overvalue the benefit of staff level  
2 exchanges, not only just the normal dialogue that goes  
3 on but the idea of secondments.

4           And Bill did a great job of describing, you  
5 know, when the FTC has had people come in. They're  
6 here, they see exactly what goes on -- the good, the  
7 bad, and the ugly, right? Mostly good, I have no  
8 doubt. But it is -- how do I want to say this? A  
9 couple of things. Just to see the nuts and bolts. I  
10 mean, how do you discover information? How do you  
11 make phone calls to industry participants? When do  
12 you use compulsory process? When you get comments  
13 from a particular industry participant, what filter do  
14 you use as you listen to that? Very basic things for  
15 people who have been doing it for 15 years. But for  
16 people who may not have been doing it for 15 years,  
17 there's a lot to be learned.

18           And, and I want to emphasize this, and I  
19 will give Bill Kovacic credit, because he's somebody  
20 who started impressing this upon me from the very  
21 first time I met him. I'm not just saying that people  
22 outside the United States should come to the United  
23 States and see how well the FTC does things. There  
24 are a lot of things you can learn from somebody here  
25 in the United States by going over, sitting in the

1 chair of somebody in an office, whether it's in  
2 Africa, Canada, Australia, or wherever.

3 And that facilitates things, because down  
4 the road, you have, I'm just giving you a general  
5 example -- oh, wow, time is up? I thought I had eight  
6 minutes. Did I use eight minutes?

7 MS. KAPIN: No, we're probably a little  
8 askew because of the missed speaker.

9 MR. BARNETT: Well, I'm very -- I want to be  
10 fair to everyone. I can finish up quickly if you  
11 want.

12 MS. KAPIN: Sure, that would be great.

13 MR. BARNETT: Okay. Well, then, what I will  
14 briefly mention, and maybe we'll get into this in the  
15 discussion is, I also underscore cooperation,  
16 discussion with the DOJ is very important. But Bill's  
17 covered that. There are a lot of practical issues.  
18 You have timing issues, you have agencies with two  
19 levels of decision-making, you can cooperate at one  
20 level, but then the decision-makers are at another  
21 level. That introduces complexity.

22 What the FTC is particularly strong about  
23 is, I think the investment in Randy's OIA shop, and I  
24 give Debbie a lot of credit for helping to set that up  
25 and for her successors in supporting it, but you have

1 people who serve longer terms, you have overlap, so  
2 that those relationships, the knowledge can build up  
3 over time. I think that's -- and I'll even say this,  
4 that's a relative challenge for the DOJ at the senior  
5 level, but the FTC has done very well with that.

6 I was going to flag the potential for mixed  
7 messages, different Commissioners saying different  
8 things, the DOJ saying something different from the  
9 FTC. That can create problems internationally, and I  
10 fully endorse efforts to try to get everyone on the  
11 same page. And so I will leave it at that, as my  
12 message is to focus very much on the informal  
13 cooperation, try to -- I think you all are doing a  
14 great job. Try to build on that, reinforce that. I  
15 think that lays the groundwork for formal cooperation  
16 as consensus develops on various issues, but with that  
17 I will pause.

18 MS. KAPIN: Okay, thank you.

19 MS. ASKIN: So as we move on I'm going to  
20 introduce our next speaker, Mr. Chilufya Sampa, he  
21 comes from the Competition and Consumer Protection  
22 Commission in Zambia. He's also currently serving as  
23 President of ICPEN. Over to you.

24 MR. SAMPA: All right. Thank you very much,  
25 Molly and Laureen. First and foremost, I would like

1 to thank the FTC for inviting me to these hearings,  
2 which, as the other previous speakers have said, are  
3 very important tools to actually get to know where you  
4 are. As a way of looking at the formal cooperation or  
5 enforcement cooperation, too, that have been there, I  
6 thought that maybe we look at the perspective from the  
7 African side, and basically to state that Africa is  
8 made of quite a number of countries with very small  
9 economies, and so you may not necessarily see  
10 engagement with the FTC directly because of the nature  
11 of the economies that you find on the African  
12 continent.

13           However, there has been a trend over the  
14 past maybe 10 to 15 years where you see a lot of  
15 countries coming up into regional block, regional  
16 trading blocks. And these become now quite  
17 significant trading partners globally, making the  
18 transactions or even with the USA quite significant,  
19 and, therefore, bring up the possibility of seeing  
20 that the FTC can actually engage with the trading  
21 block. So we have one in the southern part of the  
22 African continent called SADC, COMESA, and the East  
23 African Community. So when you look at that, you have  
24 close to 30 countries altogether and making it quite  
25 significant.

1           Now when you look at the tools that the FTC  
2     has used generally over the years, for example, I'll  
3     pick on the SAFE WEB Act, which, to me, brought out  
4     the combination of the Livingstone principles where 20  
5     countries, African countries, together with the FTC,  
6     agreed to communicate, collaborate, investigate in  
7     appropriate cases, different cases that may affect not  
8     just the US citizens but the African citizens as well.

9           And with this encouraged -- with this type  
10    of communication, the Livingstone principles, I would  
11    not say that we have as Africa seen the -- been able  
12    to actually engage with the FTC, but we have used  
13    these same principles to engage with other cooperating  
14    or other agencies within Africa and at times outside  
15    of Africa. And with -- for example, I'll give a  
16    situation where we had a case of secondhand motor  
17    vehicles with Japan and the UK, and we did use the  
18    Livingstone principles in trying to engage with them  
19    and share, and try and enforce -- come up with an  
20    enforcement.

21           MS. KAPIN: Can you just, for those who  
22    don't know, tell us what the Livingstone principles  
23    are, just the short version?

24           MR. SAMPA: The Livingstone principles  
25    basically talk -- well, it's quite a long list of

1 clauses, but it's basically a willingness by these  
2 countries to work together in enforcement, work  
3 together in investigation, and work together in  
4 sharing of information. In summary, I can say that  
5 that is what it is based on, yes.

6 MS. KAPIN: Perfect.

7 MR. SAMPA: And, of course, even the  
8 fellowship of -- the FTC fellowship that has been  
9 offered over the years, that has been -- is also part  
10 of the Livingstone principles. And we have used that  
11 to have the informal communication or even the formal  
12 communication with Ethiopia, Sudan, Rwanda, the  
13 Seychelles, Namibia, and Botswana, and based on that,  
14 and we see that that, too, would not have been  
15 possible without the tools of the FTC.

16 One of the cases I think that became quite  
17 apparent is the Western Union case where there was a  
18 refund to many consumers, and I, for one, was once  
19 approached by one of the consumers in Zambia who had  
20 been a victim of the scam. And she had made an  
21 application to the FTC to actually receive her  
22 refund. And what we did was, when we heard that the  
23 FTC had actually made that decision, we publicized it  
24 to our -- within our jurisdiction. I'm not sure how  
25 many other people came through, but I was aware of

1 this particular one person who approached us.

2 As I say, also aware of the cases where we  
3 were dealing with secondhand vehicles and we tried to  
4 apply the Livingstone principles, and unfortunately,  
5 maybe because the United Kingdom and Japan, because  
6 those are the two countries that we were trying to  
7 have cooperation with, did not -- we did not have the  
8 same level of cooperation or agreements. So that  
9 didn't work very well with that.

10 There is also another enforcement that  
11 we had, again based on that, the Livingstone  
12 principles as I keep on saying is the Fastjet on  
13 misrepresentation that took place within the region.  
14 This affected Tanzania, Zambia, Zimbabwe, and Malawi,  
15 and we were able to get enforcement by cooperation  
16 between the various agencies that I've just mentioned.

17 Another tool that I think the FTC has been  
18 instrumental to and have really, really helped is the  
19 ICN working group -- major working group cooperation  
20 firm work. We have used this again to share  
21 nonconfidential information, share information on  
22 transactions that are similar in nature, share  
23 theories of harm, definition of relevant markets, just  
24 depending on the type of case that has come up.

25 Again, the structure of the African

1 countries is very highly concentrated. You would not  
2 necessarily maybe find two merging firms operating in  
3 one particular market, but when you look at it on a  
4 regional level, you will find that that becomes a  
5 possibility. And so coming from my area of remarks,  
6 that as we see the region integrating, with the  
7 possibility of better cooperation with the FTC,  
8 because it becomes possible for a major transaction to  
9 actually affect both regions, so to speak.

10 In a number of cases, there was a merger  
11 case where Walmart, which is, of course, a US company,  
12 was taking over mass discount stores of South Africa,  
13 and there were a number of issues that we shared with  
14 the South African Competition Authority, the Namibian  
15 Authority, as well as the Botswana Competition  
16 Authority. And basically this was on the remedies,  
17 especially that some of the laws within these  
18 countries do have public interest issues that are  
19 raised. And we shared with the other authorities to  
20 see how we could work together and come up with  
21 similar remedies and ensure that we have similar type  
22 of enforcement procedures.

23 There is also the Toyota-Tsusho takeover of  
24 CFAO. That's a French company, and both these  
25 companies had presence in the region. We had



1 cooperation with Kenyan authority, Tanzanian  
2 authority, Malawian authority, and this merger looked  
3 like it had the potential to raise the concentration  
4 of the market, and we were able to share the theories  
5 of harm with the other cooperating agencies.

6 The more recent case was a merger between  
7 BSA and Aspen Pharma, and with this, the Botswanan  
8 Competition Authority and ourselves shared on theories  
9 of harm in the relevant market.

10 So we can say that the cooperation has been  
11 going on and it has been successful, but as I say, I  
12 think the FTC tools have really benefitted from --  
13 benefitted us in engaging with other African  
14 competition authorities, and we have been able to  
15 engage with that.

16 When you look at maybe where there's room  
17 for improvement, we see, I think, a situation where  
18 the tools have not really been fully appreciated. I  
19 think one that Professor Kovacic mentioned is that  
20 there is need for probably FTC to go out more and  
21 explain what they do and what their role is. And I  
22 think that is what most African countries, especially,  
23 and I may speak for Zambia here, may not fully  
24 understand and appreciate what the role is that they  
25 do, but not to say that these tools are extremely

1 important. I can close for now.

2 MS. ASKIN: Okay, thank you.

3 MS. KAPIN: Thanks so much. So now I have  
4 the pleasure to introduce Jean-François Fortin, who is  
5 the Executive Director of Enforcement of the Autorité  
6 des Marchés Financiers in Quebec, that is the agency  
7 in charge of Quebec's financial sector. So I hand it  
8 over to you.

9 MR. FORTIN: Thank you. Thank you so much.  
10 Good morning, everybody. Thank you, Molly and Laureen  
11 for the invitation. As it was said, I am Executive  
12 Director of Enforcement within the AMF, and I think  
13 the reason why I am here today is also because I am  
14 chair of a committee for IOSCO and also the screening  
15 group of IOSCO, and I will just tell you what it is.  
16 IOSCO, as probably some of you know, is the  
17 Organization of Securities Commissions. And it's an  
18 international body that brings together the world's  
19 securities regulators. Here in US, obviously, the US  
20 SEC and the CFTC are two very important members of  
21 this organization. And it represents between 90 and  
22 95 percent of the world's securities market.

23 As you all know, the securities commissions  
24 are responsible for market efficiency but also for  
25 consumer protection and enforcement is a very

1 important part of our mandate. So committee for --  
2 under IOSCO umbrella is the group composed of  
3 enforcement people and also discussing standards, but  
4 how we can share information together and also how we  
5 can work in -- I mean, there's a lot of cross-border  
6 activities. I think it's also true in the competition  
7 world, but nowadays, the globe -- the markets --  
8 financial markets are global. And the need for  
9 cooperation in the international context is really  
10 important.

11 We have a MMOU, a multilateral memorandum of  
12 understanding, that was adopted in 2002. It was borne  
13 further to the event of September 11 where there were  
14 a few investigations going on everywhere, and there  
15 was a need after those investigations to see how  
16 multiple regulators could really work together and  
17 cooperate in the context of investigations that had  
18 crossed borders remit.

19 There was, at the time, few bilateral MMOUs,  
20 and I know some of the previous speakers talked about  
21 existing bilateral MMOUs in their competition context.  
22 At IOSCO, we realized that there was a need for a  
23 multilateral MMOU that would be a more efficient way.  
24 You don't have to renegotiate bilateral MMOUs from  
25 time to time, and the goal was to create a document

1 which would be at the same time strong in its wording  
2 but also flexible to accommodate the different  
3 systems, legal systems in the world.

4           So I think the success of the MMOU is really  
5 -- it has become recognized internationally. It's now  
6 the benchmark recognized by the AMF, the World Bank  
7 and FATF, where they would consider if a jurisdiction  
8 is signatory to MMOU. As of today, out of 149  
9 eligible members, there are 121 signatories to the  
10 MMOU. And just to give you an example of the level of  
11 the use of the MMOU, in 2003, there were 56 requests  
12 for information, and last year in 2017, there was  
13 4,803 requests for information.

14           One of the main reasons I think why the  
15 MMOU is so successful is because of the screening  
16 process that is really robust. You don't -- you  
17 cannot become a signatory just because you express a  
18 willingness to become signatory to it. You have to  
19 demonstrate that you have the legal capacity to  
20 cooperate and to share information with your foreign  
21 counterparts. For that, there is a screening group,  
22 composed of a few people even in this room today, that  
23 of 35 member jurisdictions that we'll screen every  
24 applicant to become a signatory.

25           Briefly, key elements of the MMOU, the first

1 one, I'll get to the second one in a few minutes, it's  
2 an nonbinding agreement but sets out specific  
3 requirements for what kind of information that can be  
4 exchanged and how it is to be exchanged; show that you  
5 have the legal capacity to compel information and what  
6 types of information you can compel. For example, in  
7 our world, it would be the tradings, the transactions,  
8 beneficial ownership, the kind of things that you have  
9 to be able to demonstrate that you can obtain in your  
10 market and afterwards you can share with the  
11 requesting authority that you have the capacity to  
12 share, and also some specifics about the permissible  
13 use of the information for the receiving authority.

14 Other specific requirements regarding the  
15 confidentiality, every request has to be treated  
16 confidentially by both the requesting and the  
17 requested authority and also that no "domesting" or  
18 blocking laws prevent the securities regulator to  
19 share the information with the requesting authority.

20 The first MMOU was adopted in 2002. In  
21 2016, there was a new agreement that was agreed  
22 between the parties. We call it the enhanced MMOU,  
23 EMMOU. The reason for that, I mean, the first MOU is  
24 a really useful tool, but we thought concerning, I  
25 think, some of the reasons that were expressed this

1 morning regarding globalization of the market but also  
2 the use of technology, there was a need for  
3 modernization of the MMOU. And we also wanted to  
4 "higher" the standard in terms of what were going to  
5 be the minimum standards to become signatory to this  
6 enhanced MMOU.

7 Key additional minimum powers that were  
8 added in the context of this agreement: capacity to  
9 obtain audit working papers from issuers; compel  
10 physical attendance for testimony; and the capacity to  
11 sanction if the person doesn't show up. Capacity to  
12 freeze the assets, there was a big debate on that, but  
13 since it was very difficult to have everybody on board  
14 to have the capacity to freeze on behalf of another  
15 regulator, if you cannot freeze on behalf of another  
16 regulator, at least you will help the other regulator  
17 to tell them how you can freeze assets in your  
18 jurisdiction. And the last two new powers are the  
19 capacity to obtain internet service providers' records  
20 and also the telephone records from your market  
21 participants in your jurisdiction.

22 One very important aspect of both MMOUs is  
23 the principle of fullest assistance permissible. It  
24 means that a regulator must assist one another to the  
25 extent it can legally do, even though it's not in the

1 MMOU. I give you one example. In Quebec, prior to  
2 the adoption of this new EMMOU, the freezing of assets  
3 was not part of the MMOU, but in Quebec, we have the  
4 capacity to freeze on behalf of another jurisdiction.  
5 So in the past, we actually froze assets on behalf of  
6 foreign regulators, even though it was not in the  
7 MMOU, but under these principles of full assistance  
8 permissible, we did it anyway.

9           So in conclusion, I think the MMOU and now  
10 the EMMOU, we only have 10 signatories so far but it  
11 was adopted recently, it's a really efficient tool.  
12 I'm not that familiar with the MLATs of the world but  
13 I hear that it's really complicated, can be really  
14 long. Requests for assistance between regulators is  
15 really efficient. Obviously if you have to go and  
16 compel information and testimony and documents can  
17 take some time, but if you have the information,  
18 literally, requests for information can be answered  
19 within weeks, if not days, and in urgent matters, it  
20 happens in a few hours.

21           And on that I will just say a word on  
22 Matthew and also Tom about the informal value of the  
23 process is really important. I think by formalizing  
24 the relationship with a formal document within the  
25 MMOU, we help the informal process. And it's true

1 that when you know the people and you can pick up the  
2 phone and talk to someone, it facilitates. You have  
3 an instrument that provides you with how you can share  
4 information, but getting to know people, build trust  
5 between organizations and with individuals, and I can  
6 speak for Quebec and with the US SEC, within urgent  
7 matters, we have ICOs investigations nowadays, we talk  
8 over the phone, we collaborate, we coordinate our  
9 efforts. It's really, really important.

10 And I can get back on any questions you  
11 have, but the MMOU has proven to be a very efficient  
12 tool for us and for every regulator across the globe.

13 MS. ASKIN: All right, thank you. As you've  
14 noticed, my colleague, Nicole, is walking around with  
15 comment cards. If anyone in the audience has  
16 questions for our panelists, now is a good time to  
17 start jotting those down so we can ask them toward the  
18 end of the session.

19 And, Matt, I will turn it back to you.  
20 Thank you.

21 MR. BOSWELL: Thanks, Molly. I guess I went  
22 over time in the introductory remarks, so I'll try and  
23 keep this short to get us back on track. So  
24 cooperating is obviously how we get our job done,  
25 collaborating around the world. Amazing to hear what



1 IOSCO does. I used to work in that world briefly, and  
2 I know firsthand the incredible cooperation in that  
3 organization.

4           But in my comments here I just want to talk  
5 about sort of gaps and trends of international  
6 cooperation, consider how we might respond to those  
7 going forward. And I also want to touch on the  
8 intersection between data privacy and international  
9 cooperation, which is more and more an area of  
10 significant concern. So we have to explore ways to  
11 enhance our relationships at the investigative level.  
12 There's no doubt about that. We always have to be  
13 looking to improve. But how exactly do we do that?

14           Some commentators in Canada have called for  
15 maybe the creation of a new supernational body with  
16 greater powers in this area. I think it's fair to say  
17 that at least from my perspective it's theoretically  
18 interesting but it's not really a practical solution  
19 for today. Some have also suggested that at least  
20 from a Canadian perspective we establish joint  
21 investigative teams, but the reality is certainly with  
22 respect to Canadian law and disclosure in proceedings,  
23 there are substantial barriers to doing this, to doing  
24 it in any way that is smooth across borders.

25           However, one untapped area, and I agree with

1 Jean-François that they can be a bit heavy, but mutual  
2 legal assistance in civil competition matters, we have  
3 some good tools on the consumer protection side that  
4 you've all heard about this morning in terms of SAFE  
5 WEB and other tools, but for abuse of dominance and  
6 mergers, civil MLATs might assist in moving  
7 information -- confidential information across  
8 borders.

9 Now, Canada and the United States have  
10 legislation in place allowing for mutual legal  
11 assistance in civil cases, but we don't -- we need to  
12 have a treaty in order to implement that. And it's  
13 something that, you know, we really should look to,  
14 certainly in the Canada-US relationship, to be able to  
15 share more as it would be really a powerful tool to  
16 crack down on anticompetitive civil conduct across the  
17 border.

18 Another issue that sort of comes up around  
19 the world is communication of confidential  
20 information, the exchange of confidential information.  
21 So when we're cooperating with the United States,  
22 whether it's the FTC or the DOJ on civil matters, and,  
23 in fact, on cartel matters, in order for us to receive  
24 confidential information in Canada, the parties have  
25 to provide a waiver in order for FTC to share that

1 information with us.

2 And there have been -- more often than not,  
3 the parties do provide those waivers, particularly in  
4 merger cases, but there have been instances where they  
5 haven't, and it causes an impediment for us. It  
6 doesn't actually, in our view, make sense in terms of  
7 efficient merger review, but it does happen.

8 Now, the flip side is in Canada, we have  
9 something we refer to as an information gateway  
10 provision in our act, and I've referred to it already  
11 in Section 29 of our Competition Act, allows us to  
12 share with foreign enforcers for the administration  
13 and enforcement of our act. So if sharing with the  
14 FTC assists us in advancing the case in Canada, then  
15 we're able to do so. And it allows us to rapidly and  
16 effectively cooperate with other jurisdictions.

17 We have -- first of all, the OECD encourages  
18 the adoption of information gateway provisions similar  
19 to our Section 29. We obviously see great value in  
20 it. It allows us to be agile in working with  
21 partners, so we also encourage the adoption around the  
22 world. We're also seeing, of course, a trend towards  
23 multilateral instruments, not as amazing as what Jean-  
24 François has just described, but I think there is a  
25 trend in the competition and consumer protection world

1 to think about this more frequently.

2 And we have seen as sort of an early example  
3 of that in the US DOJ and the FTC pushing forward  
4 what's called the multilateral framework on  
5 procedures, which is designed to bring many  
6 jurisdictions on board to make a commitment to issues  
7 related to procedural fairness. And procedural  
8 fairness and transparency and those issues have been  
9 certainly on the agenda at the ICN and the OECD, but  
10 the MFP that the United States Department of Justice  
11 has advanced, has the been lead on, has really  
12 assisted, at least in Canada's view, in getting much  
13 more traction around the world for this multilateral  
14 type agreement. And perhaps it's the beginning of a  
15 movement towards something like the MMOU or the EMMOU  
16 that IOSCO has.

17 So let me return to the issue of privacy.  
18 As we all know, discussions are increasingly focused  
19 on the intersections between privacy, consumer  
20 protection, and competition. We're seeing -- we are  
21 thankfully seeing collaborative efforts within the  
22 international regulator forums in an attempt to better  
23 understand and map out where the cross-sections are  
24 between privacy, consumer protection, and competition.

25 A great example of this is the global

1 privacy enforcement network now has observer status  
2 with ICPEN, which leads to more dialogue, more  
3 relationships, and I will echo the comments of all my  
4 fellow panelists on the importance of these  
5 relationships to advance collaboration.

6 Now, the question is to what extent is  
7 privacy interacting or hindering our ability to share  
8 amongst ourselves, and we're seeing examples of that  
9 and, in fact, unfortunately, we in Canada have  
10 encountered situations where we wanted to share  
11 information but privacy laws have prevented us from  
12 achieving that objective, to get information --  
13 important information with respect to consumer  
14 protection to others in the global community.

15 So the opportunity for greater collaboration  
16 between agencies or examining the area where data  
17 protection and competition law intersect are  
18 incredibly important and something that these  
19 conversations over the next two days, I think, will  
20 tackle. And I look forward to our further discussion  
21 and question-and-answer period.

22 MS. KAPIN: Thank you. Thanks to all our  
23 panelists. So we have a couple of quick follow-ups  
24 before we go to some questions from the audience.

25 Matt, you had just pointed out that

1 sometimes, you weren't able to share information the  
2 way you wanted to because of privacy laws, and I'm  
3 wondering what the experience of our other panelists  
4 has been in terms of the impact of privacy laws on  
5 your ability to share information, particularly with  
6 your international partners. Maybe two minutes each  
7 if you have a view.

8 MR. FORTIN: The one thing I may add very  
9 quickly is that with the adoption of the GDPI in  
10 Europe had potential great impact on our European  
11 colleagues to share, continue to use the MMOU, and  
12 share information with non-EU authorities. We tried  
13 to convince them that they should rely -- continue to  
14 rely on public interest jurisdiction. The European  
15 authorities on data protection believed that it's true  
16 that we can rely on it, but it was not sufficient  
17 enough, so we needed to provide them with some more  
18 safeguards so that non-EU members can demonstrate that  
19 they can, you know, protect the information provided  
20 to them.

21 So a few weeks ago, IOSCO and ESMA, which is  
22 the European Securities Market Authority, confirmed  
23 that they reached an agreement with the GDPR in  
24 Europe, whereby a non-EU authority can get into an  
25 agreement which we call an administrative arrangement

1    whereby the signatory to a non-EU authority would  
2    provide some safeguards so that EU authorities can  
3    continue to use the MMOU, rely on public interest  
4    jurisdiction and share because, I mean, most of the  
5    information that we need in the context of an  
6    investigation contain, you know, personal data. So we  
7    need to continue to share that kind of information.

8           MS. KAPIN: So just a brief follow-up.  
9    So basically you've worked out a separate protocol  
10   of safeguards in order for you to be able to share  
11   with -- in order for EU authorities to be able to  
12   share with you, a non-EU authority. And I'm just  
13   curious, how long did that take? And was it an  
14   elaborate process?, or was it a fairly --

15           MR. FORTIN: Yeah, it was very long. I  
16   mean, there's a board of IOSCO, there is a board of  
17   directors, so there was a board subgroup that was  
18   mandated to negotiate with ESMA and GDPR, and it took,  
19   from memory, at least a year and a half and maybe two  
20   years to negotiate.

21           MS. KAPIN: Oh, my goodness. Okay, thank  
22   you.

23           Chilufya.

24           MR. SAMPA: Yes. We've also had similar  
25   experiences where privacy laws have hampered the

1 sharing of confidential information. And it is quite  
2 difficult, therefore, to maybe investigate a case that  
3 you may be looking at without that type of  
4 information, especially where maybe the -- as the case  
5 usually is, a lot of transactions will happen out of  
6 South Africa and then have an effect on the Zambian  
7 market, and, therefore, you would want to actually get  
8 the information that is residing in South Africa, but  
9 because of the privacy laws that becomes a bit  
10 problematic.

11           However, there is -- what the two  
12 governments have done is come up with a separate  
13 arrangement. It's called the Joint Permanent  
14 Commission, and within that, we had to sign an MOU  
15 with the South African agencies, and that is how we  
16 intend to go around it. We haven't done it yet, but  
17 it's something that is in the offing at the moment.

18           MS. KAPIN: Thank you.

19           Tom.

20           MR. BARNETT: I will just mention that in  
21 the private sector this actually introduces another  
22 element. For example, if you're responding to a  
23 second request in a merger review and some of that  
24 information is located abroad, it may -- and given the  
25 scope of what you're collecting, you may well be



1 collecting information that's protected. Moving it  
2 from one jurisdiction to another obviously creates  
3 issues or can create issues.

4 So I'm not -- at least in my experience,  
5 we've managed to work through all of that, but I can  
6 tell you, that's a whole 'nother work stream that gets  
7 created these days that you have to pay attention to.

8 MS. KAPIN: Thank you. So what I'm hearing  
9 is that these privacy laws have required some  
10 creativity in coming up with approaches to meet these  
11 challenges, probably ranging from the year and a half  
12 of complex negotiations to what I'm intuiting may be a  
13 little more of an abbreviated timeline for your  
14 private practice situations.

15 MS. ASKIN: And one other question. So  
16 we've heard the importance of both the relationships  
17 and tools, and we've also heard from each of you a  
18 variety of tools mentioned, whether it's the ICN  
19 framework, OECD recommendations, the Livingstone  
20 principles, as well as MLATs, MOUs, the expanded MMOU  
21 and EMMOU.

22 So in particular for Tom and Chilufya, I'd  
23 just be interested in your perspectives considering  
24 both competition and consumer protection and data  
25 protection cases. Are new tools similar to MMOUs or

1 EMMOUs that we heard about something that would be  
2 beneficial? Are they needed, or are other new tools  
3 needed?

4 MR. SAMPA: You go first.

5 MR. BARNETT: With the initial caveat that I  
6 will say is I'm not a consumer protection lawyer, and  
7 for areas that are focused on that, I'm not really in  
8 a position to have a position, if you will. But  
9 focusing more on a competition perspective, I don't  
10 actually feel that some major new tools are needed. I  
11 agree that you need a framework, as Jean-François was  
12 saying, to enable dialogue and communication. I think  
13 there's a lot that is going on and a lot that can be  
14 done under the existing framework, so I'm not sure  
15 that any particular new tool jumps out at me, so...

16 MR. SAMPA: I would tend to agree. That's  
17 why I asked you to go first.

18 (Laughter)

19 MR. BARNETT: I've been reassured.

20 MR. SAMPA: I would tend to agree that,  
21 personally, I think coming from Africa, we don't think  
22 we've fully utilized the tools that have been at our  
23 disposal. And we see ourselves, I think, as looking  
24 at the tools and looking at what they represent. And  
25 we see that it actually covers a lot, a lot of areas

1 where the formal cooperation or informal cooperation  
2 can actually achieve what you want to achieve in the  
3 long run. However, maybe it's a question of making --  
4 popularizing them -- popularizing them, maybe making  
5 them more simplified, and that is the route we would  
6 suggest, that if we did that, then we'd have a full  
7 impact of the tools that have -- that are present now.

8 MS. ASKIN: Okay, thank you.

9 And we also have a question from the  
10 audience that's a little bit related. But, Matt, this  
11 question for you. And that question is you mentioned  
12 the importance of information sharing in merger  
13 reviews, but in thinking of civil MLATs and examples,  
14 how do you think that idea might fit in in consumer  
15 protection and data privacy cases?

16 MR. BOSWELL: Well, in terms of consumer  
17 protection, I don't actually think we need it in  
18 consumer protection because of the SAFE WEB Act and  
19 the reciprocal CASL provisions in Canada, which as  
20 Laureen knows all too well, we are using to the  
21 greatest extent we can based on both of our resources.  
22 So it's really to be better able to obtain specific  
23 information with respect to abuse of dominance cases,  
24 as an example, or merger cases if the need arose where  
25 there wasn't a waiver where the parties weren't

1 willing to allow for sharing.

2 MR. BARNETT: And I do not have a tremendous  
3 amount of experience with MLATs. My experience that I  
4 have had is that they are very slow. And what I  
5 remember is I received -- there was an MLAT request  
6 that went out, I won't say to who, years before I got  
7 to the department, I mean, literally years. It was  
8 not my immediate predecessor who had sent it out or  
9 the one before him. And it came back and the response  
10 was, could you clarify your question, please?  
11 Literally.

12 (Laughter)

13 MR. BARNETT: SO I know that's an anecdote  
14 but I will say I don't know that -- I'm not sure that  
15 -- one ought to think about improving the efficiency  
16 of that process if one were going to go down that  
17 road. And I'm not faulting anyone. It's a  
18 complicated process.

