Antitrust Hot Tub: Is Consumer Welfare in Hot Water?*

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BILL KOVACIC: Welcome to the Antitrust Hot Tub. Today we're going to talk about a fundamental question that runs throughout the field of competition law—that is, what is the purpose of this endeavor?—an area that joins us together in the application of a public policy regime that goes back to the late 19th century.

There are obvious answers to what brings us to the field—there are matters of material need and interest. Many of us rely on this field, in part, to earn a living, but I think the interest that draws us together is much broader than that. I think there is a special attraction in the field of competition law that deals with its larger sense of social purpose and its fundamental importance to the operation of a market economy, and it is the definition of that purpose that is a matter of intense contemporary concern.

If we go back to the mid-1940s, with Learned Hand's epic poem of competition law in *Alcoa*,[1] you see a broad egalitarian vision of what the law is supposed to accomplish. If you go back to just sixty years ago to *Brown Shoe*,[2] an interpretation of the U.S. merger regime, you see again a very decisive expression of a broad concept of egalitarian aims and goals.

* Edited for publication.

Then, come forward to the late 1970s, where that vision disappears from American jurisprudence, and we see the recognition under the umbrella of a phrase called "consumer welfare" of a microeconomic policy/economic welfare-based conception of competition law that arguably has anchored law and policy for the subsequent period of time.

Indeed, into the early 2000s, we see U.S. and European Union policy officials—the Commissioner of Competition in the European Union and the heads of the U.S. antitrust agencies—embracing the vision of the consumer interest under the rubric of consumer welfare as being the reason for what we do. For those of you who have been on an interstellar voyage for the past five years and have just come back to Earth, you'll notice that those assumptions are a matter of extremely vigorous debate today, where we are going back to first principles and asking: "What's the point of it all? What are we trying to do?"

Today we are going to hone in on that topic. There have been many debates on this, and a large number of the debates, in my eye, often start with a high-level discussion of consumer welfare. To mention the phrase causes people to raise the shields right away. The discussion quickly devolves into what I'd say is a not terribly informative discussion of aims.

We want to come at this a bit differently today by