19 MR. BOSWELL: No, I completely agree with  
20 you, and we've had -- on the criminal side, we've had  
21 examples similar to yours, and certainly within  
22 Canada, there's been lots of talk of we need to make  
23 this faster and we need to make this more efficient.  
24 And all the more so in a fast-moving, digital economy,  
25 you don't have time to be looking at something two or

1 three years later. The world has moved on, and if you  
2 don't act, you've become irrelevant. So I totally  
3 agree with you.

4 MR. BARNETT: Yes.

5 MS. KAPIN: Yes?

6 MR. FORTIN: Can I add a word on the  
7 previous discussion about the need for an MMOU?

8 MS. KAPIN: Of course.

9 MR. FORTIN: I just want to say a word on  
10 the fact that at IOSCO there were -- there are a lot  
11 of members that were not able to sign the MMOU at the  
12 beginning. And there was a desire to bring them in  
13 the club, meaning that we want, on underregulator  
14 jurisdiction or uncooperative jurisdictions, to be  
15 part of the club, and that meant for them to adopt new  
16 legislation.

17 So we kind of raised the bar on a global  
18 basis, whereby 20 years ago, many jurisdictions were  
19 not able to share and cooperate. Maybe they didn't  
20 have the willingness, but being part of IOSCO and the  
21 meaning and the value of being able to say that you  
22 are a signatory to the MMOU and when you're under  
23 evaluation by the IMF or FATF, it's been a great  
24 consideration.

25 So that's why at one point in time we were

1 able to maybe start with 20, 30 signatories to the  
2 level we are right now with 120 signatories to the  
3 MMO. It's not only the biggest and the most developed  
4 jurisdictions that have that. So if we have an  
5 investigation in other part in the world, we know that  
6 they have the obligation to cooperate with us.

7 MS. KAPIN: And that includes the US  
8 Securities regulator, does it not?

9 MS. FORTIN: Yes.

10 MS. KAPIN: Yeah, we had a question from the  
11 audience, and I just wanted you to underscore that.

12 MS. FORTIN: And the CFTC as well.

13 MS. KAPIN: Perfect.

14 MR. BOSWELL: If I can just comment, it's an  
15 interesting -- I mean, it really does work very well,  
16 but it's an interesting -- it would represent an  
17 interesting culture shift at least in terms of the ICN  
18 and ICPEN in terms of how we go about achieving what  
19 we are trying to achieve. It's sort of suasion,  
20 consensus building, but if I understand correctly,  
21 there was a significant push by IOSCO to incentivize  
22 people to join, to really push them to get on board,  
23 which is a complete sort of culture shift from what we  
24 have now in the international competition and consumer  
25 protection community. So it's interesting.

1 MS. ASKIN: That is true. The tools we do  
2 have through those organizations tend to be voluntary  
3 frameworks, principles, recommendations.

4 MS. KAPIN: So shifting topics a little bit,  
5 I'm wondering -- and this is for everyone to the  
6 extent there's an experience or analogous experience.  
7 How has technical assistance or informal exchanges in  
8 educational programs from foreign counterparts  
9 assisted you in your enforcement efforts? We're  
10 curious about that. I know people at the table may  
11 have very -- a different range of experiences there.  
12 Matt you're nodding your head --

13 MR. BOSWELL: You want me to go first?

14 MS. KAPIN: -- so I'm going to take that as  
15 an invitation.

16 MR. BOSWELL: I guess at a high level we've  
17 done it extensively in Canada, both outbound and  
18 inbound. And I think it's -- across the board, it's  
19 benefitted us tremendously. For example, last year,  
20 we had Jean Pratt, who is here today, our Senior  
21 Deputy Commissioner responsible for mergers go to  
22 Australia, and I can't remember the title she had in  
23 Australia, but she was running the mergers branch at  
24 the ACCC, and we had the benefit of Rami Griess coming  
25 to Canada. Now, Rami was a mergers guy, but he came

1 into our Cartels and Deceptive Marketing and brought  
2 new perspectives, brought the ACCC's approach to  
3 various things, which made us reconsider various  
4 approaches, and I'm sure that happened at the other  
5 end.

6 We have Bryan Cowell who is about to or  
7 subject to visa and passport issues about to start a  
8 fellowship here at the FTC to glean as much knowledge  
9 as he can and bring it back to the Bureau. So we've  
10 had very positive experiences with it. And every  
11 time, I think as Tom said, every time you see how  
12 other people operate, you pick up good pieces of that  
13 and bring it home to enhance your functioning as an  
14 enforcement agency.

15 MR. SAMPA: May I add one thing?

16 MS. KAPIN: Chilufya, yes, please.

17 MR. SAMPA: We've had -- also received quite  
18 a number of technical assistance. And I'll also just  
19 maybe speak generally on the African front. I know  
20 like South Africa, when this started up, there was a  
21 resident advisor that was sent from the FTC, who was  
22 stationed in South Africa for I think, if I'm not  
23 mistaken, two years. And that has really helped them  
24 develop the processes and carry out major reviews to  
25 the extent that they are one of the world's best, I



1 suppose, in terms of competition analysis.

2           Ourselves, Zambia, we had Bryan, who came  
3 and was attached to the FTC. We have had two other  
4 members who were attached to the ACCC for about a year  
5 and so on. So all these experiences have developed  
6 Zambia to what it is, and even assumed the leadership  
7 of the ICPEN being a young agency. That is something  
8 that we can only say we've benefitted because of the  
9 experiences we've had from the various technical  
10 assistance.

11           MR. BARNETT: I don't know if it's technical  
12 assistance or cooperation, but two quick examples, one  
13 when I was at the DOJ in a merger situation where  
14 there was a divestiture that was going to be required  
15 that had different impacts in different countries.  
16 And in the particular case I'm thinking about, we were  
17 able to engage with the other agencies and work out  
18 something. I mean, it was basically one buyer was  
19 good for us; another client was better for another  
20 country. And we managed to work out something that  
21 worked for everybody and was very effective.

22           The other thing that comes up sometimes, and  
23 this actually goes to personal relationships, it was a  
24 cartel investigation, it was covert. The question is  
25 when do you go overt? We were not ready; somebody

1 else was ready. I made a phone call to somebody who  
2 they were very anxious to move forward for good reason  
3 and basically prevailed upon them to wait. And they  
4 did, it all worked out, and everything went fine. But  
5 I go back to had I not had that relationship, it would  
6 have been a much more difficult phone call, and I  
7 don't know what the result would have been.

8 MR. FORTIN: Yes, and no personal  
9 involvement but I know IOSCO has a technical  
10 assistance program. There are many jurisdictions  
11 training for a specific area on insider trading, on  
12 market manipulation. But I know also that they can  
13 have individual jurisdiction training. I think the US  
14 SEC is providing technical assistance, UK and France  
15 in some instances, and also some of them offer some  
16 secondment in that area as well.

17 MS. KAPIN: And then to wrap it up, what  
18 would you each say, and you're probably only going to  
19 have a minute, biggest challenges to international  
20 enforcement cooperation for your agency or your  
21 practice, and if there are any practical and efficient  
22 ways to overcome that challenge. So the headlines,  
23 one minute each.

24 MR. BARNETT: Sure, I'll jump in.

25 MS. KAPIN: Great.

1           MR. BARNETT: I will say just sort of  
2   referencing generally in the digital age that there  
3   are a lot of issues that are common across agencies  
4   that are driven by similar forces that agencies are  
5   dealing with sometimes separately. One thing that  
6   hasn't come up is -- well, Bill Kovacic alluded to it  
7   -- competition amongst agencies. There is a bias  
8   towards action, right? In order to -- you know, if  
9   you brought a strong enforcement action, you get  
10   credit for it. If you just built the infrastructure,  
11   you don't get the credit for it or the same credit for  
12   it, or if you hold off, you don't get the same credit.

13           There can be a competition among agencies to  
14   be the most relevant, to be seen as doing something.  
15   I think agencies cooperating and talking and trying to  
16   come to a consistent, well-considered approach on  
17   issues that really are common across the agencies is  
18   an important challenge.

19           MS. KAPIN: Thank you.

20           MR. FORTIN: I would agree with that, and I  
21   would add I think -- I was going to say that in our  
22   world we see a lot of requests for information. We  
23   don't see that many true joint investigations. Maybe  
24   for one of the reasons you just mentioned, are we  
25   competing one against another or do we really want to

1 achieve a joint result and coordinate our efforts so  
2 that we achieve the results in a very coordinated  
3 manner, so I think it's really important.

4 MR. SAMPA: I would say privacy laws, that's  
5 a big challenge to us, we failed to coordinate or  
6 cooperate or even carry out investigations because of  
7 the privacy laws. One way of probably dealing with  
8 that is maybe coming up within the frameworks of the  
9 ICN or the ICPEN of the common denomination of what  
10 confidential information is. We've seen sometimes  
11 that agencies may not -- may use the privacy law even  
12 to not share nonconfidential information. So maybe if  
13 there is some kind of common definition of what  
14 confidential information may be, that could sort of  
15 help.

16 Then, of course, I think the informal  
17 cooperation is top, up there in terms of cooperating,  
18 that you can get quite a lot done just with the  
19 informal cooperation that you receive.

20 MS. KAPIN: And you have the last word,  
21 Matt.

22 MR. BOSWELL: Oh, okay. Well, I'll go back  
23 to what has been a common theme, which is supporting  
24 the ongoing personal relationships between people  
25 around the world. You know, people move in and out of

1 jobs. You have to keep those relationships, and it  
2 can be expensive. And it can be to certain outside  
3 parties hard to justify to expend those resources on  
4 having people attend, for example, ICN workshops so  
5 that they know people around the world, they're  
6 sharing best practices, we're not reinventing the  
7 wheel. Somebody has come up with a good way to do  
8 something, we should have those relationships where we  
9 can learn it, but it costs money to invest and to  
10 always invest in relationships.

11 MS. KAPIN: Well, I want to thank everyone.  
12 I think we heard a recognition that we should  
13 recognize the value of infrastructure, some common  
14 protocols and definitions and best practices can also  
15 help us overcome the challenges for international  
16 cooperation.

17 But first and foremost, what I heard echoed  
18 was the recognition that this human glue really is the  
19 stuff that lets us stick together and accomplish our  
20 common goals.

21 So, Molly?

22 MS. ASKIN: I think one thing I've also  
23 heard is the importance of the networks that we have  
24 seen evolve over, if we're looking at the past 25  
25 years, either be founded in the first instance or have

1 changed in their mission to really be able to be  
2 nimble enough to address some of these important  
3 issues and give agencies a forum for interaction that  
4 can facilitate both the tools and the relationships.

5 So thank you all very much for  
6 participating. And we are now going to go into a 15-  
7 minute break and return for the next panel at 11:30.  
8 Thank you.

9 MS. KAPIN: Thank you.

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1                                    CONSUMER PROTECTION AND  
2                                    PRIVACY ENFORCEMENT COOPERATION

3                    MS. FEUER: Okay, it's about one minute  
4 early, but we'd like to get started. I'm Stacy Feuer.  
5 I'm the Assistant Director for International Consumer  
6 Protection and Privacy here at the FTC's Office of  
7 International Affairs. This entire morning we've  
8 heard about a number of very interesting enforcement  
9 developments and challenges all over the world. Now  
10 we're going to take a deeper dive into enforcement  
11 cooperation in the area of consumer protection and  
12 privacy.

13                    One of the most interesting aspects of our  
14 work here at the FTC on international consumer  
15 protection and privacy matters is the very wide range  
16 of issues we cooperate on, everything from  
17 telemarketing scams to online subscription traps to  
18 cross-border data transfer mechanisms, and to other  
19 privacy law violations.

20                    Equally remarkable to me is the incredibly  
21 wide range of authorities that we cooperate. So, for  
22 example, we cooperate with not only consumer  
23 protection agencies but data protection authorities,  
24 criminal regulators, and sometimes telecommunications  
25 and financial regulators.

1           Our panelists that we have here today  
2 represent these different strands of our enforcement  
3 cooperation activities. They will highlight the  
4 issues involved in some of these different cooperation  
5 strands, and I will introduce them individually as we  
6 move through this panel.

7           I do want to remind you at the outset that  
8 we have comment cards available, and please do send up  
9 questions. We'll try and be a little interactive and  
10 ask some of your questions during the panel and not  
11 just wait until the end. So please ask away.

12           So we've segmented our panelists into mini-  
13 groups so as to better draw out some of the  
14 cooperation strands. I'll turn first to James Dipple-  
15 Johnstone who is the Deputy Commissioner at the UK's  
16 Information Commissioner's Office and ask him, and  
17 then followed by Deputy Assistant Secretary Jim  
18 Sullivan from the Department of Commerce's  
19 International Trade Administration for their thoughts  
20 about cooperation and particularly focusing on the  
21 privacy sphere. We are so pleased that you are both  
22 here.

23           So, Commissioner Dipple-Johnstone, can you  
24 begin?

25           MR. DIPPLE-JOHNSTONE: Yes, and thank you,



1 Stacy, and thank you to FTC colleagues for your invite  
2 and the opportunity to speak with you today. I'm  
3 looking forward to our discussion of these important  
4 issues, and it was interesting to hear the different  
5 perspectives from the previous panel.

6 A little bit about the Information  
7 Commissioner's Office first, given there's a range of  
8 different types of organizations on the panel, in case  
9 it helps with my comments later on. With the  
10 implementation of the GDPR, which has already been  
11 referenced this morning, I'm pleased to hear, and the  
12 new equivalent legislation in the UK, the ICO has been  
13 through a significant growth process over the past 12  
14 to 18 months. We've taken on new powers, and as has  
15 been mentioned this morning, as many other  
16 organizations, we've been through a capability growth  
17 over the past few months, which has begun to see us  
18 work more internationally and deal with more complex  
19 and challenging caseload.

20 This reflects in part the importance the UK  
21 Government places on data protection and consumer  
22 protection, but also the seriousness of some of the  
23 recent scandals we've seen, for example, that  
24 involving Cambridge Analytica recently. In granting  
25 powers, the UK Parliament has gone further than many

1 other EU legislatures to ensure that the ICO has both  
2 the funding through its funding regime to give us the  
3 financial resources, but also the new powers to do its  
4 work in the digital age.

5           There was significant national debate in the  
6 UK about these new powers, many of which are actually  
7 quite intrusive and are more common in law enforcement  
8 agencies than in a traditional data protection  
9 authority and the balances in checks and balances  
10 being put in place to go with those powers through the  
11 UK's Information Rights Tribunal who oversee our work  
12 and our individual case judgments.

13           I couldn't come here and talk to you without  
14 recognizing there's quite a lot of difference within  
15 the ICO as well. As well as our data protection  
16 remit, we have a remit for access to information. So  
17 one part of the office is working very hard around  
18 keeping privacy concerns and how data can be  
19 safeguarded and secured and only disclosed where  
20 appropriate; another side of the office is hearing  
21 appeals about how to make public information more  
22 widely available.

23           We have around 700 officers and new powers  
24 to seize equipment, search premises, examine  
25 algorithms in situ for bias to make sure that they are

1 working effectively, and audit company systems and  
2 processes. We also have powers which were touched  
3 upon this morning as well, around the power to compel  
4 provision of information from wherever and whomever  
5 holds it, which is quite a wide remit for an office of  
6 our type.

7 We deal with around 50,000 citizen  
8 complaints each year and undertake around 3,500  
9 investigations across different parts of our office.  
10 And we cover both the commercial sector, but also the  
11 public and law enforcement sector. In many ways, as  
12 colleagues are, we're learning as we go with these  
13 powers and these new resources. And one of those key  
14 areas of learning has been that which has been touched  
15 upon this morning. And that's the importance of  
16 working collaboratively with others internationally.

17 Many of the most significant files on my  
18 desk -- and I have responsibility for the enforcement  
19 and investigation arms of the office -- in the last 12  
20 months, we've engaged with 50 international colleagues  
21 on various different files. And most of the major  
22 cases we have on at the moment are involving  
23 international colleagues, either as joint  
24 investigations, seconding staff to and from other  
25 offices, or sharing information and intelligence about

1 the work we're doing.

2 As our citizens become more aware and  
3 concerned about the use of data and as the digital  
4 economy becomes the economy, people expect this kind  
5 of international engagement. And with this in mind,  
6 we value hugely the UK's positive relationship with  
7 its colleagues on this side of the Atlantic, the FTC,  
8 but also our colleagues in Canada who have been  
9 speaking this morning.

10 We value the different networks we're  
11 involved in. There have been mention of some of those  
12 networks already, but in particularly GPEN, the Global  
13 Privacy Enforcement Network, but also those networks  
14 which involve looking at unsolicited communications,  
15 which continues to be a significant part of my  
16 office's work.

17 We learn a huge amount from these  
18 relationships, as well as the sort of human glue that  
19 was described this morning, just the opportunity to  
20 discuss tactics, approaches, to understand how each  
21 other work is a real positive that comes out of that  
22 work and allows us to do our jobs more effectively.

23 To support this, we have a number of legal  
24 gateways to share and receive information. These are  
25 backed by strict protections within UK domestic law,

1 which bite both collectively on the organization but  
2 also the individual officials within that. They are  
3 backed by criminal sanctions, and nothing focuses the  
4 mind like those.

5 In the course of our investigation, we could  
6 use one or any of MOUs, MLATs, and we've heard about  
7 the challenges with the time scales that MLATs take.  
8 Membership arrangements, such as GPEN or the  
9 International Conference of Data and Privacy  
10 Commissioner arrangements or, indeed, Convention 108.  
11 This very much depends on the exchange of information,  
12 what's involved, who it's going to, who's asked for  
13 it, and what we need to do our work.

14 Of particular note are the DPA 2018, which  
15 is the Data Protection Act in the UK. That contains  
16 formal information gateways. That allows us to share  
17 information for law enforcement purposes or for  
18 regulatory purposes where there's an overlap and  
19 there's a public interest. Of relevance to the FTC in  
20 particular is Schedule 2 of the DPA. That sets out  
21 the conditions for public interest and information-  
22 sharing within the UK law.

23 And I understand the UK has been working  
24 through these for a number of years from the 1998 act  
25 and now into the 2019 act and working with colleagues

1 at the FTC through the SAFE WEB Act provisions and the  
2 criteria for sharing information there with foreign  
3 enforcers. And that's been a huge positive. Just in  
4 the short time I've been with the Office over the last  
5 two years, there have been a number of cases that  
6 we've been working on, on sharing information and  
7 understanding.

8 And, of course, this goes alongside our EU  
9 work. We mustn't forget that. We are a competent  
10 authority under the GDPR, the EU provisions for the  
11 one-stop-shop mechanism. And around a fifth of those  
12 cases in the mechanism over the past year have  
13 involved the UK as either a lead supervisory authority  
14 or a concerned supervisory authority.

15 Many of the big issues we are grappling with  
16 is privacy authorities, algorithmic transparency,  
17 adtech, microtargeting and profiling of citizens, part  
18 of the bread and butter of those cases we're working  
19 through. And our ability to work with international  
20 colleagues, in particular the FTC, has been really  
21 helpful in us discharging our role, notably on the  
22 Ashley Madison file, but also on other confidential  
23 matters more recently, where we found the insight  
24 afforded by our bilateral arrangements with the FTC  
25 help us fill in the missing pieces. They help us make

1 better investigations.

2 We know that the FTC has helped us by using  
3 its SAFE WEB powers to obtain information for us, in  
4 particular with some of the -- I think you call them  
5 robocalls here, but unsolicited communications in the  
6 UK, and that information has been hugely beneficial in  
7 protecting UK citizens. And we hope the reciprocal  
8 has been helpful to the FTC and colleagues here.

9 And I'm mindful of time, but in closing, I'd  
10 just like to say we're very keen in the ICO to  
11 continue to use these positive engagements and  
12 continue to build them, particularly as you come to  
13 look at the renewal of the SAFE WEB Act. Thank you.

14 MS. FEUER: Thank you very much.

15 Deputy Assistant Secretary Sullivan, how  
16 does the issue of privacy enforcement cooperation come  
17 within your purview at the Department of Commerce?

18 MR. SULLIVAN: So in my role, I'm in the  
19 International Trade Administration, which is one of  
20 the agencies at the Commerce Department, and one of  
21 the offices that I oversee is responsible -- they are  
22 the US Government Administrator for and our  
23 interagency lead on different privacy frameworks --  
24 international privacy frameworks, including both  
25 privacy shield frameworks, the EU and US Privacy

1 Shield and the Swiss-US Privacy Shield.

2 We're also very actively engaged in  
3 promoting the expansion of the Asia-Pacific Economic  
4 Cooperation and Cross-Border Privacy Rule system, APEC  
5 CBPR as it's called. And we work extremely closely  
6 with the FTC on those issues around the world as we  
7 see a growing number of countries grappling with  
8 privacy while trying to balance innovation at the same  
9 time, which as everyone here knows, I'm sure it's not  
10 always the easiest formula. So that's a quick summary  
11 of what we do at Commerce. I'll leave it at that for  
12 now.

13 MS. FEUER: Great, great. Well, it's  
14 interesting to hear you both speak about the  
15 importance of enforcement cooperation in the privacy  
16 area, James, for your agency on many, many individual  
17 files and Jim as the sort of overarching systemic  
18 systems for cross-border transfers. So I want to  
19 follow up with a few questions.

20 So, James, sort of the elephant in the room,  
21 we've heard a lot this morning in the first panel  
22 about privacy as a "barrier" to regulatory enforcement  
23 cooperation. And I'm wondering what your view is of  
24 that statement or assertion and what kinds of tools do  
25 agencies need to cooperate effectively given some of



1 these limitations and, of course, in privacy  
2 enforcement investigations?

3 MR. DIPPLE-JOHNSTONE: Yes, yes. And it's  
4 not something we've -- you know, which is uncommon to  
5 us. We get that call often. I mean, we want to be  
6 clear, we're not the "ministry of no." But, actually,  
7 what's really important in this space is to do that  
8 groundwork and that thinking about what information do  
9 you need, how is it going to be transmitted, how is it  
10 going to be secured, what purpose is it going to be  
11 used for. And we often find there are many avenues  
12 and routes to be able to share information.

13 We also get the -- interesting when we ask  
14 for information, we sometimes get from colleagues  
15 internationally, we can't because of privacy. And,  
16 oh, that's an interesting concept. How do we work  
17 through that? We've often found there is a way  
18 through. Sometimes where these arrangements are being  
19 agreed internationally and where, for example, it was  
20 mentioned this morning about the challenge with the  
21 advent of the GDPR, IOSCO working with colleagues at  
22 the EDPB and needing to sort of tease through that, it  
23 can sometimes be tough to be the first going through  
24 that process, but once those processes are in place,  
25 people understand how they work, those relationships

1 are built, that common understanding is built. Things  
2 do flow a lot quicker and a lot easier in subsequent  
3 cases. And so very much it's that sort of keep  
4 talking, keep engaging.

5 And, importantly, I've recently come back  
6 from an international conference working group, where  
7 one of the key challenges has been that with the scale  
8 and pace of change internationally with enforcement  
9 agencies and enforcement bodies, some of which, again,  
10 was referenced this morning, just keeping pace of who  
11 can do what where and with what data is really  
12 important. So if those international networks can  
13 really help their members understanding where the  
14 right levers are and how their respective national  
15 laws work, that can only be a good thing.

16 MS. FEUER: Thank you.

17 Well, Secretary Sullivan, in your  
18 experience, how important has the issue of enforcement  
19 cooperation been with the foreign governments and  
20 stakeholders that you have negotiated these  
21 international data transfer mechanisms with, and how  
22 important are the powers that the FTC has in those  
23 discussions?

24 MR. SULLIVAN: So, again, I'm going to refer  
25 to the three frameworks that I cited just a moment

1 ago. And both the enforcement power and the  
2 international cooperation authority granted to the FTC  
3 under the SAFE WEB Act are both integral to the  
4 functioning of those frameworks, I think. Without  
5 them, they would lack legitimacy or credibility.

6 You have to have some teeth behind these  
7 frameworks so that folks know that companies are going  
8 to be held accountable for the pledges and the  
9 promises and commitments they're going to make to  
10 comply with the principles or the practices that they  
11 have pledged to comply with in accordance with these  
12 frameworks. I don't know how that would be possible  
13 without what we just cited to, both the powers to  
14 enforce but also to coordinate with other enforcement  
15 agencies cross-border.

16 MS. FEUER: Thanks. As a follow-up, I asked  
17 you about how important this is for foreign  
18 governments, but I'm wondering what you hear from your  
19 industry stakeholders here in the US.

20 MR. SULLIVAN: I don't want to generalize.  
21 We certainly hear a lot. I think there's a strong  
22 recognition among most of the stakeholders that we  
23 engage with, sort of along the lines of what I just  
24 said. I mean, first of all, what would be the  
25 incentive to comply with something that really didn't

1 have any teeth? I think they know increasingly how  
2 important it is to align their practices with these  
3 frameworks, given a lot of the developments.

4 We've seen recently, and it's I think --  
5 they generally -- and I am generalizing -- they do  
6 want to see strong frameworks that are actually  
7 enforceable and, they do want to see, as I think James  
8 just alluded to, greater collaboration because that's  
9 going to lead to more consistent best practices or  
10 principles and approaches to a lot of these issues as  
11 opposed to just this fragmented, diverse, ad hoc  
12 approach to a lot of these same dilemmas that we're  
13 all facing.

14 MS. FEUER: Thank you.

15 I want to ask my fellow panelists, while  
16 we're talking about privacy, whether there was  
17 anything that they want to add in sort of response  
18 to what Commissioner Dibble-Johnstone and Secretary  
19 Sullivan were talking about. So does anyone want  
20 to -- it looks like Marie-Paule wants to hop in.

21 MS. BENASSI: Yes. What I would like to say  
22 is that we should make a difference between issues  
23 related to privacy and to the confidentiality of  
24 investigations. And very often, indeed, it is quite a  
25 common answer to refuse cooperation, to say, oh, no,

1 we cannot share information because of problems of  
2 privacy.

3 But in the European Union, first of all, I  
4 think we have solved this, and I think that our GDPR  
5 itself helps a lot to clarify that authorities can  
6 exchange information, including information which  
7 contains personal data. And so this enables, in  
8 principle, very seamless type of cooperation in the  
9 European Union, because for law enforcement purposes,  
10 we can exchange this information between authorities  
11 in one member state or in other member states.

12 And this -- I think in this way, the GDPR is  
13 an enabler. And when we look into the implementation  
14 of the GDPR for international cooperation, we should  
15 also look at it in the same way as an abler and  
16 enabler, because if it is respected; then exchange of  
17 information for law enforcement purposes should be  
18 facilitated. And, for example, we are also doing  
19 adequacy decisions, for example, with some other  
20 countries in order to also create the seamless  
21 facilities, including for law enforcement purposes.

22 MS. FEUER: Thank you.

23 Anyone else? Kurt.

24 MR. GRESENZ: So I agree with Marie-Paule's  
25 sentiments there. You know, the issue that we

1 encountered at the SEC as a civil agency with  
2 administrative investigatory powers, while the  
3 Department of Justice was out in front with an  
4 umbrella agreement to facilitate cooperation in the  
5 criminal sphere under the public interest mechanism,  
6 which is something that James talked about at the  
7 beginning, it was less clear how that applies in the  
8 civil or administrative context. So the step that  
9 IOSCO took to negotiate what is the first  
10 administrative arrangement under the GDPR will enable  
11 the second step of what Marie-Paule talked about,  
12 which are transfers of personal data from the EU to  
13 jurisdictions and authorities outside the EU.

14 And now with that process, as Jean-François  
15 in the earlier panel talked about, having been blessed  
16 by the European Data Protection Privacy Board, we in  
17 the security space are looking forward to the data  
18 protection authorities in the 28, possibly 27, EU  
19 members states adopting that and approving that and so  
20 it can be the standard with the securities authorities  
21 who are IOSCO members.

22 MS. FEUER: Thanks. So I want to shift us  
23 now from what has been a privacy-heavy conversation to  
24 more of a focus on consumer protection. Our second  
25 pair of panelists represent two of the different

1 strands of the kind of consumer protection enforcement  
2 cooperation we do here. So to hear about the EU  
3 enforcement model, we'll have Marie-Paule Benassi from  
4 the European Commission's DG Justice, and to hear  
5 about our cross-border work with our Canadian criminal  
6 counterparts, we'll hear from Jeff Thompson, Acting  
7 Superintendent in Charge of the RCMP's Canadian Anti-  
8 Fraud Centre.

9 So, Marie-Paule, can you start us off?

10 MS. BENASSI: So thank you, Stacey and thank  
11 you for the FTC to invite me. So, first of all, I  
12 would like to remind you that the European Union is  
13 currently counting 28 member states, and it's very  
14 well known for being something very complicated, and I  
15 would like to try to break that myth. But  
16 unfortunately, I think, or fortunately for a better  
17 understanding of the complexity of the Union, I think  
18 that Brexit and the interest which this is bringing in  
19 the headlines is also maybe shedding some light on why  
20 it is so complicated.

21 So we have an integration of EU-level and  
22 national laws, a model, and this is where I think it's  
23 simple. It's based on a very simple principle. We  
24 have one EU law in a certain domain, and it tries to  
25 harmonize national laws using key high-level

1 principles. What is not harmonized is how this law is  
2 implemented. So it is -- except in a very few cases,  
3 it is implemented nationally. It is enforced  
4 nationally, and we try to do this in a way which  
5 preserves the diversity of the enforcement model in  
6 the member states.

7           And so in the area of consumer protection,  
8 it is how it works. And the European Commission for  
9 which I'm working has no direct enforcement power. It  
10 is the member states which have the enforcement  
11 powers. So when I speak of enforcement, it means  
12 enforcement of the law towards businesses and other  
13 possible subjects because the European Commission is  
14 in charge of checking that the member states are  
15 enforcing the laws correctly, but we are not directly  
16 involved to stamp out illegal practices.

17           In the area of consumer protection, so we  
18 have a strong role. And this role has been  
19 strengthened in the recent past. What is our role?  
20 Our role is to facilitate the cooperation of the  
21 member states because this is a EU, I would say, a  
22 harmonized law, and we want it to be implemented in a  
23 consistent manner in all the member states. And to do  
24 this, the only solution is cooperation.

25           So we have a long tradition of cooperation



1 inside the European Union and now we are doing it via  
2 a law which is called the Consumer Protection  
3 Cooperation Regulation. This law is establishing the  
4 framework for cooperation. So we start by first  
5 saying even if the member states are very different,  
6 they should have similar type of powers, so  
7 investigative powers. For example, the power for  
8 mystery shopping, the power to request information on  
9 financial flows, the power to obscure illegal content  
10 online.

11 Another thing, also, is the framework for  
12 cooperation. So we have two types of cooperation now  
13 in our new legislation. One is what we call the  
14 bilateral cooperation, the more traditional  
15 cooperation, where one member state asks -- requests  
16 enforcement cooperation from another member state.

17 But now we have this new system which is E-  
18 level coordination. And there, the European  
19 Commission has a new role because we have a role of  
20 market surveillance. And from this role, we can ask  
21 the member states to check some practices that we  
22 think are likely to be illegal. And if the member  
23 states find that there is sufficient evidence to start  
24 an investigation, then the Commission is coordinating  
25 this investigation.

1           We also have a new power in terms of  
2 intelligence I mentioned. And we are also doing  
3 coordination of priorities. So, in fact, the role  
4 which we have is quite strong. And the new model,  
5 which we are going to implement from January next  
6 year, in fact, is already functioning, maybe in a  
7 lighter way. And it's working. So we have in the  
8 past done some coordinated actions, which are  
9 concerning. For example, illegal practices by big  
10 companies operating at the level of the European  
11 Union.

12           Today, we are publishing a press release on  
13 an action done in the field of car rental, for  
14 example. So with the authorities, we have been  
15 working together with the authorities to find -- to  
16 analyze bad practices of the five leaders of this  
17 sector, and we wrote a common position asking these  
18 companies to change their practices. They made  
19 commitments, and now we have been monitoring the  
20 commitments and concluding that finally these  
21 companies are implementing these commitments. This is  
22 a negotiated procedure, so this is another element I  
23 would like to stress.

24           These EU-level actions are not based on  
25 strong enforcement means because they don't exist at

1 the European level. They are based on a coordinated  
2 approach and the cooperation with the traders. If the  
3 traders refuse to cooperate, do not cooperate  
4 sufficiently, or do not follow their commitments, then  
5 what is going to happen is coordinated enforcement  
6 action by the member states.

7 And we have just added something very  
8 recently which is a system of fining that can be  
9 applied for this kind of EU-level infringement and  
10 coordination of the fines. And this is a big -- it's  
11 not yet completely finalized, but it's going to be a  
12 big step forward because in certain member states,  
13 they don't even have a fining system for consumer  
14 offenses. So we are building the system.

15 So for the future, what is -- what can we  
16 do? We can do international agreements. So there is  
17 a possibility on the basis of this framework to agree  
18 international cooperation agreements with certain  
19 countries. And the framework which I've described can  
20 be applied also with the said countries to the extent  
21 possible, of course, depending on the type of base  
22 laws that exist in the member states.

23 And what I could say is that we would like  
24 to start discussing on the basis of this new  
25 regulation with the FTC, if we can progress such an

1 agreement. Why an agreement would be necessary?  
2 Because it's important that the formal part is there.  
3 Because as we heard from various speakers, the formal  
4 part is an enabler also for an efficient cooperation.

5 This system, however, has several  
6 challenges. One of the challenges, as I said, it's  
7 based on negotiation with traders. So it doesn't work  
8 when there is fraud, fraudulent operators. This is  
9 really required to develop additional cooperation, for  
10 example, with police forces because in most of our EU  
11 member states, they don't have this possibility of  
12 going against fraudulent operators. They need the  
13 cooperation of police, so this is an area where we  
14 need to develop in the future.

15 And then relation with competition, relation  
16 with data protection, these are the future avenues for  
17 our cooperation. Thank you.

18 MS. FEUER: Thank you very much, Marie-  
19 Paule. And that was the perfect segue to Jeff  
20 Thompson, who is from the RCMP's Canadian Anti-Fraud  
21 Centre. And, Jeff, maybe you can sort of talk us  
22 through a little bit about what some of the tools and  
23 challenges you face and we face in cooperating on US-  
24 Canada cross-border fraud matters.

25 MR. THOMPSON: Sure. Thank you, Stacy.

1 It's a pleasure to be here today to talk about  
2 international cooperation and consumer protection.  
3 Since the start of my career, I've learned that cross-  
4 border fraud was an evolving criminal market that  
5 cannot be tackled by any one country alone and even  
6 more so today. Consumer Sentinel reporting shows more  
7 than 1.4 million reports were received in 2018, up  
8 from 433,000 in 2005. Similarly, the Canadian Anti-  
9 Fraud Centre data shows annual losses to fraud  
10 continues to increase, reaching 119 million in 2018, a  
11 495 percent increase since 2005.

12 So it's easy to say that mass marketing  
13 fraud and cross-border fraud continues to be a threat  
14 to the economic integrity of Canada and the US,  
15 furthermore, if you consider technology, voice-over-  
16 net protocols, social media, virtual currencies, money  
17 service businesses, and other key facilitators that  
18 continue to provide criminals and criminal  
19 organizations behind a scam opportunities to operate  
20 across multiple international jurisdictions.

21 And as we heard this morning, while this is  
22 an evolving threat, there is good news. There are,  
23 indeed, existing strategies that do exist and tools  
24 that provide an effective approach to attack on this  
25 criminal market. In fact, as we heard this morning

1 again, the history between Canada and the US is long.  
2 It dates back to 1997, when Former President Clinton  
3 and Prime Minister Chretien met at the first US Cross-  
4 Border Crime Forum. It was at this meeting that  
5 telemarketing fraud first got identified as a major  
6 Canada-US cross-border crime concern. And it also  
7 made a number of recommendations, including the  
8 establishment of a multiagency task force, the  
9 development of consumer reporting and information-  
10 sharing systems, enforcement actions, and better  
11 public education and prevention measures.

12 Since then, both US and Canada cooperate to  
13 implement and refine a number of these strategies, and  
14 while all recommendations made are important, I'm  
15 going to focus my discussion on the existing  
16 multiagency task force, or in today's terms, strategic  
17 partnerships.

18 This case and work that the partnerships  
19 have done showcase an effective enforcement approach.  
20 They highlight intelligence-led policing and  
21 integrated policing models, along with providing  
22 insight into some of the tools and approaches to  
23 consumer protection. So if we consider the cross-  
24 border fraud partnerships as an intelligence-led  
25 approach, what we see is a group of key stakeholders

1 joining efforts to achieve a common enforcement  
2 objective, namely, reducing fraud.

3 To give you a practical idea of this, I  
4 think back to some of my early meetings at the Toronto  
5 Strategic Partnership. I did not fully recognize or  
6 appreciate the significance of the discussions held  
7 around the table. Members from several different  
8 agencies and organizations discussed top reported  
9 scams, scam trends, top offenders, current  
10 investigations, and gaps and challenges in enforcement  
11 options. Oftentimes, this intelligence-led approach  
12 was started by members from the Federal Trade  
13 Commission or the Canadian Anti-Fraud Centre, bringing  
14 intelligence developed from their respective central  
15 databases, Consumer Sentinel and the Anti-Fraud Centre  
16 database.

17 This dialogue helped identify the new and  
18 emerging scam trends and discussion around the key  
19 facilitators to the scams. It also helped to  
20 coordinate joint priority setting, identify lead  
21 agencies, investigative assistance, and actions  
22 required to complete the files, and in many cases  
23 helps with deconfliction amongst the agencies.

24 Sharing information around the table was a  
25 key factor, and as long as there's a willingness to

1 share, there is a way to share. There is also a  
2 common trust and understanding amongst the partners to  
3 share information within the confines of law. Thus,  
4 the partnerships serve as an intelligence-led approach  
5 in as far as they create a platform to share and  
6 synthesize information from multiple perspectives.

7           Turning now to consider the partnerships as  
8 an integrated policing approach, we begin to realize  
9 that criminals and criminal markets can be disrupted  
10 through civil, regulatory, or criminal investigations  
11 and that different agencies and different laws all  
12 play a role. If we dissect again the Toronto  
13 Partnership, we have a minimum of eight different  
14 organizations: the Federal Trade Commission, the  
15 Royal Canadian Mounted Police, the United States  
16 Postal Inspection Service, Toronto Police, the Ontario  
17 Provincial Police, the Ministry of Consumer and  
18 Government Services, the Competition Bureau of Canada,  
19 and the Ministry of Finance.

20           The FTC alone has 70 different laws that it  
21 enforces. Who really knew that the Ministry of  
22 Consumer and Government Services enforces numerous  
23 consumer protection laws such as the Loan Brokers Act,  
24 which can be used to go after the advance-fee loan  
25 scammers? Or that, again, as we heard this morning,



1 CASL legislation also has clauses that allow for  
2 foreign enforcement to request assistance from  
3 respective Canadian law enforcement partners?

4 At the heart of an integrated policing model  
5 is a give-and-take approach. And in the US-Canada  
6 cross-border partnership context, this approach is  
7 formalized by MOUS. As recent as 2017, the Federal  
8 Trade Commission and the Royal Canadian Mounted Police  
9 formalized an MOU that identifies best efforts that  
10 participants can use to further the common interest of  
11 combating fraud.

12 The language used highlights the foundation  
13 of information-sharing and cooperation. Participants  
14 shall share materials, provide assistance to obtain  
15 evidence, exchange and provide materials, coordinate  
16 enforcement, and meet at least once a year. So,  
17 again, if we take a practical view, the strategic  
18 partnership model against cross-border fraud uses  
19 intelligence-led and an integrated policing approach  
20 that allows investigators from Canada and the US to  
21 move beyond simply coming together to talk about  
22 cross-border fraud concerns to developing  
23 investigative plans that identify investigative steps  
24 and processes needed to gather that evidence.

25 Each participant brings a range of tools

1 that can be leveraged to ensure the effective  
2 cooperation. One such tool that we've heard plenty of  
3 today is the US SAFE WEB Act. From a Canadian-US  
4 perspective or from the Canadian perspective, I mean,  
5 it provides us an avenue to formally seek  
6 investigative assistance in the US from the FTC. It  
7 also formally acknowledges by name some of the  
8 regional partnerships that exist today.

9 This act alone has assisted strategic  
10 partnerships in countless cases, at least 22 by my  
11 count since 2007, and as we've heard, a lot more.  
12 These cases have led to arrests -- civil arrest  
13 charges, civil forfeitures, and, most importantly,  
14 victim restitution, which in the Canadian context is  
15 often rare to see. This includes Operation Telephony,  
16 which involved more than 180 actions brought by the  
17 Federal Trade Commission, including actions in Canada  
18 and the US, and it also includes the Expense  
19 Management Case that we heard about in the last panel  
20 involving \$2 million that was eventually turned over  
21 to the FTC for consumer redress.

22 And while there's a history of success and  
23 continuing work and outcomes to look forward to, we  
24 know that the criminals adapt. Today's frauds  
25 typically involve solicitations coming from one

1 country targeting consumers in another country and  
2 funds going to yet another one. Mass marketing fraud  
3 is truly a transnational crime. We know that in a  
4 number of cases, the criminals and criminal groups  
5 involved are deeply rooted in Canada and the US and  
6 that moreso today, the work being done by these  
7 partnerships exposes these international networks who  
8 are also providing each other an opportunity to  
9 leverage our international networks to tackle this  
10 problem collectively.

11 And we're already doing this to some extent.  
12 The International Mass Marketing Fraud Working Group  
13 is another example of how Canada and the US  
14 cooperation has extended beyond North America. As  
15 recently as March 7th, this group announced -- or the  
16 US Department of Justice announced the largest ever  
17 nationwide elder fraud sweep, and the International  
18 Mass Marketing Fraud Working Group played a role. At  
19 least eight different countries were engaged.

20 At the same time, there are other  
21 challenges, such as the willingness of other countries  
22 to identify mass marketing fraud as a transnational  
23 threat, whereas in many cases fraud or financial crime  
24 is not a priority. And this even holds true today to  
25 some extent. The parties and law enforcement agencies

1 are subject to change, and the ability of any one  
2 agency to solely lead a partnership can be impacted by  
3 this change. Albeit, there's still partnership models  
4 that work in which chairs to partnerships rotate and  
5 changing priorities are acknowledged.

6 In May of 2018, the RMCP coordinated a  
7 national mass marketing fraud working group meeting  
8 whereby we acknowledged the changing nature of mass  
9 marketing fraud and sought to renew our efforts. We  
10 also sought input from key US stakeholders. The  
11 Federal Trade Commission and the United States Postal  
12 Inspection Service were at these meetings. And while  
13 work continues to renew this renewal, such as the  
14 emergence of a Pacific partnership to replace Project  
15 Emptor, there's still work to be done.

16 So in concluding, there's a long and  
17 successful history of Canada-US enforcement in  
18 consumer protection, and that demonstrates effective  
19 cooperation through integrated and intelligence-led  
20 approaches and that this continued cooperation is  
21 integral to combating this transnational crime today.  
22 Thank you.

23 MS. FEUER: Thank you very much, Jeff.

24 So I think that we now have a couple of very  
25 interesting issues out on the table about consumer

1 protection and enforcement cooperation, both the EU  
2 model of the CPC network and the FTC Canada model,  
3 which focuses on these seven strategic partnerships  
4 that exist in Canada. So I want to ask a few  
5 questions of our panelists, Marie-Paule and Jeff  
6 Thompson, and then I do want to turn back to Secretary  
7 Sullivan.

8 But, first, Marie-Paule, I did want to ask  
9 you one thing. I know that the CPC network uses a  
10 technological tool to facilitate the cooperation among  
11 the 28 member agencies. I'm wondering your thoughts  
12 about how well that works and how it might work in a  
13 more multilateral context.

14 MS. BENASSI: Thank you, Stacy, for this.  
15 So, first of all, I think I would like to make two  
16 types of tools. One is the system which we use to  
17 network, and I would say this is based on technologies  
18 of collaborative websites. And we have been using  
19 them now since several years and we are quite  
20 confident that it is safe for exchanging information  
21 and including information on containing personal data,  
22 for example, on businesses or on witnesses, and also  
23 it can be adapted. But currently, the CPC system  
24 doesn't contain a lot of cases. So it's growing  
25 organically, I would say. And it's also very much

1 used to exchange information, best practices, for  
2 example.

3 In the future, we are building something  
4 which is going to be a case management system and it  
5 will contain several modules, including a module for  
6 our external [indiscernible]. So we are going to open  
7 this to various entities -- NGOs, entities. And so we  
8 are going to build doors, in fact, in such a way that  
9 the two systems can communicate, but without having  
10 [indiscernible] you know, for -- so that the  
11 stakeholders will only see their external areas. And  
12 I'm quite confident that we can build the same type of  
13 modules for international cooperation with our  
14 technology.

15 But what I would like to say is that we are  
16 also developing technologies for online enforcement  
17 tools. And what we want is to create, for example, a  
18 system where we would have an internet lab that could  
19 be used by the various member states, and we are also  
20 building capacities of administration in the EU  
21 countries. We are developing training, and we think  
22 also that this kind of tools could benefit from  
23 pooling of expertise from various agencies, including  
24 in an international context.

25 MS. FEUER: Thank you. So I want to turn --

1 before I turn back to Jeff Thompson, I want to turn  
2 back to Secretary Sullivan and ask what are the tools  
3 that can be used to facilitate cooperation under the  
4 various cross-border mechanisms? And why are they  
5 important?

6 MR. SULLIVAN: So in terms of why they're  
7 important, I mean, again, a lot of this is probably  
8 self-evident to those in this room, but the data  
9 explosion we've seen is only going to continue. And  
10 we now have these cross-border data flows that really  
11 do benefit stakeholders across our societies and our  
12 economies. So you've seen these cross-border data  
13 flows help enable consumers, for example, to access  
14 more  
15 and better services and products. They help our  
16 companies to increase the efficiency of operations  
17 and innovation, and they help nations in terms of  
18 their competitiveness and their ability to help create  
19 jobs and facilitate economic growth.

20 So this is all great. The problem we're  
21 dealing with is that different countries now take very  
22 different approaches to how they regulate these data  
23 flows specifically on privacy. And so what I wanted  
24 to just touch on a bit was what we do, the Commerce  
25 Department, in conjunction and partnership with the

1     FTC to deal with this issue, this dilemma. How do you  
2     continue to facilitate these cross-border data flows  
3     when you are dealing with countries that have all  
4     adopted varying approaches, legal regimes, or policy  
5     priorities.

6             I touched on the three frameworks, and I  
7     just quickly wanted to go through some of the tools  
8     within those frameworks, if I could, which from our  
9     perspective are absolutely critical to digital trade  
10    because, again, right now, there is no single  
11    comprehensive binding multilateral approach governing  
12    these cross-border data flows. So you know, again,  
13    I'm repeating myself a bit but we have stakeholders  
14    that we meet with all the time coming in, telling us  
15    about this constantly shifting and evolving and  
16    rapidly accelerating policy landscape that they have  
17    to deal with.

18            So in response to this challenge, one  
19    approach that we've taken, as I alluded to earlier,  
20    for example, is the APEC CBPR system. And it's  
21    basically a voluntary enforcement code of conduct  
22    based on internationally recognized data protection  
23    guidelines. It establishes principles for both  
24    governments and for businesses to follow to protect  
25    personal data and to allow the data flows between APEC



1 economies.

2           To join this system, an APEC economy has to  
3 designate a third party called an accountability  
4 agent. And that accountability agent is empowered to  
5 audit a company's privacy practices and take  
6 enforcement action as necessary in some instances, but  
7 if that accountability agent cannot do that, resolve a  
8 particular issue, an APEC economy, their domestic  
9 enforcement authority serves as a backstop for dispute  
10 resolution.

11           And in the United States, the FTC is our  
12 designated regulator, obviously, and enforcement  
13 authority for the CBPR system. And they enforce the  
14 commitments that are made by the CBPR participating  
15 companies to comply with the principles that they have  
16 committed to comply with.

17           I do want to note all CBPR participating  
18 economies also have to join the cross-border privacy  
19 enforcement arrangement, CPEA, to ensure cooperation  
20 and collaboration among their designated enforcement  
21 authorities. To date, if memory serves, I know the  
22 FTC has brought four enforcement actions against  
23 companies for making deceptive statements about their  
24 participation in CBPR, and it's also used its  
25 authority under the SAFE WEB Act to enhance

1 cooperation with other privacy and data protection  
2 regulators within APEC.

3 So, again, as I noted at the outset, FTC  
4 enforcement and international cooperation are  
5 absolutely critical to the credibility, to the  
6 integrity, and the success of the CBPR system. There  
7 are currently eight economies in APEC of the 21  
8 economies participating in the system: the US, Japan,  
9 Mexico, Canada, South Korea, Singapore, Australia, and  
10 Chinese Taipei. And the Philippines is currently  
11 working on joining the system as well.

12 I want to underscore that if this system  
13 were to scale across APEC, the framework would help  
14 underpin over a trillion dollars in digital trade. So  
15 we regard that as a very big priority and, again, we  
16 cannot emphasize enough just how critical the FTC is  
17 to that framework. And it's also a similar dynamic  
18 with the EU. It's been, the FTC, extremely integral  
19 to the success of both privacy shield frameworks.

20 We all know, and it's been touched on, about  
21 a year ago, GDPR was put into effect in Europe. And  
22 like the predecessor directed before it, it imposes  
23 certain restrictions on the ability of companies to  
24 transfer certain data from Europe to other  
25 jurisdictions, so we have Privacy Shield. And, again,

1 like CBPR, it's a voluntary enforceable mechanism that  
2 companies can use to promise certain protections for  
3 data transferred from Europe to the United States, and  
4 the FTC enforces those promises made by Privacy  
5 Shield-participating companies in its jurisdiction.

6           Again, I talked about how big APEC was and  
7 how these data flows underpin trade there. The EU is  
8 actually the largest bilateral trade investment  
9 relationship with the US in the world. That, too, is  
10 valued at over a trillion dollars. And I know the  
11 Transatlantic economy accounts for about 46 percent of  
12 global GDP, about one-third of global goods trade, and  
13 the highest volume of cross-border data flows in the  
14 world.

15           And the Privacy Shield program is absolutely  
16 key to underpinning this economic relationship. We  
17 have about 4,500 companies now participating in the  
18 program. They've all made these legally enforceable  
19 commitments to comply with the framework, and they  
20 range from startups and small businesses to Global  
21 1000 and Fortune 500 companies across every sector,  
22 from manufacturing and services to agriculture and  
23 retail.

24           And I do want to note that about 3,000 --  
25 nearly 3,000 -- of those companies are actually SMEs,

1 so it's not just the big tech companies that we're  
2 talking about.

3 So to help protect data against improper  
4 disclosure or misuse, the Commerce Department and the  
5 FTC do work together, and they move swiftly to ensure  
6 that participating businesses who join Privacy Shield  
7 and certify under Privacy Shield are complying with  
8 their obligations. And over the last two years,  
9 Commerce, for example, has implemented a buying  
10 arbitration mechanism and new processes to enhance  
11 compliance oversight and reduce false claims. And by  
12 the same token, the FTC has enforced companies'  
13 Privacy Shield declarations and commitments by  
14 bringing several cases pursuant to Section 5 of the  
15 FTC Act, which prohibits unfair and deceptive acts.

16 We also refer false claims participation in  
17 the program to the FTC, which have often resulted in  
18 FTC settlement agreements. And under those  
19 agreements, the FTC can obtain certain remedies such  
20 as remediation measures and compliance monitoring that  
21 are, I think, generally otherwise unavailable in an  
22 enforcement action. And to date, the FTC has brought  
23 about four false claims cases.

24 So, again, as with CBPR and APEC, the FTC  
25 has been just an essential element in bridging the gap

1 between the EU and the US approaches to privacy. And,  
2 again, I'll just end by saying you're not going to get  
3 buy-in legitimacy or credibility without that  
4 enforcement power and that collaboration and  
5 cooperation that we're all talking about today. So  
6 thank you.

7 MS. FEUER: Thank you very much.

8 I want to turn back to Jeff for a minute.  
9 So everyone has done, I think, a really fantastic job  
10 of outlining the tools. And, Jeff, you talked about  
11 these partnerships, and I guess I'd like to know a  
12 little bit more about the partnerships in terms of  
13 their status today, whether you think that they kind  
14 of could be adapted for a more, I guess, global  
15 enforcement model and whether you have any ideas about  
16 how cross-border cooperation and consumer protection  
17 matters could be improved.

18 MR. THOMPSON: Sure. Thanks, Stacy. So,  
19 yeah, the status of the partnerships -- as I  
20 mentioned, the partnerships stem from a 1997 meeting.  
21 There were three partnerships created across Canada --  
22 one in Vancouver, one in Toronto, Ontario, and one in  
23 Montreal, Quebec. At one point in time, we saw this  
24 increase to seven Canada-US cross-border partnerships,  
25 but that wasn't maintainable for a number of reasons,

1 primarily being there wasn't a lot of enforcement work  
2 in Atlantic Canada and Saskatchewan, for instance.

3           So, I mean, things changed. And, again, as  
4 I said, priorities change. So right now we have three  
5 partnerships, including the new Pacific partnership  
6 which replaced Project Emptor. The Montreal Canada  
7 project, Project Colt is also defunct currently, but I  
8 mentioned we're working on renewing these efforts and  
9 coordinating something there. So, right now, as it  
10 stands, there's the Alberta Partnership and the  
11 Toronto Strategic Partnership, and the Montreal  
12 Partnership.

13           As far as improvements go, one area for I  
14 think more global enforcement cooperation that we  
15 discuss a lot at the office is disruption. And by  
16 disruption, I'm not talking about actual enforcement  
17 action. I'm talking about cooperation with private  
18 sector partners, using the data that we capture in our  
19 central fraud databases to block, say, shut down  
20 foreign numbers, to get bank accounts blocked. In  
21 Canada, we're sharing information with banks and  
22 credit card providers to go after the subscription  
23 traps, the continuity schemes, the counterfeit sales  
24 of other goods online and nondelivery goods.

25           So the information we house that there's

1 other alternatives to enforcement, and those are some  
2 of the areas that need to be improved on  
3 internationally.

4 MS. FEUER: Thank you very much.

5 I now turn to Kurt Gresenz, who is the  
6 Assistant Director at the SEC's Office of  
7 International Affairs. And, Kurt, as we heard earlier  
8 from Jean-François Fortin, securities enforcement  
9 collaboration is truly global and truly impressive, I  
10 have to say. I'm interested in hearing more from your  
11 perspective to inform our thinking about the  
12 cooperation in the areas that fall within the FTC's  
13 jurisdiction.

14 MR. GRESENZ: Thank you, Stacey. Let me  
15 start out by giving the disclaimer I'm required to  
16 give, that these are my views, only my views, and not  
17 necessarily those of the Securities and Exchange  
18 Commission, its Commission, or its staff, which I like  
19 doing because that frees me up now to say what I would  
20 like to say, which hopefully follows what the SEC  
21 would say.

22 Okay, so let me start out with building on  
23 some of the themes that have been talked about. One  
24 of the reasons, I think, that we have been successful  
25 in forging a pretty broad alliance of securities

1 authorities around the world that are cooperating is  
2 by virtue of the fact that the IOSCO principles of  
3 securities regulation are part of what national  
4 economies are assessed against as part of the  
5 financial sector assessment program that is done by  
6 the IMF. So essentially when the IMF and team comes  
7 into a jurisdiction to grade you on your financial  
8 resiliency and financial regulation, they're going to  
9 look at the IOSCO principles.

10 And the IOSCO principles say that your  
11 securities has to have certain minimum powers and also  
12 the ability to share information across borders for  
13 enforcement purposes. And I think that has been one  
14 of the key tools that has caused one of the things  
15 that Jean-François talked about from early adoption,  
16 say two dozen countries in 2002 under the MMOU to  
17 where we are now as 121, that it's an easy way to  
18 getting a failing grade by not being signed up to the  
19 MMOU. And national legislatures have, for the most  
20 part, made the amendments to their domestic law to  
21 enable them to meet the MMOU standards.

22 So in the scale of cooperation, Jean-  
23 François talked about over 5,000 requests that were  
24 made under the MMOU last year. The SEC is, as you  
25 might expect, a big user of those, probably 600 to 800



1 of those were ours. So we have an incentive in that  
2 process working smoothly. And where the parallels  
3 are, I think, for me is when I talk to my colleagues  
4 at the FTC, we're talking about consumer protection.  
5 And the concept of investor protection is essentially  
6 the same concept. The investor is our consumer. And  
7 one of the focuses of our enforcement priorities is on  
8 the mom-and-pop investor, the retail investor who  
9 really is somebody that will benefit from an active  
10 securities authority acting in their stead.

11 In the securities context, one of the things  
12 Jeff talked about was he mentioned you have people set  
13 up in one country, you have targeting of investors  
14 somewhere else and then you have sending the funds  
15 elsewhere. I would actually build on that. In an ICO  
16 case for example, the entities might be incorporated  
17 in two or three different jurisdictions. The  
18 investors might be targeted in the UK, Australia, and  
19 the US. They might be storing their documents in a  
20 fourth or fifth jurisdiction or in the cloud so it's  
21 very difficult to, you know, figure out where those  
22 are to begin with.

23 So those are the challenges, and building  
24 through those, and I think we've had a good discussion  
25 of the privacy challenges, but two things I want to

1 mention that also came up in the earlier points is one  
2 is what I call regulatory arbitrage, which somebody  
3 called regulatory competition. Cooperation works very  
4 well, but we also have to be cognizant that there are  
5 competing policy concerns with how we approach our  
6 enforcement tasks.

7           So for example, a sophisticated fraudster is  
8 going to have some basic awareness of what the  
9 regulatory scope is in a given jurisdiction. And  
10 these people may set up shop in particular places and  
11 do things in particular places for taking advantage of  
12 whatever the legal system is there, and often that  
13 legal system may be one that is less conducive to  
14 cross-border sharing.

15           So then as we advance down the path of the  
16 investigation, either related to that or other things,  
17 regulators move at different speeds. They may have  
18 different approaches as to how they approach  
19 witnesses. Are we going to go let everybody know in  
20 advance?

21           I will tell you that from an SEC  
22 investigative perspective, which I'm sure people  
23 around the room and at this table would share, that  
24 people acting in a manner that is entirely consistent  
25 with their own investigative processes and procedures,

1 but that may be contrary to what somebody is doing  
2 elsewhere. Those are things that are going to almost  
3 always result in people wanting to control their own  
4 investigation, perhaps at the expense of greater  
5 coordination. And I think that's where, you know,  
6 discussion is certainly important.

7           And I don't know if this is really privacy.  
8 Maybe this goes to confidentiality. Also, different  
9 authorities have different legal requirements when it  
10 comes to what types of information they have to  
11 disclose in a particular setting. So let's say that  
12 we transmit files to an authority who assigned  
13 assurances of confidentiality and then we read a  
14 newspaper report that talks about things that we  
15 disclosed on a confidential basis, and then we drill  
16 down and it turns out that, well, yes, they kept it  
17 confidential but not from a lawful request, and it  
18 might be a Freedom of Information Act request or  
19 something like that. So that's obviously going to be  
20 something that maybe you don't anticipate on the front  
21 end, but it might chill information exchanges going  
22 forward.

23           And then the case of the ambitious  
24 prosecutor, he or she who may leak to the press. I  
25 know that that's always a source of great

1     consternation, whether it's the SEC or DOJ or  
2     elsewhere, when you read confidential details that are  
3     unattributed by a source who's not authorized to speak  
4     about something that you thought you transmitted in  
5     confidence. So I do want to talk about those.

6             I think the last thing I want to talk about  
7     in challenges is one of the things that we are dealing  
8     with frequently at the SEC, and I think we sort of  
9     have a little bit of a handle on it, and I know it  
10    must be something that the FTC confronts, also, but  
11    the law has been unsettled for a number of years as it  
12    relates to the Electronic Communications Privacy Act  
13    and what type of records we can get from internet  
14    service providers, and maybe who a subscriber is, who  
15    is the identity of a particular account. Maybe that's  
16    something that is reachable, but what about the cases  
17    where you know there's communications and you want  
18    those communications, and maybe there's impediments  
19    there. I know that the criminal authorities can go  
20    through a warrant process for things like that. What  
21    is the recourse of an administrative agency where we  
22    don't necessarily have recourse to a criminal  
23    mechanism to show just cause, due cause, probable  
24    cause, reasonable suspicion, whatever the standard is.

25             So cooperation works, but we have to be, I

1 think, vigilant of the challenges to that, and like  
2 we've already talked about in the GDPR space, how do  
3 we get to a solution that works for most people most  
4 of the time.

5 MS. FEUER: Thank you very much. So let me  
6 ask you one follow-up, which is about your statutory  
7 authority which underlies your ability to cooperate.  
8 I know that you have some tools that you've had since  
9 the 1970s that are somewhat similar to what we have in  
10 SAFE WEB. And I'm wondering how they actually  
11 underpin what you do and how effective you think  
12 having that statutory authority has been.

13 MR. GRESENZ: So there are three sections  
14 that I'll talk about. And absent these three things,  
15 we would not be able to meet the IOSCO principles,  
16 which means we wouldn't be able to sign the MMOU,  
17 which means the Treasury Department would be unhappy  
18 when we were adjudged to be noncompliant in an FSAP in  
19 these areas.

20 The first one is what I call our access  
21 request authority, and what this says is the  
22 Commission has discretion to share confidential file  
23 materials with any person, provided that person  
24 demonstrates need and can make appropriate provisions  
25 of confidentiality. And I think more or less that

1 tracks what the FTC can do, although maybe the Safe  
2 Web is restricted to regulatory authorities, where the  
3 SEC, in theory, has discretion to share with any  
4 person.

5 Our Commission has delegated that authority  
6 to exercise the discretion to the staff in the area  
7 where I work with, which is cross-border enforcement  
8 cooperation. Now, typically, my office will look at  
9 any request for access for SEC files that comes from a  
10 foreign authority, and we will make a baseline  
11 determination of whether sharing is appropriate with  
12 that organization or not. Obviously, if they're an  
13 MMOU signatory, that question is easier. So that's  
14 the first one, the ability to give access to materials  
15 and files.

16 The second one is to use our compulsory  
17 power on behalf of a foreign authority. And I think,  
18 again, here, there's probably parallels all down the  
19 line with the FTC's existing authority, is we have to  
20 make sure that there's -- well, for us to start with,  
21 the requesting authority has to be a foreign  
22 securities authority, which means do they enforce laws  
23 that fall within their securities regulation.

24 Number two, the authority has to be able to  
25 provide reciprocal assistance. And, again, if it's an

1 MMOU party, that's already written in and baked into  
2 our principal cooperation mechanism. The sharing has  
3 to be consistent with the public interest of the  
4 United States, and we go through that process of the  
5 deconfliction process with the US Department of  
6 Justice. So that's something else that is taken care  
7 of.

8           And one interesting fact here is it's not  
9 necessary for the conduct to be a violation of US law.  
10 So, for example, if it's illegal in Country X but it  
11 may not be illegal here, we do have the authority to  
12 assist in appropriate circumstances.

13           The third piece after the access request and  
14 the compulsory authority, you know, of course, you  
15 list three and then you forget the third one. Let me  
16 come back to that one. I should have made a note when  
17 I was thinking about this.

18           MS. FEUER: Okay. Well, that's great.

19           So we have a lot here to work with to start  
20 us off on questions, and there are so many strands to  
21 the strands that we've brought out that it's hard to  
22 know where to start, but I am going to start with two  
23 questions that have come in. And the first really  
24 builds on, Kurt, what you were just talking about,  
25 that your investigative assistance power doesn't

1 require the law violation to be a law violation in the  
2 United States if it is a law violation in another  
3 country.

4           And we actually have a question on that.  
5 And this is, I think, to the consumer protection and  
6 privacy areas where I think laws diverge more than  
7 they do in the securities arena. But the question is  
8 this, when an act or practice would violate consumer  
9 protection law in a consumer's home country but it  
10 isn't against the law in the seller's country, should  
11 agencies cooperate? When there is a conflict of laws,  
12 what should consumer and privacy agencies do? And I'm  
13 going to throw that out to the panel and see who hops  
14 on it.

15           James?

16           MR. DIPPLE-JOHNSTONE: Is it helpful to say  
17 just in terms of our experience at the ICO's offices  
18 for that very reason is our legal gateways are framed  
19 with a public interest test? And that's a very widely  
20 drawn public interest test, so it doesn't need to be a  
21 specific offense in the UK for us to be able to  
22 cooperate and exchange information, for that very  
23 reason is there is quite a variety.

24           MS. FEUER: So that's helpful to know. By  
25 way of background, the FTC's -- yes, I work for the



1     FTC -- the FTC's authority to obtain investigative  
2     assistance for foreign counterparts relates to unfair  
3     or deceptive acts or practices, as well as violations  
4     of laws that are substantially similar to those that  
5     the FTC enforces. So we have a little bit more  
6     defined statutory language, although as you can see  
7     here, it allows to us cooperate with a wide variety of  
8     agencies.

9             Anyone else want to opine on this first  
10     question from our audience? Marie-Paule?

11             MS. BENASSI: Yes, thank you. It's a very  
12     important and interesting question. So in the  
13     European Union, we have laws which are harmonized,  
14     fully harmonized, or minimum harmonization. So our  
15     system of cooperation for enforcement actions are  
16     based on the minimum harmonization, when it is minimum  
17     harmonized. So it means that you cannot take an  
18     enforcement action for a violation which goes beyond  
19     the minimum harmonization and which would not be the  
20     same in one -- in your member state where the trader  
21     is established compared to the member states of the  
22     consumer.

23             But requests for information and other types  
24     of assistance I think can function. And what we see  
25     when we work with cooperation in an informal setting

1 with other jurisdictions outside of the European Union  
2 is that very often the principles -- at least the  
3 principles are quite the same. And so it's on this  
4 basis, I think, that in many cases exchange of  
5 information can be possible.

6 MS. FEUER: Jeff.

7 MR. THOMPSON: Yeah, I think this touches a  
8 little bit on what I was referring to with disruption  
9 as well. Enforcement is not the only answer where we  
10 can't enforce the law in another country or a law  
11 doesn't exist that prohibits a certain action.  
12 However, we may be able to work with, again, private  
13 sector partners or other agencies to block these  
14 services from being offered in Canada.

15 Binary options was a great example in Canada  
16 where we worked with credit card companies, and  
17 Canadian law prohibits the sale of securities if  
18 somebody is not registered. So, therefore, there was  
19 no binary options. Companies registered in Canada,  
20 therefore, any sales to Canadians are against our  
21 laws. So we're able to work with Mastercard and Visa  
22 and the credit card companies to prevent any Canadian  
23 transactions for binary options.

24 MS. FEUER: So that's very interesting. So  
25 there are really a range of options here from a very

1 broadly defined public interest standard to the  
2 European Union's concept of minimally or maximally  
3 harmonized laws, which essentially means whether every  
4 EU country has the exact same law or whether they have  
5 more leverage and freedom to implement laws  
6 differently. To the example that Jeff has given with  
7 disruption and also being able to cooperate across the  
8 civil and criminal divide, because we obviously  
9 cooperate with the RCMP as a criminal agency, and many  
10 of our colleagues, for example, the UK ICO, has  
11 criminal authority as well as civil authority.

12 Kurt, I saw you want to say one more thing  
13 here.

14 MR. GRESENZ: Yes, I was actually thinking  
15 about a topic that you and I have talked about. So  
16 one of the questions that can come up in the work that  
17 I do is there might be a hesitation on the part of  
18 some of our foreign counterparts to work with us in  
19 some cases if they are afraid that an SEC outcome will  
20 foreclose them from acting. And I think this is the  
21 result of different legal interpretations of what  
22 amounts to double jeopardy.

23 So you know, in the US, depending, we have  
24 different sovereigns for different purposes. What  
25 some of my colleagues overseas have said that

1 essentially should the SEC take some action, even  
2 administrative action against an actor where the  
3 conduct is based on something the foreign authority is  
4 looking at that that could potentially preclude the  
5 foreign authority from doing any action at all? So  
6 that's in one direction we have to be sensitive to  
7 that.

8           You know, the question there is let's say we  
9 ask for help in a case and they're looking at it and  
10 they say, well, we don't want to tell you because  
11 you're going to take action and then we're going to be  
12 left with nothing. And, again, we would work through  
13 that stuff, but it's a real issue.

14           You know, from our side, we take Foreign  
15 Corrupt Practices Act violations seriously. And from  
16 an economic perspective, my personal view is there's a  
17 really good strong reason to do that. That's not  
18 always the approach that some foreign jurisdictions  
19 take. And we have from time to time encountered  
20 hesitancy to help us on our FCPA investigations on the  
21 SEC side, not speaking for the Department of Justice,  
22 because of a view that well, you know, I don't  
23 understand how that falls into a securities violation.  
24 It could be just code for, well, we don't really look  
25 at it in that way from our country. So we don't think

1 we can help you. Again, people have to decide are  
2 they going to step up and are they going to help.

3 MS. FEUER: Right. So really interesting  
4 question and really interesting responses. I want to  
5 turn to another question that sort of focuses on one  
6 of the hot topics of today, which is this. Congress  
7 is considering passage of a comprehensive data  
8 protection and privacy law. How might that change or  
9 affect the relationship between US regulators and  
10 those in Europe and elsewhere, particularly as it  
11 relates to privacy investigations and litigation? And  
12 I'm going to put James on the spot first.

13 MR. DIPPLE-JOHNSTONE: Okay. Well, I think  
14 in many ways, you know, we should look at the  
15 opportunities. There are many countries around the  
16 world which are looking either at their first data  
17 protection act or privacy act or enhancing the one  
18 they've got. And I think the key things are to make  
19 sure that, you know, as referenced by the  
20 international conference, that there are those  
21 opportunities to collaborate and cooperate to  
22 ultimately do what we're all there to do, which is to  
23 keep our citizens safe.

24 And this will continue to be a theme as we  
25 go forward. Countries like India are looking at the

1 data protection bill, going through their Parliament  
2 and their legislative process. They will be  
3 significant, given the scale and size of their  
4 economies and their country. So we should look for  
5 the opportunities to work better together.

6 MS. FEUER: And I thought you were going to  
7 mention GPEN again.

8 MR. DIPPLE-JOHNSTONE: Well, GPEN provides a  
9 great opportunity to do that, both in terms of the  
10 cooperation, but also more importantly the technical  
11 challenges, the assistance. One of the great things  
12 GPEN does, if I can make a plug for it, is coordinate  
13 around sweeps, so looking at upcoming threats and  
14 risks that might affect privacy authorities and  
15 sharing that load out and sharing that learning out in  
16 terms of all of us looking consistently at threats  
17 within each of our nations and then bringing together  
18 the results of that for a common discussion.

19 MS. FEUER: So any other observations on the  
20 question? It focuses on whether changes in privacy  
21 laws might affect cooperation, but I think the  
22 question is really broader. As we talked about this  
23 morning, many countries are in the process of updating  
24 their laws, whether it be consumer protection laws,  
25 privacy laws, securities laws, maybe? And so I wonder

1 how this whole issue of changing laws, changing  
2 standards affects the way or the opportunities or the  
3 challenges for cooperation.

4 And I'll throw that out to whoever wants to  
5 go first. Secretary Sullivan.

6 MR. SULLIVAN: So I'll just say, we in the  
7 International Trade Administration have been working  
8 with the National Telecommunications Information  
9 Administration and the National Institute of Standards  
10 and Technology, also sister agencies at the Commerce  
11 Department, to evaluate what, if anything, the Federal  
12 Government should do to address some of the privacy  
13 concerns that have certainly captured a lot of  
14 attention in the last couple of years.

15 I think this goes back to what I was talking  
16 about. This is my personal opinion. I think we're  
17 probably quite a long ways off from any global  
18 standard. I think -- you know, you talked about  
19 India, Brazil. A lot of countries, you know, many  
20 have been looking to GDPR as an example, but no one is  
21 replicating GDPR exactly. There are still these  
22 differences, and those are going to continue because,  
23 as I think I said earlier, different countries have  
24 different cultural norms and legal traditions and  
25 histories, and they have different policy priorities

1 that are all going to, you know, result in differences  
2 of kind if not degree.

3           Again, I sound like a one-trick pony, but  
4 this goes back to the APEC CPBR system because what  
5 that basically is, is it takes these internationally  
6 recognized norms that we all agree on, which came from  
7 the OECD guidelines and the fair information  
8 principles before that and said let's all agree to  
9 these baselines, because you are going to have these  
10 differences. And we have to find a way to bridge  
11 these differences between these different regimes that  
12 countries have.

13           I think, again, you know, there are  
14 aspirations for a single global standard. I don't  
15 think that's about to happen anytime soon, so we've  
16 got to figure out, you know, how these different  
17 regimes can be made to work together. The approach in  
18 APEC is this interoperability approach, which I really  
19 think has a lot of appeal, is very well developed, and  
20 has been embraced, as I said, by a lot of countries in  
21 APEC, and we've heard a lot of interest from other  
22 countries around the world because it really is very  
23 flexible and can be adapted.

24           On the one hand, it definitely protects  
25 privacy, but it can deal with technology because we in



1 government are always going to be one step behind in  
2 regulation and legislation to begin with, but in this  
3 space in particular with the technology evolving so  
4 quickly, I really think there's great appeal there.

5 MS. FEUER: Thanks.

6 Anyone else? Marie-Paule?

7 MS. BENASSI: I agree with what James  
8 Sullivan said. I think it's going to be really  
9 incredibly difficult to sort of have a very harmonized  
10 universal framework for that data protection but also  
11 for consumer protection. And in the European Union,  
12 we are -- we have these principle-based laws and even  
13 in case of maximum harmonizations, there remain some  
14 differences.

15 So our reply is to work on common  
16 enforcement actions and develop these actions in a way  
17 that they have become also guidance in a way. So --  
18 and they are less theoretical than the law because  
19 they are applied to practical problems, practical  
20 practices. And in the future, what we want to do is  
21 to do more of these actions where, in fact, we have --  
22 we publish the common position of the CPC network in  
23 the form of a guidance that can be applied by all the  
24 different operators in a certain industry.

25 The other point I wanted to mention is

1 notice and action procedures. So in the European  
2 Union, we have a law which is called the E-Commerce  
3 Directive, and which provides that marketplaces and  
4 social networks do not have a duty to monitor illegal  
5 practices, but they have a duty to act upon  
6 notification against an illegal practice. And this  
7 means, for example, withdrawing the account, obscuring  
8 the information.

9 One of the problems of these operators,  
10 because we are now discussing a lot with them, is  
11 that, first of all, the domain of laws, which should  
12 apply, which is enormous and then it's -- for them,  
13 it's very difficult in a way to have an efficient  
14 action when the domain of law is so big and also the  
15 enforcement type are very big.

16 And so I think that also cooperation on  
17 common notice and action procedures at the  
18 international level with a certain level of  
19 recognition, so this is what Jeff is saying about this  
20 disruption, so looking into also other type of models  
21 which are more based on practical enforcement tools,  
22 systems.

23 MS. FEUER: Thank you.

24 Anyone else?

25 So in the few minutes we have remaining,

1 what I'd like to do is turn to each of the panelists  
2 and, similar to the first panel today, ask for a one-,  
3 maybe two-minute takeaway of what you see as the most  
4 important tools for international cooperation, what  
5 you see as your main challenges, and how you might  
6 remedy them.

7 So I'm going to put Kurt on the spot and ask  
8 our SEC colleague to start first.

9 MR. GRESENZ: So when you started with  
10 tools, I did remember the third tool that was so  
11 important that I forgot it, but it actually is very  
12 important. So we have two provisions of law which  
13 help us protect information we receive from foreign  
14 authorities. The first one is a statutory protection  
15 that protects from any third parties any materials  
16 that we receive from foreign securities authorities.  
17 So outside of the litigation context, that essentially  
18 gives us ironclad protection for SEC files for  
19 enforcement purposes.

20 But more recently, we added a legal  
21 amendment, a new tool that protects in litigation any  
22 material that would be privileged in the foreign  
23 jurisdiction. So let's say, for example, we get  
24 confidential financial intelligence from a foreign  
25 authority, and as a condition of receiving that, the

1 foreign authority makes a good faith representation  
2 that this is for intelligence purposes, and it is  
3 privileged from disclosure in our jurisdiction.

4 Under Section 24(f) of our 34 act, that  
5 protection would carry over into US law, and there is  
6 an absolute privilege it would stand discovery, for  
7 example, that it will carry over the foreign privilege  
8 to US law. And it could be anything. It could be  
9 financial intelligence, it could priest-penitent. I  
10 mean, if there is a privilege that is recognized in  
11 the foreign jurisdiction and we receive materials  
12 pursuant to that privilege without waiver, then  
13 there's no examination behind the statute for the  
14 court to make. It just has to be the representation.

15 So that, I think, gives us added teeth when  
16 it comes to representations that we, in fact, can  
17 protect things in our files. So, you know, the  
18 takeaway for me is the big difference that I see is it  
19 looks like what we do in the security space is much  
20 more concentrated. You know, we know exactly who the  
21 players are. We see them all the time. There's  
22 crossover to some criminal authorities and other  
23 domestic agencies, but by and large, we seem to be in  
24 a more narrow lane.

25 And I think my takeaway would be that

1 listening to my colleagues here is there's a lot of  
2 lanes running in parallel and overlapping and  
3 overpasses and other sides that I think that we just  
4 don't have that much of in the security space in my  
5 view.

6 MS. FEUER: Thanks. And that raises two  
7 interesting points. I think this afternoon we'll have  
8 a panel on competition enforcement, and I think there  
9 might be a few less lanes, although I know there are  
10 some. And, also, your mention of your statutory  
11 ability to protect information, we have an analog in  
12 the SAFE WEB context for information provided by  
13 foreign law enforcement agencies when they ask for  
14 confidentiality that gives a privilege against FOIA  
15 disclosure.

16 So turning now to Jeff, your top takeaway.

17 MR. THOMPSON: At the end of the day, what I  
18 got out of this is, I mean, there's an increasing  
19 abundance of information in the world, and we need to  
20 be able to prioritize our enforcement efforts. So  
21 it's processing all that information that's certainly  
22 a challenge, and there's all kinds of technology tools  
23 to help us. But not only that, it's setting the right  
24 priorities and working smarter. So the intelligence-  
25 led approach, where we're using the central fraud

1 databases such as Consumer Sentinel or Anti-Fraud  
2 Centre to start driving enforcement action in a more  
3 targeted and effective manner.

4 MS. FEUER: Thank you. So intelligence is  
5 key to international cooperation.

6 Marie-Paule?

7 MS. BENASSI: So I wanted to say two things.  
8 The first thing Jeff said it already, which is about  
9 prioritization. And I think that fraud is becoming  
10 internet fraud, all the different facets of it, and  
11 its internationalization, I think, is becoming a very  
12 big problem in terms of the harm caused to consumers  
13 and collectively in the world.

14 And also in this respect, the role of the  
15 big platforms, you know? And if we don't prioritize  
16 and don't find efficient ways, building also on what  
17 this platform can do, I think is going to become more  
18 and more difficult to prevent fraud. And we see  
19 organized crime moving into these kind of activities,  
20 which seems to be giving them the possibility to earn  
21 a lot of money very easily.

22 But then we have a different type of problem  
23 which we didn't discuss much, because also we have a  
24 bit -- had discussions a bit in silos here, but which  
25 is how to tackle the new types of misleading practices

1 which are developing and which are based on the data  
2 economics. So on this we need to build links between  
3 competition, data protection, and consumer protection  
4 in order to understand this and see how -- what are  
5 the impact on consumers in terms of also the possible  
6 harm and also for businesses, possible lack of  
7 competition that this type of new data models are  
8 creating.

9 MS. FEUER: Thank you.  
10 Secretary Sullivan.

11 MR. SULLIVAN: So, again, for me, my  
12 perspective, the biggest challenge we're dealing with  
13 right now is the fragmentation or the vulcanization of  
14 the internet around the globe. You're seeing rising  
15 delocalization, which, again, I think that just  
16 impoverishes everybody, those within the country that  
17 have imposed delocalization measures, those that have  
18 overly strict restrictions on data flows. I think  
19 certainly we share a legitimate and strong desire for  
20 consumer privacy with a lot of other countries. And  
21 as I noted earlier, we take different approaches.

22 I do think we need to be very wary because  
23 these issues, the way we're headed and in the coming  
24 years, we're going to be looking at, you know, more  
25 and more connected devices that are transmitting data,

1 and this data has to be protected on the one hand, but  
2 it can lead to such tremendous opportunities. I mean,  
3 in the public sphere, in terms of smart cities and  
4 efficiencies and health breakthroughs and precision  
5 medicine and detecting disease patterns. And we want  
6 to be very wary of going too far in one direction, I  
7 think. So I agree with you about the balancing of  
8 these interests.

9 And, again, I'll go back to my -- I really  
10 think, you know, the EU, for example, and the US do  
11 take different approaches, but we ultimately share, at  
12 eye level, the very same goal. And I think  
13 interoperability between GDPR on the one and CBPR on  
14 the other could be a very positive development. I  
15 know there was a referential a few years ago with  
16 BCRs, binding corporate rules, which is an EU proof  
17 mechanism for data transfers and mapping it relative  
18 to CBPRs.

19 And, again, these all derive from the same  
20 OECD guidelines, and I think there's a lot of overlap.  
21 And I know GDPR allows for certification mechanisms,  
22 and I think there's a tremendous opportunity there for  
23 us to make these systems work together and make sure  
24 that we are extending privacy protections around the  
25 globe, while at the same time making sure that we're



1 not quashing or squashing innovation and, again, doing  
2 damage to our long-term interests.

3 So I think interoperability would be my  
4 solution there. And as, again, I've said a couple  
5 times already, you know, the FTC is probably the  
6 preeminent privacy data protection authority, as it  
7 were, in the world going back to the 1970s, has been a  
8 great partner as we go around the world and talk to  
9 countries on this. And so we should continue to do  
10 that. And I hope we can partner with other like-  
11 minded countries to that end.

12 MS. FEUER: Thank you.

13 And the clock is quickly counting down, so  
14 I'll ask Commissioner Dipple-Johnstone to say a final  
15 word.

16 MR. DIPPLE-JOHNSTONE: I will be very quick,  
17 then. I mean, I can almost echo the comments of  
18 others. I think it's that keeping updated and keeping  
19 pace with vast changes in the landscape and technology  
20 and making sure that we don't become the ministries of  
21 no, that we support innovation in a very practical  
22 sense. And as part of that, it's making sure we make  
23 the right links both internationally with each other  
24 but also in each of our respective homes with the  
25 other agencies and authorities we have to work with so

1 that the offer we can make internationally is the  
2 right one.

3 MS. FEUER: So thank you very much to the  
4 panel for some incredibly thought-provoking ideas.

5 Before we break for lunch, I just want to  
6 mention that the Top of the Trade on the 7th floor has  
7 catering available for you to purchase. There's a  
8 handout on the table just outside with information  
9 about nearby restaurants. If you leave the building,  
10 you will have to go through security again unless you  
11 are an FTC employee. And be mindful that there is a  
12 small group of protesters outside the building, so  
13 leave ample time to get back in for our fascinating  
14 afternoon panels. Thank you.

15 (Applause.)

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1 AFTERNOON SESSION

2 COMPETITION ENFORCEMENT COOPERATION

3 MS. COPPOLA: Okay. I'm getting the green  
4 light from Bilal Sayyed, our head of Policy. So I  
5 think we should get started.

6 Thank you all for coming to this afternoon's  
7 panel. Today, we're going to talk about enforcement  
8 cooperation on the competition side. You've just  
9 heard, in the break before lunch, about cooperation on  
10 the consumer side. It has a very different nature on  
11 the competition side. So we'll be talking about that  
12 this afternoon.

13 I'd like to introduce my panelists briefly.  
14 Starting with -- going in alphabetical order, Nick  
15 Banasevic. Nick is from the European Commission's DG  
16 Competition where he heads the unit that covers IT,  
17 internet, and consumer electronics. So we've had the  
18 very good fortune to cooperate with Nick on a number  
19 of cases.

20 Next to Nick is Marcus Bezzi. He is the  
21 Executive Director at the Australian Competition and  
22 Consumer Commission, where, among other things, he  
23 oversees all of the ACCC's international engagements.  
24 So I also have had a great time working with him, even  
25 though very often the calls were extremely early for

1 us and extremely late for him. We still have a  
2 terrific relationship.

3 Then we have Fiona Schaeffer, who is an  
4 Antitrust Partner at Milbank LLP. She has practiced  
5 on both sides of the Atlantic. So she brings unique  
6 perspective in that sense and has lot of experience in  
7 multijurisdictional mergers in particular.

8 Then just to my left -- I was a little  
9 thrown off because I thought it was alphabetical and  
10 that's why I was -- yeah, you didn't look like Jeanne,  
11 anyway. So Jeanne Pratt, who is Senior Deputy  
12 Commissioner from the Canadian Competition Bureau.  
13 She oversees their abuse of dominance and mergers and  
14 noncartel horizontal conduct matters. She also has  
15 experience at the ACCC. So I'm sure that she will  
16 bring that to the discussion today.

17 So those are our panelists and you're going  
18 to hear from them, not from me. Just by way of  
19 background, a lot of the cooperation issues that are  
20 relevant to the competition enforcement discussion  
21 were addressed in this morning's session. So we'll  
22 try to get into a little bit more granular level so  
23 that we don't repeat what was discussed this morning.

24 Just I guess to set the stage in thinking  
25 about cooperation in general, we engage in enforcement

1 cooperation for a number of reasons. Often, we find  
2 that it will improve our own analyses. It allows us  
3 to identify issues where we have a common interest, it  
4 allows us to avoid inconsistent outcomes, and perhaps,  
5 most importantly, for the outcome to coordinate  
6 remedies.

7 So with that in mind, I have asked the panel  
8 to start off -- we're trying to understand strengths  
9 and weaknesses of enforcement cooperation, get some  
10 advice for the FTC. So before we delve into specific  
11 questions, I've asked each of the panelists to deliver  
12 the headline of their story. What is your elevator  
13 speech? Starting with Nick.

14 MR. BANASEVIC: Thank you, Maria. Thank you  
15 to you and to the FTC. It's really a great pleasure  
16 to be here and, hopefully, share some interesting  
17 insights.

18 My elevator ride is 27 floors up and it  
19 takes about half a minute. So I don't know if that's  
20 how long I've got. But I think my five-second message  
21 is don't neglect cooperation, it can really bring  
22 benefits. Of course, I think the first instinct that  
23 we have and what we're responsible for by definition  
24 is our own jurisdiction, and the bread and butter of  
25 that is doing individual cases and that's what we

1 focus on. That's, as I say, the bread and butter of  
2 our work.

3 Beyond that we have our policy, guidance,  
4 soft law role which is complementary to the actual  
5 case enforcement. I think my core message and,  
6 hopefully, I'll illustrate it during the panel is,  
7 although you're not going to necessarily spend the  
8 majority of your time, although you might spend a lot  
9 in an individual case on cooperation, I think it's  
10 trying really -- in terms of what agencies can gain  
11 and benefit mutually.

12 Don't view it as add-on activity, something  
13 extra that you have to do. It can really bring  
14 organic benefits to either an individual case -- and,  
15 hopefully, I'll give some examples -- and also to  
16 policy to avoid misunderstandings, to converge where  
17 possible. It's really something that should be  
18 fostered over the years. I've known Maria and her  
19 colleagues and colleagues at the DOJ for many years,  
20 and it's really very useful in terms of building  
21 trust, facilitating relationships, and understanding  
22 where each of us are coming from.

23 So from my perspective, I've had very good  
24 experiences over the years and I will give some more  
25 insights as we go on.

1 MS. COPPOLA: Thanks.

2 Marcus?

3 MR. BEZZI: Well, if Nick had been standing  
4 next to me in the elevator, I would say I agree with  
5 all of that.

6 I'd also say -- make the point that was made  
7 a lot this morning, that commerce is now more global  
8 than ever and, indeed, that's a trend that's  
9 significantly enhanced by the digital economy. And  
10 the corollary of that is that enforcers have to  
11 respond to the pace of change and globalization by  
12 working more closely together. We have to be more  
13 joined up and timely.

14 And we need to do this for three reasons.  
15 Firstly, because I believe that in doing so, we will  
16 facilitate more efficient commerce. It will actually  
17 be better for the commercial parties if we are more  
18 joined up. Secondly, it will make us better at our  
19 jobs. We'll be more effectively able to police  
20 compliance with laws in our jurisdictions. And,  
21 finally, because we've got scarce resources and  
22 working closely together is likely to prevent us from  
23 reworking issues, from seeking to reinvent the wheel  
24 or overlapping each other's work. It will make us  
25 more efficient. Thanks.

1 MS. COPPOLA: Great.

2 MS. SCHAEFFER: Well, hopefully, we're not  
3 in a Dutch elevator so there's room for me as well. I  
4 certainly agree with everything that both Nick and  
5 Marcus have just said.

6 I particularly like the idea that  
7 cooperation is not the icing on the cake, but,  
8 hopefully, the glue, as Kovacic would say, or the  
9 icing in the middle.

10 What does cooperation mean? It doesn't mean  
11 achieving the same result on the same timetable in  
12 every transaction or investigation. That's not  
13 cooperation. That's utopia. And that's never going  
14 to exist. But I do think it can and often does mean a  
15 greater understanding of the issues, an enhanced  
16 understanding, as you said, Maria, for your own  
17 investigation and how to address concerns. And it,  
18 hopefully, can be used to maximize all of the  
19 efficiencies in the process given the substantive  
20 constraints and the procedural limitations that each  
21 jurisdiction has to live within.

22 So I think from a private practitioner  
23 perspective, I agree there is a lot to be gained from  
24 cooperation. And I would love to use this panel to  
25 talk about practical ways that we can enhance



1 cooperation, again using Kovacic's human glue analogy,  
2 more at that human level than at the formal,  
3 procedural MLAT kind of level that I think we've all  
4 worked with or had our frustrations with over the last  
5 decade or so, and have found that it is these informal  
6 connections and understandings that have facilitated  
7 greater cooperation more than the very formalistic  
8 process.

9 MS. PRATT: Well, I agree with everything  
10 that everyone said. The only thing I would add is I  
11 don't think cooperation is only good for enforcement  
12 agencies, I think it's good for business. It allows  
13 competition law enforcement agencies to benefit from  
14 the experience of one another, reach conclusions  
15 quicker, and with less probability of conflict and  
16 ultimately, hopefully, increased timeliness and  
17 effectiveness of the outcome.

18 But it's -- as all of these people have  
19 said, it's more than about sharing information, it's  
20 that human glue. It's having the trust amongst  
21 agencies to be able to have productive discussions, to  
22 be able to exchange theories of harm, to talk about  
23 what they're hearing from the marketplace, to sort of  
24 be in a united front with the businesses so that they  
25 understand that it is in their benefit and it will be

1 more efficient for them to cooperate with all of us  
2 together.

3 And so I think the result, hopefully, is  
4 that investigations aren't longer, are more focused,  
5 and the probability of outcomes being conflicting  
6 outcomes is minimized, and ultimately for all of us,  
7 the predictability, consistency, and effectiveness of  
8 outcomes across jurisdictions is maximized.

9 The Canadian Competition Bureau, as you  
10 heard from Commissioner Boswell this morning and as  
11 you heard from some of my colleagues from the RCMP, I  
12 think Canada generally is a strong advocate for  
13 international cooperation and we're always looking for  
14 opportunities to cooperate further, including with  
15 respect to not just merger cases, but unilateral  
16 conduct cases as well.

17 MS. COPPOLA: Thanks, Jeanne.

18 Okay. So there's a lot of human glue. So  
19 we seem to all agree that there's a lot of great  
20 things that come out of cooperation, cooperation is  
21 very important. I guess drilling down to the next  
22 level, what can parties expect for agencies, and I  
23 guess for Fiona, what can agencies expect at a more  
24 detailed level from cooperation. Why don't we start  
25 with Marcus this time.

1 MR. BEZZI: Thanks, Maria.

2 Well, there are things like sharing case  
3 theories, if waivers are given there will be sharing  
4 of information. If we use our formal processes, they  
5 can expect them to take a long time. In our  
6 experience, MLATs -- well, I'll just relate one story.  
7 We used an MLAT in a criminal matter recently and were  
8 absolutely stunned to get a result from the process in  
9 one year or a little bit less than one year. That's  
10 the fastest that anyone can ever think of. Mostly,  
11 they take two years, three years, four years.

12 We've got 19th Century formal cooperation  
13 procedures, 19th Century timetable for our formal  
14 cooperation procedures. So really we spend most of  
15 our time on the informal. And I must say, I listened  
16 to some of the sessions this morning and heard people  
17 talking about the IOSCO MMOU. I was very envious  
18 hearing about how quickly their processes work. They  
19 really do seem to operate at a more reasonable speed  
20 given the speed of commerce today.

21 I should say that in mergers, the informal  
22 cooperation works extremely well and we don't have to  
23 rely upon the formal. A lot of the time in Australia,  
24 we use the processes to coordinate remedies and people  
25 can reasonably expect us to do that in a fairly

1 efficient way. I think that is a good aspect of the  
2 current system.

3 MS. COPPOLA: Thanks.

4 Jeanne, do you want to --

5 MS. PRATT: Sure. I mean, we cooperate very  
6 closely with the Federal Trade Commission and with the  
7 US Department of Justice and the DG Comp. Those are  
8 the three jurisdictions or three agencies that we  
9 cooperate most with. And if you're a party either on  
10 the merger side or on the conduct side, you can expect  
11 that we would have in-depth discussions related to  
12 investigative approach, theories of harm, market  
13 definition, concerns expressed by market contexts in  
14 the various jurisdictions and, frankly, our analysis  
15 of the data and evidence that we've seen.

16 In some cases, you will see us do joint  
17 market interviews of joint market context. We'll have  
18 sometimes joint calls with the parties and we'll  
19 coordinate that interaction with the parties to make  
20 sure that the risk of uncertain or conflicting  
21 messages is minimized.

22 And where cross border competition concerns  
23 are identified, you can expect the Canadian  
24 Competition Bureau to engage agencies in remedy  
25 discussions, because we need to make sure that those

1 remedy discussions are considered in the broader  
2 context, including the need for remedies in one or  
3 more jurisdictions and whether a remedy in one  
4 jurisdiction may actually be sufficient to address  
5 concerns in another, so that we may not need our own  
6 consent agreement in Canada. We also look at whether  
7 a common monitor should be appointed or looking at the  
8 consistency of the language around preservation of  
9 assets or hold separate arrangements.

10 And in some cases that cooperation with the  
11 Canadian Competition Bureau may ultimately lead to us  
12 accepting a remedy that is proposed from a sister  
13 agency and it can, where appropriate, ensure the most  
14 efficient and least intrusive form of remedy for  
15 market participants.

16 So we do cooperate very deeply with our  
17 agency. And that, again, is based on a strong  
18 foundation of trust that has been built over 20 years  
19 of cooperating with the counterparts with whom we  
20 cooperate most frequently.

21 MS. COPPOLA: Thanks, Jeanne, very much.

22 I'm very sorry to have to ask Nick to add to  
23 that because I think you about covered the universe.  
24 But, Nick, what do you think that parties can expect  
25 from cooperation and thinking specifically about your

1 perspective from a shop that deals with conduct  
2 matters?

3 MR. BANASEVIC: I agree with everything so  
4 far. So not --

5 MS. COPPOLA: Okay. Can we be clear? You  
6 have to disagree at some point. This would be like  
7 dreadfully boring if you --

8 MR. BANASEVIC: In the post-panel, perhaps.  
9 No, but I think, as Jeanne said -- and  
10 perhaps -- and this is something I think we'll develop  
11 perhaps as a difference in terms of incentives in  
12 conduct in mergers. Most of what my experience, in  
13 terms of what parties have incentive-wise, is in  
14 conduct. I've worked on a few mergers where the  
15 incentives have been aligned. We've had issues with  
16 parties where sometimes they don't want to give  
17 waivers in conduct cases because they feel that that  
18 would somehow not be beneficial to them. That is, of  
19 course, their prerogative.

20 My personal view is that actually, you know  
21 if they've got a good story to tell, there's no issue  
22 with giving away, but because it's precisely those  
23 things that we can discuss openly with them and with  
24 our colleagues, our sister agencies. But I think  
25 exactly the kinds of things that -- whether or not

1 there is a waiver, because I think even without a  
2 waiver we're able to, from our perspective, in terms  
3 of what we can gain, talk about theories of harm in  
4 the abstract and general levels, test, test theories,  
5 test realities.

6 So I think if we're doing that anyway, there  
7 is an interest for parties to give us a waiver.  
8 Again, that's my personal view. But as I say, we've  
9 had some cases where we haven't had waivers.

10 To switch, in terms of what -- because I  
11 think we do have that responsibility ourselves to  
12 parties. And, again, maybe it's more in mergers that  
13 it happens that they have these incentives where  
14 they're aligned in terms of timing, coordination. In  
15 terms of what we can expect as an agency, just to  
16 develop a bit what I was saying at the beginning, I  
17 think, again, it's not that we must always dream of  
18 having the uniform solution worldwide. We all have  
19 different legal traditions, different systems. Having  
20 said that, I think where we can achieve at least a  
21 high level of convergence where possible, I think  
22 that's something that is desirable.

23 So I think we, in terms of both policy  
24 development -- and then when we're doing cases, I  
25 think it is invaluable and we each have a lot to gain

1 in terms of, again, coming back to some of the things  
2 I've said in terms of case specifics, theories of  
3 harm, making sure that we've got a reality check on  
4 whether something is correct or not, testing these  
5 theories with each other, and if appropriate, moving  
6 the cases forward in the same or similar direction.  
7 If not, at least understanding the background to where  
8 we're each coming from and why we may take a different  
9 approach. And I found that invaluable over the years  
10 in many cases, and I'll develop that a bit more a bit  
11 later.

12 MS. COPPOLA: Thanks. I think that the last  
13 point you mentioned, this idea that the effects of  
14 case cooperation are not just contained to the case  
15 itself, but to a longer-term story of deepening the  
16 understanding between agencies is really important.

17 Fiona?

18 MS. SCHAEFFER: Sure. Well, I think from  
19 the parties' perspective -- and my comments are  
20 primarily in the context of merger reviews -- the  
21 goals of what can realistically be achieved from  
22 cooperation include reducing duplicative effort,  
23 reducing the burdens of investigation, convincing the  
24 agency, through cooperation, that just because there  
25 is a hill there to climb doesn't mean that everyone



1 has to climb it. One can climb and report, assuming,  
2 of course, it is a similar hill.

3 We hope to have consistent, if not  
4 identical, outcomes and that includes, where possible,  
5 hopefully convincing an agency that they don't need to  
6 have the same remedy as everyone else just because  
7 someone else has a remedy. We don't have to have  
8 every jurisdiction reviewing, believing that it needs  
9 to have its pound of flesh in order to believe that  
10 it's conducted an effective review. And that, of  
11 course, involves some levels of trust between the  
12 different agencies as well, that the enforcement of a  
13 remedy in one jurisdiction is going to be sufficiently  
14 robust to protect others. And, you know, that may not  
15 always be the case and it may vary by jurisdiction.

16 We hope, also, that through cooperation we  
17 will, if not have a shorter overall timetable,  
18 certainly not a longer one. I think that is sometimes  
19 a concern that private parties feel is that a  
20 potential cost of cooperation is that you may be put  
21 on, in essence, the timeline of the slowest  
22 jurisdiction, rather than promoting efficiency  
23 throughout the process.

24 I guess a word on waivers just to Nick's  
25 point. In principle, I agree that knowledge is power

1 and I like everyone at the table to have a similar  
2 level of knowledge, if we have good substantive points  
3 and arguments and documents to share, or even if not  
4 so good. The agency can do a better job armed with  
5 that knowledge than if there is some game-playing and  
6 trying to orchestrate the process and manage who knows  
7 what.

8 I do think that that calculus is quite  
9 different in merger versus conduct cases. And it's  
10 not a question of giving different agencies the same  
11 level of knowledge, necessarily, although in some  
12 cases it can be. But I think for us there is a bigger  
13 concern in conduct cases that information provided to  
14 one regulator and then shared more broadly increases  
15 the risk of discovery obligations and private class  
16 action consequences that aren't so much of a practice  
17 concern in a merger context. So it's not the sharing  
18 within the agencies necessarily that is the biggest  
19 challenge there; it's what can be done with the  
20 information once it is within multiple agencies.

21 We know that we're dealing with  
22 jurisdictions that have very different levels of  
23 confidentiality protection, and in some instances, for  
24 example, are required to give third parties due  
25 process or other government agencies access. So I

1 think there's a greater feeling of concern about being  
2 able to manage the flow of that information in the  
3 conduct arena.

4 MS. COPPOLA: Thanks, Fiona. I think we'll  
5 come back to that point about information exchange in  
6 a moment. But I think, before that, I want to pick up  
7 on Marcus' point about keeping pace. I don't know  
8 that -- the 19th Century might be a bit of an  
9 exaggeration, but I think even 20th Century tools are  
10 not fit for purpose. Last night, I was watching All  
11 the President's Men with my 12-year-old son and they  
12 were trying to find the phone number for someone and  
13 they had a room full of phone books, and he just kind  
14 of said, what's that, what are they doing?

15 Anyhow, what types of things, what kind of  
16 -- what would a tool look like that was fit for the  
17 21st Century? Are these more in the realm of informal  
18 cooperation? What tools do you use? What tools do  
19 you wish you had? What can we learn from you?

20 MR. BEZZI: Would you like me to go first?

21 MS. COPPOLA: Yes. That's why I'm looking  
22 at you. I'm sorry.

23 (Laughter.)

24 MR. BEZZI: Well, where do I start. So  
25 informal -- I'll start on the informal. And, look, I

1 should say 95 percent of the cooperation that we're  
2 involved in -- probably more than 95 percent is  
3 informal and it's very effective and it involves  
4 engagement with the various agencies that we've got  
5 excellent relationships with. We have many  
6 counterpart agencies that we've got second generation  
7 cooperation agreements with or first generation  
8 cooperation agreements with. And they help to create  
9 a formal framework in which we can engage in informal  
10 cooperation.

11 And I should actually just go back a step.  
12 The formal arrangements really do enhance the  
13 informal. We have a very formal arrangement with the  
14 United States. We have a treaty with the US. I think  
15 we're the only country that has an antitrust  
16 cooperation treaty with the US. We rarely use it. I  
17 think the number of times it's been formally used you  
18 could probably count on probably less than two hands.  
19 But I believe that it promotes the use of waivers, it  
20 promotes the cooperation of witnesses, the cooperation  
21 of parties with our investigations, and it really  
22 facilitates and creates the atmosphere in which  
23 informal cooperation works very, very well.

24 So what does that actually mean? It means  
25 that we can have case teams that have regular phone

1 calls if we've got a common investigation or we're  
2 investigating common or related issues. We can talk  
3 about case theories. We can talk about practical  
4 things like when we're going to interview common  
5 witnesses. We can talk about lines of inquiry that  
6 have not been successful that have been a waste of our  
7 time and suggest to each other perhaps don't bother  
8 going there, it won't lead anywhere or, actually, look  
9 here, it's a better place to look. Those sorts of  
10 discussions happen between case teams and they are  
11 really valuable.

12 The exchange of information when we've got  
13 waivers -- confidential information when we've got  
14 waivers is very, very useful. I should emphasize that  
15 we very, very rarely -- in fact, I can't think of a  
16 single occasion that we've done it using a waiver, but  
17 we very rarely exchange evidence. I can think of two  
18 cases where we've done that using formal processes.  
19 If we want evidence, we will go to the source and get  
20 the evidence from the source if we possibly can. It's  
21 much more valuable to us that way, anyway.

22 So I think you said, what would be better?  
23 Well, some of the processes that exist under IOSCO  
24 where -- and, indeed, exist under the antitrust treaty  
25 that we have with the US -- where we can ask

1 counterpart agencies to compel testimony, we can ask  
2 counterpart agencies to compel the production of  
3 evidence or production of information and to do so in  
4 a very timely way, to put in a request that can be  
5 responded to in days or weeks rather than months or  
6 years. Those sorts of things are things that we  
7 aspire to.

8 We get a lot of it informally, I should  
9 emphasize that. I don't want to understate the  
10 importance of the informal. But having a more formal  
11 framework which would enable more of that -- and I  
12 think they have in IOSCO context -- would really be a  
13 facilitator of even greater informal cooperation.

14 MS. COPPOLA: I think we heard on the  
15 consumer protection and privacy panel that some of  
16 that investigative assistance is already happening on  
17 that side. So it's --

18 MR. BEZZI: Very much so, yes.

19 MS. COPPOLA: Since we're all -- many of us  
20 have it housed in the same agency, you would hope that  
21 we can have that transfer over to the competition  
22 side.

23 Jeanne, could you pick up a little bit on  
24 the informal cooperation point and tools?

25 MS. PRATT: Yeah, I'll try not to do --

1 MS. COPPOLA: So we can just --

2 MR. PRATT: I, again, agree with everything  
3 that Marcus said. And I think what I would say is it  
4 only works -- those informal cooperation tools, again,  
5 only work if you've got trust in the legitimacy, the  
6 competence, the candor and, frankly, the ethics of  
7 your counterparts in the other agency.

8 And you can't develop that necessarily in  
9 the context of just having a case discussion. You've  
10 got to take the time to have the conversations to  
11 understand different frameworks, to understand how  
12 they go about doing their work. And, frankly, that in  
13 our experience has led to us getting to learn some of  
14 the lessons from our colleagues so that we don't have  
15 to repeat the same mistakes and, hopefully, we have  
16 also shared some of those with our foreign  
17 counterparts.

18 So some of the mechanisms that we use  
19 outside of informal cooperation on a case to try and  
20 do that are the case team leader meetings that you  
21 heard Commissioner Boswell talk about this morning,  
22 which I find incredibly useful because it is our  
23 officers who are doing the work, that are leading  
24 those cases, that will take some time out to talk  
25 about how they do their work, what issues they are

1 facing. Sometimes it's talking about a particular  
2 case development or a lesson learned that they have  
3 from their jurisdiction. And that builds  
4 relationships amongst our staff, it builds trust, it  
5 builds confidence in our counterpart's abilities as  
6 economists and lawyers doing the same type of work.

7 Exchanges are another tool. And as was  
8 mentioned this morning, I am the very lucky candidate  
9 who got to go to the ACCC for a full year and see how  
10 they do their merger work, and I benefitted greatly as  
11 an individual. But I also I think benefitted the  
12 Bureau because we got to see not just how a particular  
13 case unfolds, but how you actually manage the  
14 organization, how you do your work, what tools you use  
15 and, frankly, seeing how something can be so different  
16 in some areas, but there's a lot of commonality in the  
17 analysis that we do in mergers.

18 MR. BEZZI: We loved having you, too,  
19 Jeanne. It was great having you.

20 MS. PRATT: It was a tough winter in Ottawa,  
21 I have to say.

22 The other thing that we have found valuable  
23 is taking some time out, maybe more publicly, to have  
24 workshops on particular issues. The FTC and the DOJ  
25 and the Competition Bureau in 2018 had a joint



1 workshop on competition in residential real estate  
2 brokerage. And, you know, we had eight years of  
3 litigation in the real estate industry surrounding the  
4 use and display of critical sales information through  
5 digital platforms that wasn't resolved until years  
6 after the US. But because we had taken so long, there  
7 had been a lot of evolution in the law and the  
8 economy. And so some of the lessons that we learned  
9 along the way were also informative to update since  
10 the fight in the US.

11 So the only other formal thing that I think  
12 I would I say, not the informal, is we have a gateway  
13 provision in the Canadian Competition Act, Section 29.  
14 So when we're doing mergers, we don't ask for waivers  
15 in Canada. As long as we're working on a case and we  
16 feel that that cooperation is necessary for  
17 enforcement of the Competition Act in Canada, we feel  
18 that that gives us the ability to have that  
19 conversation with our counterparts.

20 So if you -- and I think this would be  
21 particularly useful in the unilateral conduct side  
22 where you may be looking at different incentives. The  
23 merging parties may want to get through our process as  
24 quickly as possible. They, I think, have come to see  
25 more of the benefits of our cooperation to get them

1 where they need to get to with less conflict and  
2 quicker results. But, you know, that kind of a  
3 gateway provision could allow us to have discussions  
4 on the unilateral conduct side because the discussion  
5 is only as good as the two-way communication allows.

6 MS. COPPOLA: Thanks. The senior level  
7 exchange, I think, would be a big hit here if the  
8 destination was Australia. But I guess kidding aside,  
9 it's interesting because what you learn there, you're  
10 coming back and you're in charge so you can actually  
11 implement the changes. So that must have had a  
12 terrific effect.

13 Okay, Nick, just thinking a bit more about  
14 cooperation in conduct investigations. I almost said  
15 antitrust investigations because I was looking at you.  
16 What kind of practical experience tips do you have  
17 that you would like to share?

18 MR. BANASEVIC: So I'm going to go back in  
19 time a bit and give you a couple of examples of very  
20 intense cooperation with the FTC and the DOJ.  
21 Actually, let me first say, to go back a step even,  
22 for us, cooperation starts at home in the sense that  
23 we've got the European Competition Network, which in  
24 -- I don't know if "unique" is the word, but it's the  
25 network of us, the European Commission with all the

1 national member state competition authorities in the  
2 EEA, the European Economic Area, all applying European  
3 competition law.

4           And so we first need to cooperate at home in  
5 terms of both just allocating cases and, of course,  
6 generally the European Commission does the cases that  
7 are over a broader geographic scope, whereas the  
8 national agencies tend to focus on more national ones  
9 and in terms of substance coordination as well.

10           Beyond that, I think we have extensive  
11 international cooperation with all the major  
12 competition authorities around the world, including  
13 Canada and Australia. But to give the two examples  
14 that, for me, have been personally particularly  
15 instructive over the years, going back to the  
16 beginning of the century is first the Microsoft case  
17 with DOJ, where, as background, you remember that the  
18 D.C. Circuit Court of Appeals affirmed a monopoly  
19 maintenance finding here under Section 2. And that  
20 was while our case was still ongoing in Europe. We  
21 had an interoperability and a tying abuse, tying of  
22 Media Player.

23           And then there was a remedy implemented in  
24 the US that changed the way that some things were  
25 done. So it had a kind of factual impact on some of

1 the things that we were doing in our case while it was  
2 still ongoing. And the issues were also -- even  
3 though the liability case here was little bit  
4 different, through the remedy, there was an  
5 interoperability element as well. So the kinds of  
6 issues were very similar.

7 We met, I think, for a period of a few years  
8 twice a year. We would come here once a year and the  
9 DOJ would come to see us in Brussels. And it was  
10 invaluable just to exchange theories, to understand  
11 where each side was coming from, and to develop a  
12 trust and understanding over the years. So I think  
13 it's fair to say that even though the issues were  
14 different, there wasn't always perfect agreement, but  
15 it was a relationship that we valued and that really  
16 brought a lot in terms of understanding where we were  
17 coming from and in my view, at least, having a  
18 solution that was not necessarily exactly the same,  
19 didn't lead to an overt situation of conflict, which,  
20 again, in my view was greatly facilitated by these  
21 contacts.

22 The second example is the kind of policy and  
23 case area standard essential patterns. This goes back  
24 to even Rambus with the FTC where we had a similar  
25 case ourselves in Europe. But more generally and more

1 recently, or five, six years ago, I guess, this issue  
2 of injunctions based on standard essential patterns.  
3 The FTC -- I think it was 2013 you had the consent  
4 decree with Motorola and we had a prohibition decision  
5 against Motorola a year earlier on the same kind of  
6 issue.

7           And, again, take a step back or try and  
8 remember, this is a very -- I don't know if "novel" is  
9 the word, but it was a controversial area of law. And  
10 perhaps it still is. For us in Europe, at least, we  
11 adopted a prohibition decision, which said that  
12 injunctions against willing licensees, based on  
13 standard essential patterns where you've given a  
14 commitment to license on FRAND terms, are an abuse.  
15 That was confirmed by our Supreme Court, the European  
16 Court of Justice, in a separate case, but the  
17 principle was confirmed. But it was, and still is, a  
18 subject that attracts a great deal of attention and a  
19 great deal of controversy. There were many people --  
20 and that debate still goes on.

21           But there were many people saying, how can  
22 you possibly do this? There are some people saying  
23 that. But against that background of that -- again,  
24 I'm not sure if "novel" is the word, but a very  
25 complex, important issue, it was really invaluable to

1 have both the case coordination with the FTC on  
2 Motorola, where we had regular contact in terms of  
3 meetings and calls, and then on the policy level with  
4 both the FTC and the DOJ, where essentially we were on  
5 the same page in terms of developing this policy and  
6 this approach towards how we deal with the specific  
7 issue of injunctions based on standard essential  
8 patterns. I think particularly because it was an area  
9 that was so complex and controversial, my personal  
10 view is that we all mutually benefitted from being  
11 able to really share these experiences and insight.

12 So those are two examples and there are  
13 many more, but it's really, for me, a manifestation of  
14 just concrete case teams talking to each other  
15 regularly, being open, exchanging ideas, evidence if  
16 appropriate, if you have the waiver, and it's been a  
17 great benefit.

18 MS. COPPOLA: Yeah, I think interplay of the  
19 case level and the policy level is a really good point  
20 that really deepens greatly the discussion and  
21 understanding.

22 Fiona, we've heard kind of rah-rah-rah  
23 cooperation and lots of pluses on cooperation. You've  
24 talked about how cooperation doesn't mean getting to  
25 the finish line at the exact same time. What are some

1 of the practical limitations on cooperation from a  
2 private practitioner's perspective?

3 MS. SCHAEFFER: Well, I think we start out  
4 with very different procedural frameworks in different  
5 jurisdictions. We happen to have probably two of the  
6 closest jurisdictions here in Canada and the US, on  
7 process. But others look quite different in terms of  
8 the amount of prefiling work in a merger context that  
9 needs to be done, the time that that will take, the  
10 uncertainty around when you actually get on the clock  
11 in say Europe or China versus in the US. And all of  
12 that leads to, you know, in many cases, if not an  
13 impossibility, certainly, all of the stars would have  
14 to align for the timing to actually be the same.

15 So we are working with different processes,  
16 different timetables, and I think we have to accept  
17 that the timing is not going to be the same. The  
18 question is, can we make it sufficiently compatible  
19 that we can have substantive discussions at a similar  
20 time frame, particularly on remedies. That will, you  
21 know, minimize inefficiencies and maximize the ability  
22 to have a consistent compatible remedy.

23 And even when you've done all of those  
24 things and there's been I think an earnest, concerted  
25 goodwill effort to align those discussions, you're

1 inevitably going to have cases where, you know,  
2 something surprising happens like one jurisdiction  
3 decides, yes, we like the remedy package that everyone  
4 else has agreed to, but lo and behold, we think there  
5 ought to be a different purchaser in our jurisdiction,  
6 which shall remained unnamed, than in the rest of the  
7 world, which as you can imagine when you're dealing  
8 with products that are sold around the globe under one  
9 brand name can be pretty challenging.

10 I'm not sure that cooperation could have  
11 changed that result. But you're always going to have  
12 these unpredictable aspects of a multijurisdictional  
13 merger review that can occur right up until the end.

14 What can we do to enhance practical day-to-  
15 day cooperation, I think your earlier question. A lot  
16 of the time when we talk about cooperation, it's  
17 really in a bilateral context. You've got parties  
18 speaking with Agency A, parties speaking with Agency  
19 B, parties speaking with Agency C, and then similar  
20 conversations happening between those agencies who are  
21 essentially, you know, in some cases, playing Chinese  
22 whispers, but reporting on conversations they've had  
23 trying to find common approaches, common  
24 understandings. I wonder sometimes can we expedite --  
25 streamline those conversations to have fewer bilateral



1 conversations and more multilateral conversations in  
2 the same room.

3 Just as when we are faced with a conduct or  
4 a merger investigation ourselves, trying to understand  
5 better the facts, what's going on, where, we often  
6 have multijurisdictional, multicounsel calls. I don't  
7 see why we couldn't do more of that involving multiple  
8 agencies on the same video conference or the same  
9 phone call. There is a limit, of course, where you  
10 get these huge conversations that, you know, are  
11 impossible to schedule, and no one says anything  
12 because there's 100 people on the line. So yes, that  
13 level of cooperation can be unwieldy, but I think we  
14 can do more to explore having simultaneous  
15 conversations.

16 I think there's been a mindset probably  
17 maybe more in the minds of -- well, maybe equally in  
18 the minds of the companies and counsel, as well as  
19 agencies, that everyone needs to have their kind of  
20 process, everyone needs to have their separate  
21 meeting, everyone needs to have the merger explained  
22 to them, you know, Australian or in Canadian or in --

23 (Laughter.)

24 MS. SCHAEFFER: But I don't think that  
25 that's necessarily the case, not for all meetings or

1 forms of cooperation. So that's something I think we  
2 could do more with.

3 MS. COPPOLA: That's a really interesting  
4 idea. I mean, we've heard earlier, and on this panel,  
5 that there's a lot of joint third party calls. I know  
6 at the FTC we have limited experience with joint party  
7 calls, but that's a really neat idea and it's  
8 certainly very 21st Century if it's video.

9 So thinking I guess -- so those are some of  
10 the practical limitations on the practitioner's side.  
11 Thinking about some of the practical limitations on  
12 the agency's side, it seems like the one that has  
13 appeared a few times in this discussion is  
14 confidentiality.

15 Nick has already talked a little bit about  
16 what we can exchange when we don't have waivers. So  
17 what falls within the realm of public or agency  
18 nonpublic information, so, as he said, theories of  
19 harm, market definition, kind of basic thinking on  
20 remedies. But, of course, those discussions are much  
21 more robust when we're saying because of evidence of  
22 X, Y, and Z.

23 Marcus, you had mentioned that you have an  
24 information gateway in Australia. What does that mean  
25 and what can the FTC learn from that?

1           MR. BEZZI: So an information gateway is a  
2 legislative provision that enables our Chairman to  
3 make a decision to release material that we've  
4 obtained through some confidential process either a  
5 compulsory power, exercise of a compulsory power,  
6 requiring compelled production of information, or  
7 otherwise, and it enables us to release that  
8 information without the consent of the party whose  
9 information it is.

10           So it's something we don't do lightly and  
11 it's something we don't do often. And it's something  
12 we'll only do if there are -- if we're really 100  
13 percent confident that people are going to comply  
14 with the conditions that are imposed on the release  
15 of the information. So if we're dealing with a  
16 trusted agency, and we are confident that they will  
17 maintain the confidentiality of the information that  
18 we disclose, then we have got the capacity to release  
19 it.

20           As I say, it doesn't happen very often.  
21 There will be more than just a set of conditions  
22 imposed. There's usually a fairly rigorous process  
23 that we put in place to ensure that the conditions are  
24 complied with. So there's reporting. And after the  
25 agency that's received the information has finished

1 with it, we'll require them to give the information  
2 back.

3 And I should say this is a very similar  
4 provision to a provision that the CMA has in the UK  
5 and that Canada has. And it, as I say can be -- it's  
6 more useful in being there than in being used, if I  
7 could put it that way.

8 MS. COPPOLA: Right, right. Thanks, Marcus.

9 I think, Jeanne, I'll have you answer next  
10 because he's just talked about your information  
11 gateway. Does this have an impact on kind of target  
12 parties, third parties' willingness to provide  
13 information, and what kind of notice do they get  
14 before you share the information? What are some of  
15 the consequences?

16 MS. PRATT: Yeah, I mean with great -- it's  
17 -- we have to take that very, very seriously. So when  
18 we're using our gateway provision, we have very  
19 transparent policies to stakeholders. It's written in  
20 a confidentiality bulletin what the conditions of  
21 sharing are. Every time we do a market contact, it is  
22 disclosed to that market contact that we do have the  
23 information gateway, that we may use it obviously in  
24 an international merger context, that we may share it  
25 with our counterpart agencies and discuss it where

1 they have waivers.

2 So I think the lesson for us is transparency  
3 is really important to maintain your reputation  
4 because without our reputation to maintain the  
5 confidential information, we won't be able to do our  
6 job and the effectiveness of our agency is diminished.  
7 It's fundamental, frankly, to how we do our job.

8 So in our confidentiality bulletin, we do  
9 set out the conditions quite clearly and we do say  
10 that we will seek to maintain the confidentiality of  
11 information through either formal international  
12 instruments or assurances from a foreign authority.  
13 And the Bureau also requires as a condition that  
14 the foreign authority's use of that information is  
15 limited to the specific purpose for which it was  
16 provided. So our information gateway provides that  
17 we can use it for enforcement of the Act, which, for  
18 us, means if we're working on a common case with an  
19 agency with whom we have a foreign -- or an instrument  
20 and we've got those certainties that that is when we  
21 will do so.

22 Where there is no bilateral-multilateral  
23 cooperation instrument in force, the Bureau does not  
24 communicate information protected by Section 29 unless  
25 we are fully satisfied with the assurances provided by

1 the foreign authority with respect to maintaining the  
2 confidentiality of the information and the uses to  
3 which it will be put. And this, again, is where trust  
4 becomes key for us, we're not going to put our  
5 reputation and our effectiveness on the line if we are  
6 not certain that those conditions will be satisfied.

7 In assessing whether to communicate the  
8 information and the circumstances, we do also consider  
9 the laws protecting confidentiality in the requesting  
10 country, the purpose of the request, and any  
11 agreements or arrangements with the country or the  
12 requesting authority. If we are not satisfied that it  
13 will remain protected, it is not shared. Likewise,  
14 when foreign authorities are typically communicating  
15 confidential information to the Bureau, they are doing  
16 so on the understanding that the information will be  
17 treated confidentiality and used for the purposes of  
18 administration and enforcement of the Act.

19 I should mention, too, we do have another  
20 provision in our Act which ensures that all inquiries  
21 conducted by the Competition Bureau are conducted in  
22 private and that provides some legislative certainty  
23 that it will be maintained in confidence on our end.

24 So I guess I would say the gateway for us,  
25 while similar to Australia, I think has been used a

1 little bit different and that mostly is a result of  
2 practice, our transparency, the market having a lot of  
3 faith in our practices and procedures, to maintain  
4 confidentiality. And without it, I don't think it  
5 would be as effective.

6 MS. COPPOLA: Thanks very much.

7 Nick, turning to the European Commission, I  
8 mean, you have sort of the highest level of  
9 information sharing and investigative assistance with  
10 the ECN and you also have things like the second  
11 generation agreement that you have with Switzerland.  
12 Do you want to share a little bit of your experience  
13 with those?

14 MR. BANASEVIC: Sure. Again, the ECN is --  
15 again, I don't want to say it's the highest level of  
16 cooperation, but everything is open there.

17 MS. COPPOLA: Right, right.

18 MR. BANASEVIC: There's automatic  
19 transmission of everything, there is -- I mean, that's  
20 a consequence of what the EU or the EEA is in a sense.  
21 So it's critical that we share up front information  
22 just about who's got what case so that we can allocate  
23 them most efficiently and to coordinate on issues of  
24 substance because we're all applying the same law.

25 In terms of outside the ECN and outside the

1 EEA, I -- as a general point, I think the main issues  
2 have been outlined in terms of maybe there being  
3 different incentives -- I'm talking outside  
4 Switzerland, which I'll mention briefly now in terms  
5 of different incentives maybe between mergers and  
6 conduct. I take Fiona's point about -- concern about  
7 disclosure in another jurisdiction. I understand  
8 that. I think the instances that I have referred to  
9 in some conduct cases have rather been a concern about  
10 not wanting agencies to discuss theories of harm even.  
11 So that's a different thing.

12 And in terms of Switzerland, actually, I  
13 think it resonated. I mean, we have a second  
14 generation agreement with Switzerland, which means in  
15 practice that we can transmit evidence between us  
16 without consent. Obviously, we're talking about where  
17 the same conduct has been investigated.

18 And what we found -- and this resonated when  
19 Marcus was talking about it -- is actually we haven't  
20 needed to use -- to invoke those provisions. And it's  
21 actually encouraged that that framework, and maybe the  
22 trust or the mechanics of how things work, have  
23 encouraged information provision without needing to  
24 use the formal provisions under the agreement. So I  
25 think that's an interesting point.



1 MS. COPPOLA: Right, yeah, yeah.

2 Fiona, you've touched on this a tiny bit  
3 already, but what are -- can you bring out a little  
4 bit some of the concerns that agencies might have  
5 either about these types of agreements or about  
6 granting waivers in the nonmerger context? What are  
7 some of the red flags?

8 MS. SCHAEFFER: From a merging party's  
9 perspective or from an investigated party's  
10 perspective?

11 MS. COPPOLA: From both.

12 MS. SCHAEFFER: Yeah, I think there is --  
13 certainly in terms of the exchange of confidential  
14 information as opposed to permitting agencies to  
15 discuss case theories, I think there is an  
16 understandable sense that if an agency really needs  
17 that kind of information and has a right to obtain  
18 that kind of information domestically, then they  
19 should just ask the parties for it directly rather  
20 than get it -- you know, it sounds a bit pejorative --  
21 but through the back door.

22 I do think, on the merger side, the  
23 incentives are greater to provide it anyway. But I  
24 think, also, at the same time, the actual exchange of  
25 confidential information is relatively rare and I

1 think its use is overrated. I think the biggest  
2 benefit that I've seen from cooperation from a private  
3 party's perspective -- and I suspect the agencies  
4 might agree with this -- is just being able to discuss  
5 the case, the theories, the investigation, the legal  
6 analysis, the basic understanding of how the products  
7 work, what third party concerns are without, you know,  
8 revealing any confidential information.

9           And all of that dialogue I've found in all  
10 of the deals I've worked on, and maybe I've just been  
11 lucky, but I can't recall a single case where we  
12 facilitated cooperation and we suddenly found that  
13 Agency C, that had been going on its normal course of  
14 business and investigating without big concerns,  
15 suddenly had a new theory of the case that was going  
16 to put them into an extended review. I've always had  
17 the opposite. Namely, Agency C, when we have  
18 facilitated contact with Agency A and B, typically has  
19 been relieved to know that Agency A and B is  
20 investigating these particular various areas, that it  
21 doesn't necessarily have to cover all of the same  
22 ground. And I have found that it's expedited, not  
23 prolonged, the review or started new lines of attack  
24 that didn't exist before.

25           And I think that could also hold true,

1    although it's less tested in conduct cases where some  
2    of the theories of harm are just more wacky or  
3    radical.  And I think agencies that have been at it  
4    for a longer period of time, in that investigation or  
5    generally, may be able to help other agencies  
6    understand what are the real issues here, what are  
7    some of the false paradigms or paths that, you know,  
8    we looked at five years ago but discovered really  
9    weren't productive.

10           MS. COPPOLA:  Right, right.  Sometimes that  
11    thinking can go the other way, too.  The learning can  
12    go the other way.

13           I think I want to circle back on your point  
14    on forbearance.  But before I do that, does anyone  
15    have any reactions to what Fiona was saying about  
16    information sharing and thinking of it as a backdoor  
17    way when it's done -- the confidential information  
18    between agencies?

19           MS. PRATT:  Well, I think it's -- I guess  
20    from my perspective it would -- I've never seen that  
21    risk become realized.  Because each of our agencies  
22    are very concerned about the confidential forecast  
23    that we have, that we want to minimize the risk of  
24    that because, otherwise, it would be a reputational  
25    risk for us doing our job.

1           I do think a lot of the value, unless you  
2           are doing a joint investigation where there is  
3           evidence that you need in another jurisdiction, most  
4           of the value of that cooperation can come from not  
5           providing confidential, competitively-sensitive third  
6           party information. So if you have waivers or you have  
7           a gateway provision, that facilitates that cooperation  
8           quite well.

9           MR. BEZZI: I agree with that. I mean,  
10          parties know -- if ever we are using an information  
11          gateway, and it happens rarely, but they know. It's  
12          not done secretly; it's done in their knowledge; it's  
13          done transparently.

14          MS. COPPOLA: Fiona, I may have  
15          misinterpreted you. When you were talking about  
16          backdoor, I think you meant even in the presence of  
17          waivers. You didn't mean out extralegally, right?

18          MS. SCHAEFFER: Yeah, I meant exchange of  
19          confidential information, where there are waivers, but  
20          the agency couldn't get the information directly.

21          MS. COPPOLA: Right, right.

22          Nick, do you have anything you wanted to add  
23          here?

24          MR. BANASEVIC: Nothing spectacular.

25          MS. COPPOLA: Okay. I have one question

1 from the audience, but before we -- and I encourage  
2 other questions. So now is the time to write them.

3 But before we get to that, I wanted to talk,  
4 I think because at the end of the day, the immediate  
5 goal in a particular case of cooperation is making  
6 sure that you don't have conflicting remedies, that  
7 you have remedies that are, if not identical, at least  
8 interoperable. And we've heard some discussion today  
9 that, you know, there's been a lot of agencies, more  
10 agencies looking at things than there used to be. And  
11 sort of the question about should we be giving more  
12 attention to cooperation, in the form of forbearance,  
13 than coordination.

14 And, Fiona, if you could start that  
15 discussion for us.

16 MS. SCHAEFFER: Sure. Well, we were having  
17 a discussion at lunch and Marcus mentioned the magic  
18 pudding story. I said to Marcus, will this audience  
19 understand the magic pudding story? And looking  
20 around the room, I see there are bemused faces.

21 Well, it's a story we all told our children  
22 growing up in Australia where, as a child, I really  
23 enjoyed it. The magic pudding just never stopped  
24 producing pudding until the entire town was flooded  
25 with porridge and pudding everywhere.

1           Well, no agency is a magic pudding.  
2           Agencies have limited resources. They can't just keep  
3           on producing. And I think from an agency perspective,  
4           as well as from the parties' perspective, one always  
5           ought to ask what are the incremental benefits of this  
6           additional investigation we're doing over -- you know,  
7           on top of what five other agencies are doing? What  
8           are the incremental benefits of a remedy that is the  
9           same or virtually identical to what another agency has  
10          obtained as opposed to taking our limited resources  
11          and using them for investigations and transactions  
12          that these other five agencies couldn't review?

13                 And it's been interesting to me just to look  
14          at how different agencies have been allocating their  
15          resources over time. Brazil is an agency that comes  
16          to mind. When I come to think about some of the  
17          cartel investigations, the merger investigations they  
18          focused on maybe ten years ago, my anecdotal  
19          perception is that there was a lot more of an  
20          international dimension to them than there is today.

21                 I think some of the larger Brazilian  
22          investigations have involved, in more recent times,  
23          transactions in the educational sector and the health  
24          care sector, in the domestic financial services  
25          sector. And their bang for their buck in those

1 investigations I think is significantly higher than it  
2 would be if they were another me-too in a global  
3 transaction.

4           Having said that, is it realistic to say if  
5 the US is looking at a deal or the EU is looking at a  
6 deal or Canada and they've got remedies, that everyone  
7 else should just back off? No, of course not. But I  
8 think at each stage of the investigation, it's useful  
9 for the agencies to ask themselves, what is the  
10 incremental value and what are the areas of this  
11 transaction that may be specific to our jurisdiction  
12 that the other people aren't covering? What are the  
13 holes that we need to fill potentially for our  
14 jurisdiction that the others aren't worrying about as  
15 opposed to retreading the same ground?

16           And as counsel to parties to transactions  
17 and conduct investigations, we ought to be asking  
18 ourselves those same questions about what are the  
19 specific impacts of this transaction or our conduct on  
20 this jurisdiction.

21           MS. COPPOLA: Mm-hmm, mm-hmm. That's very  
22 interesting. Thank you, Fiona.

23           Marcus, what did you say to the magic  
24 pudding discussion and what are your thoughts on the  
25 topic more generally?

1           MR. BEZZI: Well, exactly, we are not a  
2 magic pudding. We have limited resources. We've got  
3 to use them intelligently. So we've got to focus on  
4 the things that are most important within our  
5 jurisdiction.

6           Fiona raised the cartel issue and  
7 international cartels. We could all spend all of our  
8 time doing international cartels and nothing else.  
9 But -- and they're important, don't get me wrong.  
10 Many international cartels have a big impact in  
11 Australia. But we've explicitly said in our  
12 enforcement and compliance policy, which sets out our  
13 priorities for enforcement and is adjusted each year,  
14 that we will focus on international cartels that have  
15 an impact on Australians and Australian consumers.  
16 It's the detriment in Australia that is the focus. If  
17 there's no detriment in Australia, then we'll let  
18 other agencies deal with those cartels.

19           Similarly, in mergers, we will focus on the  
20 detriment in Australia. We'll focus on a remedy that  
21 can fix the problems we have identified in Australia,  
22 and if it happens that that remedy has already been  
23 devised somewhere else and the remedy somewhere else  
24 will completely fix the problem in Australia, then  
25 what we can do is accept what's called an enforceable



1 undertaking, which is essentially a statutory promise,  
2 which requires the parties to give effect to whatever  
3 the commitment that's being given outside Australia  
4 is, give them -- they are required to give that  
5 commitment to us in Australia, and that essentially is  
6 -- deals with the problem that we've got jurisdiction  
7 to deal with.

8 MS. COPPOLA: Right. That allows you to  
9 have something that you can enforce of there is a --

10 MR. BEZZI: We've got something that we can  
11 enforce.

12 MS. COPPOLA: Right.

13 MR. BEZZI: And we're recognizing that our  
14 resources will be managed in a better way.

15 MS. COPPOLA: Better focused. Right, right.  
16 Jeanne?

17 MS. PRATT: Well, I guess speaking -- the  
18 Canadian approach in mergers in particular, we  
19 actually have accepted and gone probably one step  
20 further than what Marcus was saying and not even put a  
21 consent agreement in place in Canada because we have  
22 been satisfied that the remedy mostly in the United  
23 States addresses our concern.

24 The only way we get there, though, is,  
25 again, to have really close cooperation. We need to

1 understand the scope of the issues, we need to  
2 understand the scope of the remedy, and, frankly, we  
3 also need to have trust in the agency that they are  
4 going to enforce that remedy at the end of the day,  
5 which we have full faith in the US Department of  
6 Justice and the US Federal Trade Commission to do  
7 that.

8           One of the primary reasons that we do use  
9 comity and forbearance is because we think it allows a  
10 more effective and streamline remedy that's least  
11 intrusive to business, avoids conflict, and  
12 simultaneously allows us, as a very small agency north  
13 of the 49th Parallel, to focus our scarce enforcement  
14 resources.

15           So two examples I would give, we had one  
16 where we accepted the US FTC's remedy in the  
17 GSK/Novartis merger in 2015. So we were satisfied  
18 there. We didn't even need a me-too registered  
19 consent agreement. We were fully satisfied that the  
20 scope of the remedy addressed our concerns and would  
21 address the anticompetitive effects on the Canadian  
22 market.

23           The second one, which is more recent, was a  
24 case we cooperated on with the US Department of  
25 Justice, UTC/Rockwell last year, which was an

1 aerospace systems review, and in that case just to  
2 underscore the importance of the cooperation to get us  
3 to the comity, we cooperated closely with the US DOJ  
4 and the DG Comp throughout the review.

5           There were waivers in place in both those  
6 jurisdictions by all the parties. We shared  
7 information and conducted some joint market calls. We  
8 discussed issues of market definition, presence of  
9 global effective remaining competition and remedies.  
10 And we determined that there were likely a substantial  
11 lessening of competition in two product markets for  
12 pneumatic ice protection system and trimmable  
13 horizontal stabilizers actuators, THSAs.

14           And Rockwell's relevant business -- they  
15 were located primarily in the US and Mexico and these  
16 products were distributed on a global basis. So we  
17 got to a place where we didn't have any assets  
18 relevant to the remedy in our jurisdiction and we were  
19 fully satisfied that the remedy addressed our  
20 concerns.

21           The other side of comity, which, you know,  
22 I'm not sure the parties appreciated at the time,  
23 Commissioner Boswell talked about our simultaneous  
24 filing of litigation in the Staples/Office Depot  
25 merger a couple of years ago. Part of that was we did

1 not see the need to file an injunction the same day  
2 because we knew that there would be an injunction  
3 proceeding by the FTC. So the parties did actually  
4 benefit because they didn't have to face an injunction  
5 proceeding north of the border as well as south of the  
6 border. We benefitted greatly from cooperation in  
7 that case.

8           Again, we had one of our Department of  
9 Justice lawyers come and was seconded and was actually  
10 part of the FTC counsel team to see how the injunctive  
11 process worked, to see the evidence go in, and at the  
12 end of the day, the injunction in the United States  
13 took care of the issues in Canada. So they still  
14 benefitted. They probably didn't like it because it  
15 was in the form of litigation, but it could have been  
16 worse.

17           MS. COPPOLA: You know, in GSK/Novartis,  
18 it's interesting, we did a lot of trilateral calls in  
19 that case with the EC, Canada, and the US. And that's  
20 not obvious in a pharmaceutical case where you expect  
21 the markets to be very different. But, certainly, in  
22 trying to understand the markets, I think the third  
23 parties were very happy to have one call and not  
24 three. So that's an interesting case.

25           Nick, we haven't heard from you yet on

1 remedies coordination or forbearance. Is there  
2 anything you want to add?

3 MR. BANASEVIC: The first thing I want to  
4 say is I'm going to look up, after this panel, what a  
5 trimmable horizontal actuator is.

6 (Laughter.)

7 MS. SCHAEFFER: I was going to say, that's  
8 what you need cooperation for. It takes three  
9 agencies to understand that.

10 MS. COPPOLA: Right.

11 MR. BANASEVIC: And there was another  
12 adjective there as well. But, anyway, for us, I mean,  
13 if you look at mergers and conduct, of course, we have  
14 an obligatory notification system in mergers, once you  
15 reach certain thresholds. I mean, you have to reason  
16 every decision whether it's a clearance of remedies or  
17 a prohibition. So there's no discretion as such in  
18 that sense. But, of course, there's great benefit in  
19 the cases that we're looking at more closely and we've  
20 got many examples that have been mentioned in terms of  
21 coordinating on the substance, on the timing, and, if  
22 appropriate, the remedies and the potential impact and  
23 how that might read across.

24 Where we have the discretion in terms of  
25 choosing which cases we do and which cases we don't,

1 with scarce resources that any public body has by  
2 definition, is a number of things, but not least the  
3 impact -- the potential impact in our market, in our  
4 jurisdiction. We're responsible for a jurisdiction of  
5 500 million people.

6 So I think it's likely if we believe that  
7 there is an issue in that market that we are going to  
8 want to look at it more closely, even if there are  
9 similar investigations going on or not around the  
10 world. So I think that's the first thing to say.

11 That being said, I think I understand as  
12 well the argument, particularly in the sector for  
13 which I'm responsible, the high-tech sector, companies  
14 operate globally, so the issue is raised, well, could  
15 you have different solutions in different  
16 jurisdictions? I actually think this risk of  
17 diversion is somehow overblown in terms of just  
18 perception. It's not that this is going around willy-  
19 nilly in every case in every sector. I think that's  
20 slightly a perception issue and, actually, more  
21 generally illustrates my core point in the benefits of  
22 really having up front, preemptively with partner  
23 agencies, discussions about the approach to be taken.

24 Again, it's not that one can or need  
25 guarantee precisely the same outcome, given the

1 differences possibly in even conduct. I mean, some of  
2 our markets are national for some of the products even  
3 if the companies are operating globally. But I think  
4 there is a great benefit in this up-front shaping,  
5 sharing thoughts to, to the extent possible, minimize  
6 the risk of divergences.

7 MS. COPPOLA: We have a question from the  
8 audience about the ongoing investigations of the tech  
9 platforms. The EC, the Japan Fair Trade Commission,  
10 are already investigating these firms. What's  
11 important to effectively investigate, including  
12 cooperation? Another question, what you can expect  
13 from the FTC, but as I'm not a speaker, but a  
14 moderator, I think I will punt that to what can you  
15 expect from the investigating agencies.

16 And, Nick, according to this week's  
17 Economist, you guys are the determinators. So I'm  
18 going to let you answer that question.

19 MR. BANASEVIC: Is that a type of actuator?  
20 A determinator?

21 MS. COPPOLA: There's these like big guns  
22 and, yeah, sledgehammers.

23 MR. BANASEVIC: I'm not allowed to say  
24 anything about ongoing cases, so --

25 MS. COPPOLA: Right.

1 MR. BANASEVIC: So what was the --

2 MS. COPPOLA: The question was, how can -- I  
3 think the question is, how can those agencies  
4 effectively investigate? What kind of joint --

5 MR. BANASEVIC: I think I have to go back to  
6 my examples from the past. I think that's the most  
7 instructive thing. I mentioned two. There have been  
8 others where in the US and in the -- particularly the  
9 same cases or the same issues have been looked at. In  
10 some, we've had waivers; in others, we haven't. I  
11 don't want to monopolize the last 2 minutes and 30  
12 seconds.

13 MS. COPPOLA: Right.

14 MR. BANASEVIC: It's really been of  
15 tremendous use. And it's my opening statement, it's  
16 not an add-on. It can really -- for these big cases  
17 where they're very important, sensitive, and you want  
18 to get it right, there's just a great benefit in  
19 sharing experiences, knowledge, with colleagues who  
20 have the same -- who want to get it right as well and  
21 get the best result. So it's a very good thing that  
22 we shouldn't have just as just a bolt-on.

23 MS. SCHAEFFER: Can I just add on to that?  
24 Maybe the Cooperation 2.0 for digital platform  
25 investigations is not necessarily between antitrust



1 agencies, but between antitrust agencies, consumer  
2 protection, and privacy agencies. Because -- and I  
3 think the term "forbearance" might come in there as  
4 well, in that not everything involving a digital  
5 platform is necessarily an antitrust issue.

6 And we certainly have a lot of intermelding  
7 of privacy and consumer protection concerns, as we see  
8 with the Australian ACCC report. And how do we  
9 jointly investigate those issues or maybe have  
10 antitrust not be the primary investigation and  
11 enforcement mechanism there?

12 MS. COPPOLA: We are very close to the end  
13 of the session. So I guess, Marcus and Jeanne,  
14 starting with you, and if there's time, we'll move on  
15 to Fiona and Nick. What are your last words of advice  
16 for the FTC in the area of enforcement cooperation?

17 MS. PRATT: I'm not sure I have advice. I  
18 think, as you've heard, I have found or we have found  
19 that gateway provision in our legislation to be  
20 particularly useful and, you know, it might be  
21 interesting to consider that in your context and  
22 whether it's appropriate.

23 And I would just want to lastly say thank  
24 you very much for having us here. I know the FTC can  
25 continue to rely on the Canadian Competition Bureau's

1 commitment to continuing to build upon the solid  
2 cooperation foundation that we have and in  
3 particularly dynamic fast-moving markets that we have  
4 today. I think the business case for cooperation is  
5 only getting stronger and will only get better from  
6 here.

7 MR. BEZZI: So I won't advise the FTC, but  
8 the advice that I'll give to the ACCC is that we need  
9 21st Cooperation and mutual assistance frameworks.

10 MS. COPPOLA: Thanks.

11 Nick, Fiona, anything to add?

12 MR. BANASEVIC; I've said it all, I don't  
13 want to repeat. I think it's don't underestimate it,  
14 use it, and benefit from the interactions and the  
15 knowledge you can have with colleagues.

16 MS. COPPOLA: Well, thank you all very much  
17 for your insights. These have been tremendous.  
18 Coming into the panel, I wasn't sure I would learn  
19 anything since I spend most of my day engaged in  
20 enforcement cooperation. But I did. So bravo.  
21 Thanks so much for participating. I think we'll move  
22 on to the next panel now.

23 (Applause.)

24 (Brief break.)

25

1       INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES:  
2                   ARTIFICIAL INTELLIGENCE CASE STUDY

3                   MS. WOODS BELL: Hello, everyone. Welcome  
4 back from break. I'm Deon Woods Bell. I'm a lawyer  
5 in the Office of International Affairs at the Federal  
6 Trade Commission. I'm so excited to be here today.

7                   It is my extreme pleasure to introduce Julie  
8 Brill. Julie is Corporate Vice President and Deputy  
9 General Counsel for Global Privacy and Regulatory  
10 Affairs at Microsoft. Of course, everybody in the  
11 building knows her as a former Commissioner and friend  
12 of the Federal Trade Commission. She's widely  
13 recognized for her work on internet privacy and data  
14 security issues related to advertising and financial  
15 fraud.

16                   She's received so many awards we could not  
17 list them all in her bio, nor could I enumerate them  
18 here today. One of my favorite is the Top 50  
19 Influencers on Big Data in 2015. And one of my  
20 favorite memories is working together with her in  
21 Brussels on these same issues.

22                   Thank you, and please welcome Julie.  
23                   (Applause.)

24                   MS. BRILL: Thank you, Deon. I remember  
25 that event, too, and it was great to work with you

1 there. And it's really an honor to be here today to  
2 contribute to today's important discussions on the  
3 FTC's international role in a world transformed by  
4 digital technology.

5 I am particularly excited to begin this  
6 session today that focuses on artificial intelligence.  
7 We have a truly distinguished panel, some of whom are  
8 -- here they come -- of experts from around the world,  
9 who will explore the implications of artificial  
10 intelligence at a time when innovative technology  
11 calls for innovative thinking about policy and  
12 regulation.

13 Today's discussion comes at a critical  
14 moment. During the past few years, how people work,  
15 play, and learn about the world has been transformed.  
16 Industries have been reinvented. New ways to treat  
17 diseases emerge almost every day. Driving all this  
18 change are groundbreaking technologies like cloud  
19 computing that enable us to collect and analyze data  
20 scale that has never before been possible. But what  
21 we have experienced so far is just the beginning.

22 Rapid progress in the field of artificial  
23 intelligence has delivered us to the threshold of a  
24 new era of computing that will transform every field  
25 of human endeavor. Already, almost without us

1 noticing, AI has become an essential part of our day-  
2 to-day lives. It powers the apps that help us get  
3 from place to place, predict what we might want to  
4 buy, and protects our systems from malware and  
5 viruses.

6           This is just a hint of what's possible.  
7 Artificial intelligence has the potential to improve  
8 productivity, drive economic growth, and help us  
9 address some of the most pressing challenges in  
10 accessibility, health care, sustainability, poverty,  
11 and much more. Yet, history teaches us that change of  
12 this magnitude has always come with deep doubts and  
13 uncertainty.

14           I believe that if we are to realize the  
15 promise of artificial intelligence, we must  
16 acknowledge these doubts and work to build trust,  
17 trust that technology companies are working not just  
18 to maximize profits, but to improve people's lives;  
19 trust that we use the personal data we collect safely,  
20 responsibly, and respectfully. But as we are learning  
21 the hard way, in the technology industry, trust is  
22 fragile.

23           In the wake of the Cambridge Analytica  
24 scandal and the spectacle of tech industry experts  
25 being hauled before Congress to answer for their

1 business practices, people wonder if technology and  
2 technology companies can be trusted. The truth is  
3 that technology is neither inherently good nor bad.  
4 Cloud computing and artificial intelligence are just  
5 tools that people can use to be more productive and  
6 effective, basically the equivalent of the first  
7 Industrial Revolution's steam engine. But it is also  
8 true that because technology has never been more  
9 powerful, the potential impact, both positive and  
10 negative, has never been greater.

11 So where does trust come from? It begins  
12 when companies like Microsoft, that are at the  
13 forefront of the digital revolution, acknowledge that  
14 in this time of sweeping change, we must consider the  
15 impact of our work on individuals, businesses, and  
16 societies. Today, we must ask ourselves not just what  
17 computers can do, but what they should do. This means  
18 there may be times when we have to be willing to  
19 decide that there are things that they should not do  
20 as well.

21 To guide us as we weigh these decisions at  
22 Microsoft, we have adopted six ethical principles for  
23 our work on artificial intelligence. It starts with  
24 transparency and accountability. We know that trust  
25 requires clear information about how AI systems work,

1 coupled with accountability for the people and  
2 companies who develop them. We believe strongly in  
3 the principles of fairness which means AI must treat  
4 everyone with dignity and respect and without bias.

5 Our fourth principle encompasses reliability  
6 and safety, particularly when AI makes decisions that  
7 affect people. We also are strongly committed to the  
8 principles of privacy and security, for people's  
9 personal information. And we believe that AI  
10 solutions should be built using inclusive design  
11 practices that affect the full range of experiences of  
12 all who might use them.

13 Now, while these principles are at the  
14 center of every decision we made about artificial  
15 intelligence research and development, we also know  
16 that the issues at stake are simply too large and too  
17 important to be left solely to the private sector.  
18 Trust also requires a new foundation of laws.

19 Here in the United States, right now, one  
20 area of the law demands our attention above all  
21 others. That area is privacy. Because so much of who  
22 we are is expressed digitally and so much of how we  
23 interact with each other and the world is captured and  
24 stored in digital form, how people think about privacy  
25 has changed. For more than a century, our

1 understanding of this most fundamental human right has  
2 been shaped by the definition set forth by the great  
3 American legal thinker and fathers of the FTC, Louis  
4 Brandeis, who defined privacy as the right to be let  
5 alone. That right will always be important. But, by  
6 itself, it is no longer sufficient.

7 Now, modern privacy law must embrace two  
8 essential realities of life in the digital age. The  
9 first is that people expect to use digital tools and  
10 technologies to engage freely and safely with each  
11 other and with the world.

12 The second is that people expect to be  
13 empowered to control how their personal information is  
14 used. Whether we protect these two things is one of  
15 the critical challenges of our time. What we need is  
16 a new generation of privacy policies that embrace  
17 engagement and control without sacrificing  
18 interoperability or stifling innovation.

19 This is why we were the first company to  
20 extend the rights that are at the heart of the  
21 European general protection regulation, and we  
22 extended those to our customers around the world,  
23 including the right to know what data is collected, to  
24 correct that data, and to delete it or take it  
25 somewhere else. And over the last year, we've seen



1 the rise of a global movement to adopt frameworks that  
2 enhance consumer control mechanisms modeled on those  
3 required by Europe's GDPR.

4 With participants here from India, Kenya and  
5 Brazil, this panel of distinguished guests is a  
6 perfect illustration of this important trend.  
7 Brazil's general data protection law, which goes into  
8 effect a year from now, includes provisions that  
9 extend new privacy rights to individuals and mandates  
10 new requirements for notification, transparency, and  
11 governance for organizations. All of these  
12 requirements that will be new in Brazil are tightly  
13 aligned with GDPR.

14 In India and Kenya, new privacy laws modeled  
15 on GDPR are also currently moving through the  
16 legislative process.

17 Here in the United States, the California  
18 Consumer Privacy Act includes provisions that give  
19 people more control over their data. And Washington  
20 State is considering legislation based on consumer  
21 rights protected by GDPR as well.

22 As part of Microsoft's commitment to  
23 privacy, we offer a dashboard where people can manage  
24 their privacy settings. Since May of last year, more  
25 than 10 million people around the world have used this

1 tool, with the number growing every day. I think it  
2 is telling that while millions of people around the  
3 world are using our tool, our data demonstrates that  
4 US citizens are the most active in controlling their  
5 data. All of this should serve as a wakeup call for  
6 US companies and the US Government.

7           At Microsoft, we believe it is time for  
8 United States to adopt a new legal framework for  
9 access and use of data that reflects our new  
10 understanding of the right to privacy. To achieve  
11 this, I believe a strong US framework -- frankly, a  
12 strong privacy framework anywhere in the world --  
13 should incorporate four core elements, transparency  
14 through robust standards that include and appropriate  
15 privacy statements within user experiences, individual  
16 empowerment that grants people meaningful control of  
17 their data and privacy preferences, corporate  
18 responsibility that is built on rigorous assessments  
19 that weigh the benefits of processing data against the  
20 risk to individuals whose data may be processed, and  
21 strong enforcement and rule-making. And, here, that  
22 means in the United States that should be all embedded  
23 at the US Federal Trade Commission.

24           While updated privacy laws are essential to  
25 building trust, new uses for artificial intelligence

1 are emerging that will require special consideration  
2 for their own specific regulations. Facial  
3 recognition is a prime example. This technology has  
4 shown that it can provide new and positive benefits  
5 when used to identify missing children or diagnose  
6 diseases. But there is a real risk that -- there is a  
7 real risk which includes the danger that it will  
8 reinforce social bias and be used as a surveillance  
9 tool that encroaches individual freedom.

10 This is why Microsoft has called on the US  
11 Government to regulate facial recognition with a focus  
12 on preventing bias, preserving privacy, and  
13 prohibiting government surveillance in public places  
14 without a court order. It is also one of the reasons  
15 we have testified in support of the Washington State  
16 privacy bill, which includes provisions that address  
17 many of these important concerns about facial  
18 recognition technology.

19 We need laws that place appropriate  
20 guardrails to ensure that companies don't take unfair  
21 advantage of individuals or violate people's  
22 fundamental rights. That is the essence of trust. We  
23 believe that guardrails can be designed in ways that  
24 facilitate global interoperability and promote  
25 innovation so we can all work together to continue to

1 harness the potential of the digital revolution to  
2 improve people's lives and drive economic growth.

3 This will require a commitment from all of  
4 us to engage in ongoing discussions and consultations  
5 that span governments and sectors. This means it's  
6 essential for the US Government and its agencies,  
7 including the FTC, to engage in a broad range of  
8 discussions with other governments on digital issues  
9 like we are doing with the honored guests here today.

10 Just as important are gatherings like this  
11 that will bring people together from around the world  
12 to explore policy approaches to new emerging  
13 technologies like artificial intelligence. More than  
14 100 years ago, when Brandeis defined the right to be  
15 let alone in his famous Law Review article, *The Right*  
16 *to Privacy*, he described, with great eloquence, the  
17 ongoing process by which rights evolve as humanity  
18 progresses and how the law adopts and adapts in  
19 response.

20 "Political, social, and economic changes  
21 entail the recognition of new rights," Brandeis wrote,  
22 "and the law in its eternal youth grows to meet  
23 demands of society." Brandeis was moved to write this  
24 article because of the impact of photography,  
25 mechanical printing presses, and other disruptive new

1 technologies of his time.

2 Today, we stand at the beginning of a new  
3 era of disruption and change, a time of technology-  
4 driven transformation that will require the  
5 recognition of new rights and the development of new  
6 laws to meet the demands of our societies. It's a  
7 task that will ask us to convene in hearings like this  
8 one and in forums, meetings and conferences around the  
9 world to grapple openly and honestly with a host of  
10 issues that will touch on virtually every aspect of  
11 our lives and our businesses.

12 We, at Microsoft, look forward to being a  
13 part of these conversations and to working in close  
14 partnership with all of you to make sure that  
15 technology moves forward within a framework of respect  
16 for human dignity and with the goal of serving the  
17 greater good. Thank you.

18 (Applause.)

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1 INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES:

2 ARTIFICIAL INTELLIGENCE CASE STUDY (PANEL)

3 MS. WOODS BELL: Thank you. Thank you very  
4 much, Julie, for those remarks. You outlined very  
5 well the tremendous potential of AI and that's one of  
6 the reasons why we're here today, to discuss them even  
7 further.

8 Well, I'm still Deon Woods Bell. And my co-  
9 moderator here is Ellen Connelly, an Attorney Adviser  
10 in the Office of Policy and Planning. And, together,  
11 we want to welcome you to our panel on international  
12 engagement and emerging technologies focusing on  
13 artificial intelligence.

14 You're in for a treat. As Julie described,  
15 we have quite a panel assembled for you here today.  
16 This session is a follow-on to the hearings in  
17 November, which focus on the same topic. And  
18 following the November meetings, colleagues here at  
19 the FTC -- and a lot of influence from Ellen here --  
20 said we should go deeper, we should focus on  
21 international issues. So today, we're thrilled to  
22 have this impressive group of international officials,  
23 practitioners, and academics here and on the line from  
24 Harvard.

25 During this panel, we'll touch upon a

1 variety of issues and we'll go deeper and let you see  
2 what these colleagues have to offer. We won't go into  
3 great detail on their bios, but we couldn't resist  
4 showing off a little bit for you and letting you know  
5 who they are.

6 On the line from Harvard is Chinmayi Arun.  
7 She's a fellow at the Harvard Berkman Klein Center for  
8 Internet & Society, and she's the Assistant Professor  
9 of Law at the National Law University in Delhi. Her  
10 chair is there and her picture will soon be on the  
11 line as she can hear us right now.

12 Next, we have, again, he's still James  
13 Dipple-Johnstone. You saw him earlier. He's a Deputy  
14 Commissioner from the UK's ICO, and prior to the ICO,  
15 he was in the Solicitor's Regulatory Authority where  
16 he had been Director of Investigation and Supervision,  
17 and he's not from the ministry of no.

18 (Laughter.)

19 MS. WOODS BELL: Next, Francis Kariuki,  
20 Director General of the Competition Authority of  
21 Kenya. Mr. Kariuki is the founding member and the  
22 current Chairman of the African Competition Forum.  
23 He's also an expert in FinTech.

24 Next over to Marcela. She's a partner at  
25 VMCA Advogados in Brazil focusing on data protection

1 and antitrust. She's served as Advisor and Chief of  
2 Staff for the President of Brazil's famous CADE.

3 Over to Isabelle. She's President and  
4 Member of the Board Autorité de la Concurrence, as she  
5 was previously the President of the Sixth Chamber of  
6 the Conseil d'État, the French Supreme Administrative  
7 Court, and other governmental capacities.

8 And last but not least, we have Omer Tene.  
9 Omer is a Vice President and Chief Knowledge Officer  
10 at the International Association of Privacy  
11 Professionals. He wears so many hats, we couldn't  
12 list them either. He's an Affiliate Scholar at  
13 Stanford and Senior Fellow at the Future of Privacy  
14 Forum.

15 So, before we get started, we want you to be  
16 open to looking to questions. We have our colleagues  
17 here. We're going to have short introductory comments  
18 from each colleague, and then after this, we'll have a  
19 moderated panel discussion, and we hope that you  
20 enjoy.

21 MS. CONNELLY: Great. So I will start us  
22 off by giving each of our panelists a chance to make a  
23 brief introductory statement to describe for us the  
24 key competition, consumer protection and privacy  
25 issues that they see emerging around the artificial



1 intelligence field. We will start with Chinmayi.

2 MS. ARUN: Thank you for having me. It's  
3 such an honor to be a part of this panel, and I'm  
4 happy to see that the FTC is listening to voices from  
5 around the world.

6 If I were to give you the three or four big  
7 highlights of how I would think about AI and the right  
8 to privacy in data sets in India, it would be -- the  
9 first would be in terms of global companies, usually  
10 American companies, operating in India versus Indian  
11 companies operating both in India, as well as  
12 elsewhere in places like Kenya.

13 The second would be in terms of data  
14 because, as you know, it's a very big country and it  
15 provides large and rich data sets that can be  
16 complicated in ways that I'm going to describe to you  
17 shortly.

18 The third is that perhaps some of you have  
19 heard that there has been a rich and, again,  
20 contentious conversation about the right to privacy in  
21 India in the context of state surveillance, but also  
22 in the context of state protection. So we've had a  
23 major case on the right to privacy, and we've also got  
24 a data protection bill, which is very interesting, so  
25 I'm going to describe the highlights of that for you.

1           And the final -- because we're discussing  
2 this in such an international context is this sort of  
3 almost a clash of jurisdictions that arises from the  
4 Indians, for example, floating proposals of data  
5 localization in certain contexts, but also the ways in  
6 which India is coping with norms that are emerging  
7 from the US and from Europe.

8           So the first is very simple, which is that  
9 as you know the major technology platforms, like  
10 Facebook and WhatsApp and Google, are used extensively  
11 in India and they have huge user bases in India, but  
12 there are also many Indian citizens that access them  
13 and have their data on them. Although I will focus a  
14 little bit more on the information platforms, it's  
15 good to know that Airbnb, Uber, and other technology  
16 platform companies are also offering services in  
17 India.

18           So our legislation, our new privacy act, our  
19 proposed amendment to our information technology act  
20 are all coping now with the very real idea that there  
21 are many Indian citizens whose lives are affected by  
22 these technologies that are designed elsewhere based  
23 on rules from elsewhere. At the same time, they're  
24 also trying to keep Indian companies competitive  
25 because there are Indian companies offering similar

1 services in India.

2 Our NITI Aayog, which is sort of our version  
3 of the planning commission, has described India as the  
4 AI garage for 40 percent of the world, and they've got  
5 a strategy paper on AI. As you know, the big data set  
6 question, it's complicated because, again, India is  
7 looking at it as a way towards machine learning, but  
8 there are also concerns of data protection and privacy  
9 that arise in that context.

10 And the big tension really is that, on one  
11 hand, the policymakers want to leverage this and have  
12 this data and sort of learn from it and, on the other,  
13 of course, there's the question of the privacy rights  
14 of Indian citizens and especially of marginalized  
15 citizens, people who are not able to assert their  
16 rights in the consumer forum.

17 And the final -- so none of this is law yet,  
18 but both in the proposed privacy legislation and in  
19 the proposed IT amendment act, the question has arisen  
20 of whether foreign companies with a sizable user base  
21 in India should be asked to localize data in India.  
22 So both these proposed legislations have suggested  
23 that these companies might be made to host their data  
24 sets in India, and I think that that also is cause for  
25 concern if they're thinking about it from a privacy

1 and data protection point of view.

2 I'm going to stop here. I just wanted to  
3 flag all of this in case anyone has questions later.  
4 Thank you so much.

5 MS. CONNELLY: Thank you very much for those  
6 really interesting comments.

7 We'll move down the line and next up is  
8 James.

9 MR. DIPPLE-JOHNSTONE: Thank you very much  
10 and thank you. It's an honor to be here on this panel  
11 with you today.

12 So I've got four issues. And I think the  
13 first, which has already been very ably covered, which  
14 is that about public trust and the risk of losing  
15 public trust in the rollout of AI systems and the role  
16 of regulators needing to work together both within  
17 country, but also internationally, which is my second  
18 theme.

19 This is an emerging area, one where I don't  
20 think we still have a clear picture of what AI's  
21 impact on our societies will be. And with that in  
22 mind, it's important that regulators keep themselves  
23 up to date, keep relevant and work together with  
24 others. And that's very much the approach we've taken  
25 in the UK. The ICO has a remit in some of the

1 technology, but actually, we work very closely with,  
2 for example, colleagues at the Competition and Market  
3 Authority, the Financial Conduct Authority, the Center  
4 for Data Ethics and Innovation and the Alan Turing  
5 Institute to look at the common issues that face us  
6 all and how we can improve our regulation.

7           An important third issue is to look at not  
8 only whether the data's held -- and when we talk about  
9 big data sets, we sometimes think of the big tech  
10 companies, but in the UK context, the state has large  
11 and valuable data sets, too. The UK National Health  
12 Service and the UK Education Service have very  
13 comprehensive data sets with millions of data points,  
14 which would be of value to a number of organizations  
15 around the world.

16           And we are seeing increasing use of AI in  
17 the public sector as a model of efficiency and to help  
18 us all strive to meet our budget considerations. AI  
19 is being looked at for use to decide whether UK  
20 citizens are likely to commit crimes, which crimes  
21 should be investigated, who's likely to reoffend,  
22 who's likely to pay their rent on time. And that is  
23 beginning to introduce issues of fairness,  
24 accountability, and transparency.

25           And so that's why, as a regulator, we are

1 really keen to keep abreast of developments. So we  
2 are putting a lot of effort into doing that. We are  
3 recruiting post-doctoral researchers to help us look  
4 at how to regulate AI. We've taken new powers to  
5 examine AI's use and look at AI systems in practice  
6 and in operation and we've reconfigured the office to  
7 set up an entire part of the office that will just  
8 focus on innovation and technology.

9 I said it this morning; I'll keep saying it.  
10 We're not the ministry of no, but we think the GDPR  
11 provisions around data protection impact assessments  
12 and our work around, for example, regulatory sand  
13 boxes and innovation hubs with other regulators.  
14 We're trying to encourage early dialogue to tease  
15 through some of these issues together, because I'm not  
16 sure any one of us has the perfect answer for all the  
17 scenarios.

18 MS. CONNELLY: Thank you.

19 Francis?

20 MR. KARIUKI: Thank you, Ellen and Deon.

21 It's a pleasure for me to be here and to share my  
22 thoughts in regard to AI.

23 And my view is as a competition and consumer  
24 protection regulator, what am I worried about? And I  
25 have about four issues, and these are transparency and

1 information asymmetries. What I would like to say is  
2 that AI has both created positive and external --  
3 externalities. And in terms of competition and  
4 consumer protection, there's an argument which has  
5 been found that they bring more efficiency in terms of  
6 prices and greater transparency compared to the  
7 traditional retail sales channels, and this is an  
8 inquiry which has been conducted in Europe and it has  
9 shown that. And, also, they provide additional  
10 benefits on these platforms. For example, AI  
11 [indiscernible], such platforms could improve choice  
12 and value for consumers.

13           However, the other challenge of -- an  
14 encountered challenge in regard to we don't appreciate  
15 the criteria behind the decisions of AI, they are only  
16 known to the designer of these systems, and,  
17 therefore, the merchant or the consumer may not be  
18 aware of how the system has been created and it's  
19 allocating the prices. So there's the risk of  
20 intentional design of the systems in favor of certain  
21 participants in the market.

22           And this could be quite catastrophic in the  
23 continent I come from where there's a lot of market  
24 concentration, and, therefore, the companies which are  
25 in Africa then can expand their space by being biased

1 against the consumers in Africa.

2 The other areas that's also barriers or  
3 pathways to entry are, in Kenya, I've seen some  
4 positive externalities especially AI has enabled new  
5 innovations, where in Kenya we have seen recent  
6 expansion of financial services for people who are not  
7 included in the financial services. And, therefore,  
8 companies have been enabled to expand financial  
9 services through lending positions for previously  
10 people who were not captured in the financial services  
11 and also in the insurance sector.

12 The challenge I see also from the AI is the  
13 line between open and proprietary data. AI often  
14 creates what is called, in fair data, an individual  
15 that is not perhaps -- not factual but opinion based,  
16 and, therefore, we may not get an optimal position for  
17 the product which is being offered or the prices which  
18 are being offered in the market. And, therefore, the  
19 challenge going forward is how do we determine data  
20 which is a product and which data is an input, and  
21 this choice of where the line is will have significant  
22 competitive implications as we move.

23 Besides information asymmetry, I've seen AI  
24 can also be used in consumer protection issues,  
25 discrimination based on other social issues like the



1 region where people come from or even race, as I had  
2 mentioned earlier, and these are some of the things  
3 where we need, as regulators, both competition and  
4 consumer, to look before we fly, because right now is  
5 that we are flying blindly and we might be flying into  
6 a storm.

7 MS. CONNELLY: Thank you.

8 Marcela?

9 MS. MATTIUZZO: So first of all, thank you,  
10 Deon and Ellen, for the invitation for the FTC, to you  
11 both for inviting me personally, but also Brazil to be  
12 a part of this discussion.

13 A lot of the points that have been raised  
14 here focus on procedural challenges of AI. What I  
15 would like to also mention is perhaps the difficulty  
16 in both attaining international convergence in these  
17 topics, not necessarily laws that are exactly the  
18 same, but that point in the same direction, and also  
19 convergence within the many fields of law that are  
20 connected to AI.

21 So here, at the FTC, we're naturally  
22 discussing antitrust, consumer protection, and  
23 privacy. And even when we're speaking only of these  
24 three areas of law, we can already see that sometimes  
25 the objectives of these policies are not always

1 totally convergent.

2           So, what I would like to -- just to give an  
3 example, I guess, that is comparing privacy and  
4 antitrust that to me is very clear. What technology  
5 has enabled today is for many companies to  
6 unilaterally access information and AI has also  
7 allowed that information, this data, to be combined  
8 and used efficiently for many purposes. So now we can  
9 know who bought something, how that person bought it,  
10 and so forth, and create, for example, consumer  
11 profiles.

12           Perhaps from an antitrust point of view, one  
13 of the solutions to a potential problem of unilateral  
14 abuse of this information would be to share the  
15 databases with other companies. So we would have many  
16 companies that have the access to the same set of data  
17 and, therefore, of course, we can have problems of  
18 collusion. But leaving that aside, we would have a  
19 level playing field.

20           If, however, we look from the consumer or  
21 data protection side of the discussion, we may come to  
22 a very different conclusion. And we may come to  
23 realize that, perhaps, consumers don't want their data  
24 shared across different platforms and shared across  
25 many companies. So, naturally, both objectives

1 pursued by either antitrust or privacy and consumer  
2 protection agencies, in the case of Brazil  
3 specifically as I hope to make clear throughout my  
4 interventions, we are at very different development  
5 stages. When it comes to antitrust and consumer  
6 protection, we are much more developed and, as you may  
7 be aware and former Commissioner Julie Brill already  
8 mentioned, in regards to data protection legislation,  
9 our specific legislation was approved just last  
10 August, August 2018, and has not yet come into force.

11 So building policy that brings all of these  
12 areas of law together in a coherent fashion to address  
13 AI challenges seems to me to be a particularly  
14 important goal and a particularly important topic for  
15 us to focus on.

16 MS. CONNELLY: Thank you, Marcela.  
17 Isabelle?

18 MS. DE SILVA: Thanks a lot to the FTC for  
19 the invitation. I'm really glad to be here.

20 I would like to say that, for me, the main  
21 point is that we think data, artificial intelligence,  
22 algorithm, are really key to the competitive process  
23 and that is why we must look at it closely. Of  
24 course, those processes affect also the way the state  
25 is being run. They also affect and they change

1 society, but for us, the main issue is how do they  
2 affect the competitive process and the way companies  
3 do business?

4 So what we see is that we really need to  
5 invest a lot more than before in understanding what is  
6 going on in the market, in the companies, and also to  
7 use all our different tools, legal tools, to gain a  
8 better understanding and also to give better vision to  
9 the market, and I will try to illustrate this with  
10 some examples.

11 So first of all, we use sector inquiries.  
12 That is a tool that is common among agencies. But how  
13 do we use it? We really take a lot of time to  
14 understand a specific market that we deem to be  
15 interesting or a process. So that's what we did with  
16 online advertising last year, and, of course, we had  
17 very interesting dialogue and followup with Australia,  
18 who has finished a very interesting report on online  
19 advertising.

20 And in this way, we get a lot of information  
21 from companies. They are sometimes reluctant to give  
22 information, but we have the legal framework that  
23 enable us to get a lot of information. And also we  
24 give information back to the market. I think this is  
25 really something interesting because some sectors are

1 moving so fast that even the companies engaging in the  
2 sector don't always have the big picture, and that is  
3 something that has been deemed very useful in the  
4 field of what we did about programmatic advertising  
5 and the way it's being run because it's a very complex  
6 and new ecosystem.

7 Another type of tool we are using very much  
8 is the joint studies with other agencies. That's what  
9 we did with the CMA about closed ecosystem in 2014,  
10 what we did with the German agency in 2016 about big  
11 data, and what we are doing right now about algorithm  
12 still with the German agency.

13 So what is the interest of this? It's  
14 really to show the impact we see that algorithms have  
15 on the competitive process and maybe I will tell about  
16 a little bit more about this later. This is really  
17 something where we draw about, of course, what the  
18 experts have written about algorithm, but also in a  
19 very practical manner how do companies use algorithm  
20 and how does it change the way they do business in the  
21 market?

22 And, finally, another tool that we use is  
23 the conference or hearings like you have today at the  
24 FTC, but really focusing on what is new, for example,  
25 in the field of algorithm. Last year, we had lots of

1 meetings with scientists, sociology experts about what  
2 is new about algorithm and also about companies. For  
3 example, we had meetings with Google and Facebook to  
4 know how they use algorithm in a very precise and  
5 detailed matter to help us to understand how it's  
6 being used.

7           And what we are setting up as of this year  
8 is a new program with those new issues that we want to  
9 know more about and the first meeting will be in April  
10 about blockchain, all those new concepts where we  
11 really want to know what is the deal and is it  
12 something new for us to know.

13           And maybe on a final note, I completely  
14 agree with what has been said about the fact that  
15 competition has a lot of points of contact with other  
16 fields of the law, for example, privacy law or  
17 consumer protection. And that is why we have set up a  
18 special program of acting as a platform between the  
19 different regulatory agencies. So we have set up a  
20 process where we meet regularly with the chair of the  
21 privacy regulator, the telecommunication regulator,  
22 the media regulator, and we set up for the first time  
23 a joint program about, for example, data or home  
24 assistant and to give a global view from the point of  
25 view from competition, privacy and media and

1 telecommunications. So this enables us to interact  
2 better also with the government that is thinking about  
3 changing the law.

4 And, of course, on the final note, I  
5 completely agree that on those topics, we have lots of  
6 international discussions within the European  
7 Competition Network that has set up a new digital  
8 working group within the OECD, within [indiscernible],  
9 within ICN. So obviously, the different meetings that  
10 we have about algorithm, big data, they also give us  
11 input.

12 And maybe the final note is, how does those  
13 algorithm artificial intelligence change enforcement?  
14 This is something that is still, I think, to be  
15 complete because I'm not sure that today artificial  
16 intelligence plays such a big role in the way  
17 enforcers do their job, but maybe tomorrow it will and  
18 we will also have some new tools to use. Thank you.

19 MS. CONNELLY: Thank you.

20 But last, but definitely not least, Omer.

21 MR. TENE: So I want to try to highlight two  
22 issues that I think are significant challenges, novel  
23 challenges, with regulating AI. The first that comes  
24 to mind is the challenge of governing technology that  
25 even its creators can't fully explain. So it's the

1 black box issue, the explainability, transparency  
2 problem.

3           Some regulatory frameworks answered this by  
4 requiring to insert humans into the decision-making  
5 process. So, if you look at GDPR Article 22, it does  
6 just that and, in fact, it continues from the data  
7 protection directive that had a similar provision in  
8 this respect.

9           However, I think the human machine interface  
10 issue is more nuanced and complicated than that. And  
11 I hate to use a harrowing example, but the recent  
12 accidents with the Boeing 737 Max planes, at least  
13 according to what was revealed in the press, in the  
14 media, implied that it was a human-machine interface  
15 problem. So the pilots tried to wrest control from  
16 the auto pilot, the machine, and there was a problem  
17 with that transition. And the result, of course, was  
18 catastrophic.

19           Now, these cases involved one plane. With  
20 AI, we think of entire cities that will be ecosystems  
21 that are governed by AIs or you can think of  
22 militaries that use AI. And then, of course, the  
23 implications can be profound. I read somewhere just  
24 this past week that some of the auto makers are  
25 actually struggling with this issue and they're



1 considering skipping semi-autonomous vehicles and just  
2 going to fully autonomous vehicles. I can tell -- you  
3 know, attest to this myself that when I use auto pilot  
4 assist and adaptive cruise control, you tend to be  
5 more passive. Your foot moves away from the brake  
6 and, you know, it's not good.

7           So I think this challenge can have  
8 disturbing implications when you think of criminal  
9 sentencing software, medical applications. When do  
10 you insert humans and how do you manage that  
11 interface?

12           The second issue I wanted to highlight is  
13 privacy. Julie mentioned Warren and Brandeis' article  
14 back in 1890 was a response to the handheld camera,  
15 and we know many times frameworks were actually  
16 crafted as a response to a technological development.  
17 Allen Weston was a response to databases. I think we  
18 need to ensure that privacy law actually responds to  
19 the new challenges of big data and AI.

20           And it's interesting that just in this  
21 panel, just the last few speakers represent laws from,  
22 I think, 1978 in France and 2018 in Brazil. So 40  
23 years apart, but the framework is still very similar.  
24 It's very individualized. It's based on individual  
25 control. It's still the Allen Weston principles and

1 individual choice and even the concept of  
2 identifiability, which is very central to the data  
3 protection frameworks currently in the world. But  
4 with data mining and different AI models, it's  
5 oftentimes not -- no longer about you and your privacy  
6 and the individual and the identity, but about people  
7 like you and lessons that are drawn from groups and  
8 then applied with particular rised implications for  
9 individuals.

10 So I think we need to start thinking about  
11 group privacy and not necessarily individual privacy.  
12 And there the concepts of individual choice and  
13 consent and even the identification no longer  
14 necessarily protects us.

15 One example is the recent Stanford study of  
16 identifying sexual orientation based on facial  
17 recognition technologies. Even if you don't belong to  
18 the group that was assessed for the model, the model  
19 can have implications for you. Thank you.

20 MS. CONNELLY: Thank you.

21 I just want to make a brief programming  
22 note. We had some trouble with the phone line. And  
23 so, unfortunately, Chinmayi had to leave the  
24 conversation. But we're hopeful we will still be able  
25 to get her thoughts on some of these important issues

1 through some other mechanism.

2 Thank you to all of my panelists for those  
3 very interesting introductory comments. Deon and I  
4 will drill down into some of the points that you have  
5 made. But before we do that, I just wanted to check  
6 in and see if anyone wants to take a minute or two to  
7 respond to anything that's been said or to sort of ask  
8 a question of your copanelists. If you do, raise your  
9 hand.

10 MS. WOODS BELL: Don't be shy.

11 MS. CONNELLY: Okay. Seeing no raised  
12 hands, we'll move on to the rest of the Q&A.

13 MS. WOODS BELL: Well, I mean, we have an  
14 opportunity throughout our conversation to try to  
15 weave in some of your thoughts. You've put so much on  
16 the table. You talked about public trust, fairness,  
17 accountability, and transparency. Permeating through  
18 all of these conversations, or at least two of them,  
19 were analogies to planes. So we want to make sure  
20 that we soar and not crash. We want to try to get  
21 this so that we can get our arms around it.

22 I think it was really interesting to hear  
23 from Isabelle, and she outlined the responsibility of  
24 the regulators to do research and then to give it back  
25 to the public. And I think that's provocative. So

1 we'll go to the question that's next on the table,  
2 which is, indeed, about research.

3           Isabelle, since you put that so eloquently,  
4 maybe you want to come back to the algorithm study,  
5 and then we'll go next to another colleague to talk  
6 about more research because there's so much going on.

7           MS. DE SILVA: Thank you so much. Maybe to  
8 comment on why we decided to launch this project,  
9 there was some debate because I remember one member of  
10 the team of economists was saying, well, you already  
11 have so many academics writing about algorithm. Will  
12 it add anything if the agency does something about  
13 algorithm? And I answered, well, this would be the  
14 point of view of the agencies. So it's not the same  
15 point of an academic and, of course, we will rely a  
16 lot on all the academic writing, but still this will  
17 be the vision of the French agency and the German  
18 agency.

19           So I would like to give you maybe some  
20 points that we will be dealing with in the study that  
21 hopefully will be released around summer. First, we  
22 will try to make a picture of the different types of  
23 algorithm that are being used today in the field of  
24 the economy and, of course, I think the fact that the  
25 state is using them a lot is incredibly important and

1 this is something that must be kept into mind.

2 In France, there was a huge debate about a  
3 very famous algorithm that is being used to decide the  
4 university you'll be able to join. So there is one  
5 big algorithm all over the country. So you cannot pay  
6 anybody to further the result.

7 (Laughter.)

8 MS. WOODS BELL: Oh, that's a low blow,  
9 Isabelle. That's a really low blow.

10 (Laughter.)

11 MS. DE SILVA: Or you have to be very clever  
12 in doing it.

13 (Laughter.)

14 MS. DE SILVA: And so it's real interesting  
15 because this algorithm is known in all the different  
16 families in France because so much depends on this  
17 algorithm. So only a side note about how incredibly  
18 important algorithm can be for the decision that are  
19 being done today.

20 And so, first, we will try to define what an  
21 algorithm is and what are the main types of algorithm  
22 that are interesting from a competition point of view.  
23 So we will, of course, deal with the issue of  
24 collusion. Why is collusion being linked  
25 so much to algorithm? And we will try to show in a

1 very practical manner the different scenarios where  
2 you can have a anticompetitive practice linked with  
3 algorithm.

4           So in some ways you have very traditional  
5 anticompetitive practices in which algorithm are only  
6 facilitating. For example, the agreement about  
7 setting a price. Then you have new types of collusion  
8 that are being driven by algorithm and that may  
9 involve third parties. So this is something that is  
10 quite new. And, finally, the thing that is the most  
11 new is the fact where you can have some form of tacit  
12 collusion that is being driven by the algorithm  
13 without any type of formal decision by the humans  
14 around the algorithm.

15           After that, we will deal about the new  
16 practical challenge that we face. How do we detect  
17 the algorithm that are problematic? The new legal  
18 challenges. How do you condemn an algorithm? Do we  
19 need to change, for example, the burden of proof?  
20 There was this phrase that I liked that Margrethe  
21 Vestager used about conformity by design. So for  
22 example, will we be able to ask companies to prove  
23 that their algorithm complies with competition law?

24           And in that framework, I think that the  
25 Google shopping decision is really an extremely

1 important one because you can see that, in this case,  
2 the European Commission really used an effects-based  
3 approach. In the decision, you don't have pages and  
4 pages of analysis of the algorithm that was used by  
5 Google, but you have a very detailed analysis of the  
6 effects that the new algorithm that had been used by  
7 Google in the Google shopping service, how did it  
8 affect the result pages? So the analysis is very  
9 concrete. Of course, the Commission had to analyze a  
10 lot of data. But this is an interesting example for  
11 me that is one of the key decision when you have an  
12 interest on the algorithm.

13 So I will stop there. I hope you will be  
14 reading the report with a lot of interest when it is  
15 finally done.

16 MS. WOODS BELL: Thank you. Thank you very  
17 much. Why don't we go over to Marcela because she  
18 also has interesting research to explore with us.

19 MS. MATTIUZZO: Yes. So as I mentioned  
20 earlier, Brazil is in a different stage regarding data  
21 protection. So we don't have yet an agency that is  
22 doing any research on this topic. However, both our  
23 antitrust and our consumer protection legislation are  
24 much more developed. And CADE is currently, for  
25 example, engaged in a specific study about the digital

1 economy, which is not focused on AI, but it's focused  
2 on the digital economy all together and also working  
3 together with the BRICs. The BRICs are conducting a  
4 study on the digital economy. So, that's something to  
5 look forward to that will hopefully shed some light on  
6 this topic.

7           What, however, I believe should be said,  
8 given that Brazil is a developing country, and  
9 Isabelle mentioned this impact on consumers,  
10 specifically when we speak of state use of algorithms,  
11 is that, in regards to any public use of algorithms  
12 for decisions that affect public utilities in Brazil,  
13 which is something that is coming, though it's not so  
14 widespread right now, the impact on the consumers will  
15 be severe. And because our data protection alleges  
16 legislation is so new, it's very important for that  
17 aspect to be highly considered in how these mechanisms  
18 are designed. A lot of the discussion about credit  
19 scoring that is happening in Brazil right now, though  
20 credit scoring in Brazil is largely private, has this  
21 in mind.

22           So Brazilian Congress last week approved a  
23 change in our credit scoring legislation. The  
24 Brazilian system before was known as the opt-in model.  
25 So you had to specifically say, okay, I want to be



1 added to this database in order to be part of it. And  
2 now, the big change was -- one of the big changes was,  
3 it's an opt-out model. You will be included from the  
4 outset. And some research has started to see what the  
5 effects of this change will be for the database. Just  
6 so you have an idea, currently, there are around 11  
7 million people in the database, which for a country  
8 that has over 200 million people is a very small  
9 number. So that number should increase and,  
10 therefore, the impact on the population as well,  
11 access to credit, and so forth.

12 So some research has already been conducted.  
13 There is an English version of the [indiscernible] ITS  
14 Rio study on credit scoring in Brazil already  
15 available. And an update should be in the works for  
16 this coming year, given this modification that I just  
17 mentioned in the credit scoring legislation. So I  
18 think these are some of the most important  
19 developments so far. And in Brazil, certainly, the  
20 big impact of big data mergings, as it's called by  
21 some researchers, should be important for research in  
22 the coming years.

23 MS. WOODS BELL: Thank you. That's  
24 certainly impressive and also very much of relevance  
25 to the work we do at the FTC and our work in the

1 credit space.

2 James, you mentioned something about you  
3 transforming your agency based on some of your  
4 research. So we hope you'll be kind enough to share  
5 some nuggets of wisdom.

6 MR. DIPPLE-JOHNSTONE: Sure, sure. You can  
7 judge whether they're wisdom or --

8 (Laughter.)

9 MS. WOODS BELL: I really am hoping they're  
10 wisdom. I'm confident they're wisdom.

11 MR. DIPPLE-JOHNSTONE: In terms of this  
12 space in research, our viewpoint is that we see that  
13 it's a key role of an authority like ours to help  
14 inform and educate. We work with organizations to  
15 achieve compliance rather than followup and enforce.

16 So our research really sort of falls into  
17 three broad categories. The first is what we describe  
18 within the office as lifting the curtains. So a good  
19 example of that was our investigation into the  
20 political use of data and data analytics where we're  
21 explaining to our citizens how these data sets are  
22 used, how they're combined, what the practical  
23 implications of those might be. And, similarly, we're  
24 looking at the role of data brokers at the moment.

25 The second is sort of establishing as if it

1 were the state of art. So what is the nature of the  
2 technology? How is it being deployed? What are the  
3 issues that are coming up? And a good example that  
4 we've told -- you know, made public in terms of our  
5 investigation is looking at the issue of use of facial  
6 recognition technology by police forces in the UK.

7           We have 43 police forces in the UK. I know  
8 that's a lot less than you have in the United States.  
9 But the risk is we have 43 different approaches, 43  
10 different uses of technology, 43 different governance  
11 rules that go with that technology. And the forces  
12 themselves are saying to us, help us understand what  
13 works and what doesn't work here. So we've been  
14 supervising some of the police deployments of facial  
15 recognition.

16           And the third is developing the regulatory  
17 tools, and this is where we have colleagues who have  
18 joined us from Oxford University, Reuben Binns, to  
19 help us understand how a good regulator would audit an  
20 AI system, this sort of how do you hold the machine to  
21 account? How do you examine the machine? How do you  
22 deal with the black box issue in terms of  
23 explainability?

24           And as part of that, as well as bringing  
25 people in, we also have an ongoing research and grant

1 program. And as I mentioned where we're working with  
2 a range of other regulators who are also grappling  
3 with these issues because we think it's probably a  
4 common solution rather than something that we'll dream  
5 up ourselves.

6 MS. WOODS BELL: Thank you. You covered a  
7 lot of terrain there.

8 Because you mentioned the research in the  
9 universities, I wonder if we might pivot to Omer.  
10 He's done a lot of research both with university and  
11 outside. Maybe you can come in there and then we'll  
12 round out with Francis after you give us your input.

13 MR. TENE: Yeah, thanks. So some research  
14 that I was involved in that's relevant here is there's  
15 recognition, I think, that just complying with laws  
16 isn't enough when we're dealing with technologies that  
17 push the envelope and innovate and create new  
18 realities really. And Julie mentioned in her talk  
19 that we need to think of not just what is possible,  
20 but what should be done and what's ethical.

21 So we've looked at trying to transform the  
22 institution of IRBs, institutional review boards, that  
23 exist in academic universities and research  
24 institutions to assess ethics of human subject  
25 research, trying to convert them to data review boards

1 that look at new innovative data uses or projects or  
2 products under ethical principles as opposed to just  
3 the law.

4 I think this raises two main questions.  
5 First of all, which ethical principles? So if you  
6 look at traditional IRBs, they operate in this country  
7 under what's called a common rule, the Belmont  
8 principles. But do those principles also fit the  
9 different context of data-based research? And then  
10 which structures? What is the structure of this new  
11 data review board? Should it be internal to the  
12 organization or external? What stakeholders should be  
13 at the table and how should decisions be reached? So  
14 I've published a couple of papers on this with my  
15 colleague, Jules Polonetsky, and we continue to look  
16 into this topic.

17 MS. WOODS BELL: Thank you. Most excellent.  
18 I'll turn it over to Ellen. She has a lot  
19 of questions too.

20 (Laughter.)

21 MS. CONNELLY: Thank you, Deon.

22 So a couple of you have touched on some  
23 specific examples of cases or specific uses of the  
24 technology. Francis, I know that you, as Deon  
25 mentioned in the introduction, have expertise in

1 FinTech issues. I'd like to maybe start with you and  
2 give you a chance to discuss any interesting AI  
3 government or private sector use cases that you've  
4 experienced or had experience with in your work.

5 MR. KARIUKI: I think Deon read the wrong  
6 CV --

7 (Laughter.)

8 MS. WOODS BELL: He's very modest. He's  
9 very modest.

10 (Laughter.)

11 MR. KARIUKI: But getting the cue in regard  
12 to the research, at the Kenyan Government level, the  
13 national government level, the Government has set a  
14 task force which is looking at the official  
15 intelligence systems, but that is work in progress.  
16 But, obviously, as the regulator, we have not been  
17 waiting for the report of this task force. We have to  
18 move forward since this is something which is really  
19 affecting markets at the moment.

20 What has happened is that -- and I'm happy  
21 Isabelle highlighted also that is what is happening in  
22 France -- is that we have increased the  
23 [indiscernible] location in terms of research.  
24 There's an area where it's very expensive to do  
25 research. I think people like Omer, they're very

1 happy now, because the market is there for them to  
2 conduct their --

3 (Laughter.)

4 MR. KARIUKI: -- their research. And it's  
5 very worrying for the part I come from in Africa in  
6 terms of the resources. It's affecting us, but in  
7 terms of resources, we don't have that kind of  
8 resources. But we have to locate an extra budget  
9 towards that.

10 Having said that, it is that one of the most  
11 promising areas of academic research is use live  
12 experimentation to understand the behavior of the AI  
13 systems and their impact on consumers. I'll give the  
14 example of -- right now, it's more of an analog  
15 example, the one we did in regard to financial  
16 services in Kenya, where we have seen in Kenya cases  
17 and other cases where mobile communication channels  
18 like USSD are blocked by a channel provider for  
19 competing firms. And this can be done by creating  
20 excessive down time or field sessions in USSD.

21 Researchers in another country, just our  
22 neighbor, learning from what we did is, that they have  
23 gone ahead and they have tracked field sessions occur  
24 and their frequency is high and it is usually the  
25 provider who sets the frequency to be high. And this

1 research documented that these failures are on the  
2 side of the channel provider and occur at higher rates  
3 for competitors. This has provided evidence that  
4 markets to enforce equal channels.

5 I'd like to see similar testing of what  
6 results AI tools provide in search or when consumers  
7 search for products to measure if they are biased to  
8 what certain website interests provide us our  
9 products. There's an area where it's quite live for  
10 research, and I challenge Omer to do that.

11 (Laughter.)

12 MR. TENE: Challenge accepted.

13 (Laughter.)

14 MR. KARIUKI: The other area is in regard to  
15 privacy. Again, I see value in live testing of  
16 products. In this case, at the product acquisition  
17 stage to map out how data is collected and how it will  
18 be used. I know there has been such research in  
19 India. It's unfortunate Chinmayi is not here to share  
20 the research with us, but we need more search audits  
21 if we are going to understand where the abilities lie  
22 in these new digital services.

23 In consumer protection, we shouldn't forget  
24 the voice of the consumer -- I always say that -- and  
25 the utility of complaints data. I know FTC has used



1 consumer complaints data to address crimes in their  
2 digital economy. In my country, Kenya, researchers  
3 have recently used social media text analysis to  
4 measure risk for consumers in banking. We should be  
5 developing new models of complaints receipt and  
6 analysis, and that's a challenge I would like to pose  
7 to myself and also regulators that can quickly  
8 categorize and flag concerns related to data privacy  
9 and artificial intelligence. These are the areas I  
10 may push forward for further research.

11 MS. CONNELLY: Thank you.

12 MR. TENE: Can I jump in here?

13 MS. CONNELLY: Yes, of course.

14 MR. TENE: Because --

15 MS. WOODS BELL: Now, you're ready to jump  
16 in. Look at this. This is working well.

17 MR. TENE: Actually, we've already gotten  
18 some of the research the Commissioner highlighted now.  
19 And I want to just mention work that IAPP has done on  
20 data philanthropy, together with the UN Global Pulse.  
21 So Global Pulse is the big data innovation arm of the  
22 UN. And what they're trying to do is to use data from  
23 various resources, some that you've just highlighted  
24 right now, so social media, mobile phones, financial  
25 transactions, satellite imagery, in order to support

1 the UN's sustainable development goals.

2           So for example, you can think of tracking  
3 clusters of an infectious disease according to the  
4 movement of people or to their social media posts and,  
5 thereafter, aiding in the allocation of medicine or  
6 medical personnel or health centers.

7           So the IAPP convened a group of experts  
8 together with UN Global Pulse. Some came from the  
9 humanitarian and development organizations, the World  
10 Food Program, the UN Development Program, the High  
11 Commissioner for Refugees, the Children's Fund,  
12 UNICEF, and International Committee of the Red Cross.  
13 Together with some NGOs like ourselves -- the IAPP is  
14 a nonprofit -- industry representatives, so there were  
15 people from Mastercard, Nielsen, IBM and other  
16 companies, and some data protection regulators from  
17 Europe and Africa actually.

18           We looked at models of trying to govern data  
19 uses. So data can be used for these beneficial goals,  
20 while not imposing privacy costs or other risks on  
21 individuals. And in that context, we looked at  
22 models, like IRBs that I mentioned earlier, data  
23 review boards or internal committees in companies.  
24 Who should head them? Should it be the privacy  
25 officer? Should it be someone else?

1           We looked at some external review  
2 committees. So the health care industry, for example,  
3 has already instituted some external review boards to  
4 try to test the ethics of different products. Cities,  
5 so, for example, Seattle created what it calls the  
6 CTAB, the Community Technology Advisory Board, to  
7 assess innovative data projects.

8           I want to mention the partnership in AI,  
9 which is a partnership that some of the large tech  
10 companies founded for this purpose. And another model  
11 we looked at are the Administrative Data Research  
12 Facilities, ADRF is the acronym. This is a warehouse  
13 of data usually hosted by an academic institution.  
14 University of Chicago has one for retail data.  
15 Georgetown actually has one where researchers can  
16 access the data in a way that protects individuals'  
17 privacy. Thank you.

18           MS. CONNELLY Thank you. I would like to  
19 see if Marcela or James would like to weigh in?

20           MR. DIPPLE-JOHNSTONE: Well, I think in  
21 terms of sharing sort of experience, I mean, our work  
22 around the Royal Free/Google DeepMind case is probably  
23 instructive of some of the issues that Omer was  
24 mentioning before in terms of not so much a challenge  
25 to the use of the AI, but it was the framework that

1 went around that. In this particular case, it was an  
2 NHS hospital, the Royal Free hospital, that developed  
3 with DeepMind a tool that improved diagnosis of a  
4 certain condition. So the tool itself was clinically  
5 effective.

6 And I think there was a lot of surprise when  
7 our office decided to enter into an undertaking with  
8 the organizations to put the system right rather than  
9 reaching for the big enforcement fines. Our view has  
10 always been it's innovation with privacy, not  
11 innovation versus privacy. But there was some  
12 surprise that we didn't look at the high-level fining  
13 arrangements because actually we could see there was a  
14 public benefit. There was a wider public benefit in  
15 the use of the technology.

16 And it was the governance arrangements that  
17 went around that's sort of equivalent of the human-  
18 machine interaction. It was the interaction between  
19 the health data set and the use of the technology that  
20 caused us concern. And that was being put right. And  
21 we could see that that was being put right. The  
22 organizations were engaging with us as a regulator and  
23 were doing the right thing. MS. CONNELLY:  
24 Thank you. Marcela?

25 MS. MATTIUZZO: Yeah, just quickly to

1 comment a little bit more on credit scoring, which is,  
2 as I mentioned earlier, something that in Brazil was  
3 much more developed earlier.

4 This research that I mentioned from  
5 [indiscernible] found that basically none of the  
6 principles that are today in our recently approved  
7 data protection legislation were basically complied  
8 with by companies. So there was no transparency from  
9 the criteria that were used to reach scores. There  
10 was in -- largely consumers were not aware of what was  
11 happening and even how these scores were used by  
12 companies, whom they were sold to, and so forth.

13 What is interesting to note, however, is a  
14 that some of that, in my opinion, informed the  
15 modifications in the current legislation that happened  
16 last week. So one provision that was inserted into  
17 the legislation that I believe the inspiration was  
18 German law is that there is no more -- whenever a  
19 consumer asks to know her credit score, that  
20 information cannot be used against her in reaching  
21 another score. So that was a modification in the  
22 credit scoring legislation in Brazil that happened  
23 last week that was aligned with data protection that  
24 didn't exist before.

25 There's also a new provision that sensitive

1 information cannot be used to reach credit scores,  
2 that means gender, ethnic origin, and so forth,  
3 political views and stuff like that. And also  
4 information that is not truly related to credit and  
5 information that is truly not related to that person,  
6 because all of that in Brazil was used to reach your  
7 credit score. So children, how many children you have  
8 or information about how those children -- are they  
9 good credit payers or not, all of that was used.

10 And I believe it's a good example of how  
11 research perhaps helped really improve legislation  
12 concretely.

13 MS. CONNELLY: Thank you. Any other  
14 comments on this point?

15 I'll turn to --

16 MR. KARIUKI: I think --

17 MS. CONNELLY: Yes?

18 MR. KARIUKI: I think what is coming out and  
19 what I would like to see is that there's a lot of  
20 potential for research, but it's expensive. And from  
21 the African continent is that that is why we have --  
22 we are cooperating under the African Competition Forum  
23 to harness the resources we have in terms of the  
24 budget and also in terms of the human skill so at  
25 least we can be able to conduct more research.

1           Also at issue is more cooperation is needed  
2 between north and south, because whatever is happening  
3 in the north now, it's really affecting what is  
4 happening in the south. And as we indicated, we don't  
5 really appreciate the AI systems, and we need each  
6 other to move forward.

7           MS. WOODS BELL: Well, Ellen and I have been  
8 going back and forth. Should we go next to GDPR?  
9 Should we go to cooperation? You guys have made us go  
10 schizophrenic here.

11           (Laughter.)

12           MS. WOODS BELL: I don't know which way to  
13 go. But since Marcela mentioned the Brazilian law,  
14 maybe we should take advantage of that opportunity to  
15 reinforce what Julie Brill opened with in talking  
16 about these new data privacy frameworks.

17           So why don't we go over to -- let's see.  
18 Shall we go to the ministry of no? No, not no. We  
19 should go to the UK ICO to a little bit about the data  
20 privacy framework. And we'll do this in rapid fire  
21 because we are running out of time.

22           MR. DIPPLE-JOHNSTONE: Sure. I'm mindful of  
23 time so from the ministry of no or the ministry of  
24 yes, as I think we want to be --

25           (Laughter.)

1           MR. DIPPLE-JOHNSTONE: -- the GDPR takes us  
2 a way forward, but it's the wider framework that goes  
3 around that. It's the thinking that is set out in the  
4 GDPR. The GDPR helps move the law in the right place,  
5 but there are still lots of derogations between  
6 individual member states, and it's how those  
7 derogations are used to combine innovation with  
8 privacy to recognize that companies will want to  
9 develop these systems as will governments to help them  
10 make efficient use of their data sets and their  
11 technologies. But it's how that's done responsibly  
12 with accountability and transparency.

13           And the GDPR, I think, is a really good  
14 starting point. But we mustn't rest on our laurels  
15 and we must think about those broader concepts to make  
16 sure that our citizens can have confidence in the  
17 rollout of AI, because if there isn't confidence, I  
18 think there's where we're going to have challenges.

19           MS. WOODS BELLS: Thank you very much.

20           Francis, do you want to us go back over to  
21 you?

22           MR. KARIUKI: Okay. The GDPR law is a work  
23 in progress and Julie mentioned about it. It's a  
24 draft bill, which is undergoing legislative process.  
25 And I've looked a the bill and it creates the Office



1 of the -- of Dipple James here, the Office of --

2 (Laughter.)

3 MR. KARIUKI: And what is the areas that it  
4 is much -- it has borrowed heavily from the European  
5 law. And looking at it, it has created -- it has  
6 addressed the issue of AI technologies, defining what  
7 is profiling very clearly, that it's a form of  
8 automated processing of personal data, and also it has  
9 gone ahead to set a rule specific to automated digital  
10 -- or automated decision-making. So it is addressing  
11 the AI.

12 But in terms of data portability, the  
13 provisions are somehow creating some competition  
14 issues, because in terms of the person with the data,  
15 if you request for the information, that person is  
16 supposed to take even up to 30 days to transfer that  
17 data. And, obviously, 30 days, you wonder, and it's  
18 an issue of technology. Why 30 -- why people are  
19 taking 30 days to transfer data? So that can create  
20 some market concentration for the people who have  
21 data. But since it's a bill which is ongoing, it's  
22 for further discussion. And this is in the right  
23 direction if I may say so.

24 MS. WOODS BELL: Thank you. You mentioned  
25 something which Chinmayi put on the record. And even

1     though she's not here, she just sent a note. She said  
2     she is going to put comments on the record. So I'll  
3     just channel a little bit of Chinmayi.

4             She mentioned the privacy law and data  
5     breach notification concerns, transparency and  
6     disclosure requirements that, in particular, impact  
7     those with small businesses and how complicated it is  
8     to comply with GDPR-type frameworks in a country like  
9     India. She talked about developing norms and ethics,  
10    some of which Omer will address, but from a different  
11    vantage point. So I just want to put that on the  
12    record and note that even though she's not here, she  
13    has engaged with us intensively and she'll put  
14    something on the record.

15            Isabelle, explore with us, if you will, your  
16    perspectives on AI and privacy.

17            MS. DE SILVA: Thank you. I will start with  
18    the example of the sector inquiry we did on online  
19    advertising because I think that really it's an  
20    excellent example of a sector driven by data. If you  
21    don't have data, you don't have programmatic  
22    advertising. So a few remarks on this sector and how  
23    GDPR or the privacy issues are related to this  
24    specific sector.

25            First, you see a sector that has moved

1     incredibly fast. Last year for the first time, online  
2     advertising was a bigger turnover than classical  
3     advertising on TV channel, movie, the press, the  
4     radio. So online advertising was a bigger budget.  
5     And what we saw was that the level of growth was huge,  
6     but two actors were taking all that economic growth  
7     for themselves, Google and Facebook in the case of the  
8     French market.

9             And we tried to understand why and the  
10     answer that we found is that those two companies were  
11     having huge data sets, very high-quality data sets  
12     about what Facebook users are doing on the platform.  
13     Of course, the data set by Google about the Google  
14     search engine. And so it was interesting to see that  
15     they had excellent data and they had excellent  
16     inventory, so the advertising spaces.

17             Another thing that was really striking for  
18     us was the level of use of data that was going on. We  
19     really felt -- and this was a strong message of this  
20     inquiry -- that the citizen was completely unaware of  
21     the fact that their data was being used in third-party  
22     website. I'm sure that 90 percent or 95 percent of  
23     the customers are completely unaware that cookies are  
24     being followed on all the different website. It's  
25     really interesting because the Facebook case in

1 Germany is really about this issue that has been used  
2 by Facebook on different website.

3 And so we also saw in this market that the  
4 way legislation is designed -- and there was this  
5 project of GDPR on e-privacy -- this was having a  
6 direct impact. So to explain, there was a debate  
7 about the fact that you should approve the cookie use  
8 through the -- I don't know the word --

9 MR. TENE: Banner.

10 MS. DE SILVA: Banner, thank you. And we  
11 said, well, this may be a good choice, but we have to  
12 say that this might affect negatively some companies  
13 and benefit others. So this was really a strong  
14 message for the government that was negotiating in  
15 Brussels and this really had an impact on the way that  
16 France was doing this negotiation on privacy that  
17 maybe there was a competitive issue, maybe privacy is  
18 good and be protected, but beware of the way you do  
19 it. You don't want maybe to favor some users and  
20 disfavor others. And, of course, like you said, GDPR  
21 is a very big deal for companies in France, small  
22 companies are finding it complex to be compliant to  
23 GDPR.

24 And maybe to finish, already in France,  
25 there is a debate that GDPR may not be enough. There

1 is the debate about should we go even further. For  
2 example, the fact that the default mode would be you  
3 don't use data by the users. Users must specifically  
4 approve a big use of their data and maybe have  
5 something for this data so that's use -- GDPR's only  
6 been in place a few months and already you have some  
7 demands for something more.

8           And maybe another example of how this issue  
9 of data is really driving the debate, this online  
10 advertising sector inquiry was directly used in the  
11 product that the French Government has put into place  
12 of the GAFA tax, so-called tax on online advertising  
13 platform, and the rationale was that those companies  
14 have such advantage on the way they use data and they  
15 create value because of the data, and this new French  
16 tax is directly linked to the way they use data.  
17 So it's interesting to see that the specifics of the  
18 sector have led to the choice of a specific instrument  
19 through a tax.

20           But I think that those privacy issues will  
21 really remain at the core of competition work,  
22 consumer protection work and also, of course, data  
23 privacy because we had the first fine based on GDPR in  
24 France against Google Android about the way they were  
25 using data. And this fine was in relation with the

1 GDPR.

2 MR. TENE: I think if I can just comment on  
3 this. It's interesting especially coming from a  
4 competition authority. You mentioned the hegemony of  
5 the two big data companies and the effect on the ad  
6 tech market in the same context of GDPR, and maybe you  
7 were hinting at the e-privacy regulation or the  
8 current directive. I think a lot of critics would  
9 argue that GDPR and even more so the e-privacy  
10 regulation and also some of the laws that are debated  
11 now in the US like the CCPA actually reinforce the big  
12 incumbents and the powerful first parties that have  
13 the customer relationship. They have the user and,  
14 therefore, will obtain the most explicit consent  
15 through a banner or some other -- really any way you  
16 can think of at that account of the more nimble, the  
17 smaller competitors who are playing in this ad tech  
18 market. So arguably, these laws have an  
19 anticompetitive effect.

20 MS. DE SILVA: For customers that are what  
21 we call logged in -- and you can see also with Amazon  
22 -- when you already have all your data on Amazon, it's  
23 easier to buy and you don't have to put your data. So  
24 of course, the way the legislation is framed is really  
25 important if you don't want to have that effect. But

1 it's difficult to avoid.

2 MS. WOODS BELL: Perfect. I was nodding my  
3 head because Omer jumped right in and no need to make  
4 the request anymore. This is dynamic and exciting --

5 (Laughter.)

6 MS. WOODS BELL: -- and that's the way it  
7 should be.

8 Ellen, take it away.

9 MS. CONNELLY: I'll use that to plug our  
10 April 9th and 10th hearings on privacy, so please tune  
11 in.

12 I think we only have about eight minutes  
13 left. So I'm going to ask just one last kind of wrap-  
14 up question, and that has to do with cooperation,  
15 which has been mentioned by a number of you. It was  
16 also mentioned in our November sessions on algorithms,  
17 predictive analytics and artificial intelligence,  
18 which were really great. And I encourage you all to  
19 watch them. They're on the web.

20 We heard at the November sessions that  
21 cooperation, in terms of steps for regulators looking  
22 at how to handle the potential challenges and  
23 opportunities brought by AI, is a very important  
24 thing. But at the same time, many people at the  
25 November sessions pointed out that cooperation would

1 be very difficult to achieve, and in particular,  
2 convergence of regulations and approaches would be  
3 very difficult to achieve.

4 So since we have people here on the panel  
5 with very diverse and interesting experiences, I would  
6 like to hear your thoughts on cooperation,  
7 convergence. To what extent is it important? Which I  
8 think a number of you have said it is. And to what  
9 extent is it going to be difficult? What are the  
10 major barriers that you see to cooperation and  
11 convergence? How can they be overcome?

12 We'll just go down the line.

13 MR. DIPPLE-JOHNSTONE: So, yes, it's not  
14 easy. I think it is the direction of travel. I think  
15 some early tentative steps are being taken in that  
16 direction. If we look at the work of the  
17 International Conference of Data Protection and  
18 Privacy Commissioners, their declaration on ethics and  
19 data protection in AI earlier in 2018 begins to set  
20 the pathway down that direction of travel.

21 Cooperation, again, is challenging. But I  
22 think there's a lot of goodwill particularly around  
23 the community. And it's not just privacy cooperation.  
24 It's got to be cross-sector cooperation, and it's as  
25 important to look at the cooperation mechanisms within



1 our respective countries as it is internationally,  
2 because it's not just one sector or one regulation  
3 that needs to be addressed.

4 MS. CONNELLY: Francis?

5 MR. KARIUKI: Cooperation is essential, and  
6 from where I stand, it's possible in the sense that we  
7 have a convergence in the problems which are facing  
8 us. And I can collapse those key priorities area  
9 where we have convergence. And that is there's the  
10 issue of discrimination, there's the issue of access  
11 to markets, there's the issue of information asymmetry  
12 for both consumers and competing firms, data privacy,  
13 and data portability. And this is affecting both the  
14 developed countries and the developing countries.

15 And taking into account that also the  
16 players in the developed countries, they are facing  
17 the same issues with Facebook, WhatsApp and also the  
18 ride hailing companies, the players are the same, the  
19 problems are the same and, therefore, there is  
20 motivation to cooperate and it's good that we  
21 cooperate.

22 The challenge would be in terms of  
23 resources, which I indicated, that some have more  
24 resources, some can afford better research. But from  
25 where I stand is that research conducted in Europe now

1 can be used in Africa because the platforms are the  
2 same, and that is the best thing. It's not like the  
3 competition regulation where we have some different  
4 industrial policies and other consumer protection  
5 laws. There's convergence in terms of the problems we  
6 are facing.

7 MS. CONNELLY: Thank you.

8 Marcela?

9 MS. MATTIUZZO: So very briefly, I come from  
10 the world of antitrust and competition as well. So I  
11 believe that what competition has reached may be a  
12 good way forward here, and I mean that even though in  
13 antitrust matters sometimes we disagree on substantive  
14 issues, we have reached convergence on many procedural  
15 issues. And because procedural issues in AI are so  
16 important, we have a lot of discussions in tech due  
17 process and so forth, perhaps that is a place to  
18 start.

19 So if we have black boxes of some sort, what  
20 are the procedures that we can agree on that are  
21 needed? And I think some of what was discussed here  
22 today goes in that direction today. So I believe  
23 that, if we focus perhaps on procedure, it may be  
24 easier to find common ground.

25 And another important topic that perhaps

1 will help this difficulty in finding legislation that  
2 is the same everywhere is that many uses of technology  
3 are global. So if you have higher standards on one  
4 place and the company's global and it has to adapt to  
5 that one place, that place can lead legislation  
6 elsewhere and can lead market practices elsewhere. So  
7 I think that perhaps by using those two tools, we  
8 could help bring convergence.

9 MS. CONNELLY: Isabelle?

10 MS. DE SILVA: Yes, I'm very hopeful about  
11 what cooperation can bring us, and I really think that  
12 this is an input that we use a lot. I would say that  
13 you have different cooperation on setting the rules,  
14 applying the rules, for example, like within the ECN.  
15 You have cooperation between the US and the  
16 Commission. I think that without this cooperation  
17 maybe we wouldn't have the Google shopping case and  
18 that the FTC was also instrumental in helping the  
19 Commission have elements for the case.

20 And I really think that one of the most  
21 useful cooperation is the sharing of concrete cases of  
22 details, sector inquiries, because it gives us really  
23 the material in which we can think about enforcing.  
24 Of course, there is this other issue of global  
25 convergence on the rules. Will the US adopt a form of

1 GDPR? I see that some companies like Microsoft have  
2 already decided to do it on their own. I think it's  
3 maybe something that we haven't mentioned enough, the  
4 reaction of the business community.

5 This is really a message that I gave to the  
6 online advertising community. You must be careful.  
7 You must react before you have new rules because if  
8 you don't respond to this issue of the trust, of the  
9 fact that the public is worried about the way the data  
10 is being used, if you don't create some internal  
11 rules, voluntary rules, you may have a worst case  
12 scenario for you with new rules that will be too  
13 strict. So we mustn't forget the companies have a lot  
14 to do on their own and they're also a big part of this  
15 landscape.

16 MR. TENE: Yeah [indiscernible] Microsoft  
17 accepted and adopted GDPR globally. It adopted some  
18 of the rights that GDPR grants, and I think part of  
19 the reason might be that just adopting any specific  
20 standard might actually violate standards that are set  
21 in other jurisdictions or countries. And I think  
22 therein lies the problem for businesses today with the  
23 multiplication of efforts. It's, of course, a good  
24 thing, but businesses really seek uniform standard  
25 rather than really being concerned where the standard

1 -- the bar is positioned. Because at the end of the  
2 day, different standards might require businesses to  
3 actually architecture different systems and frameworks  
4 and products and, you know, break the internet into a  
5 splinternet.

6 My organization argues that regardless of  
7 the policy choices, it's clear that everyone agrees, I  
8 think, that we need duly trained and qualified  
9 individuals, a workforce to implement the policy  
10 choices on the ground. And this is through doing  
11 things like mapping data flows and doing risk  
12 assessments and imposing accountability requirements  
13 and data governance, including the application of  
14 technologies, not only to infringe on but also to  
15 protect privacy.

16 MS. CONNELLY: Thank you very much. And  
17 with that, we are just about out of time. I want to  
18 thank all of our panelists for this very interesting  
19 and useful discussion.

20 And I want to encourage you all to tune in  
21 tomorrow to Day 2 of the international part of the FTC  
22 hearings. Thank you.

23 (Applause.)

24 (End of hearing.)

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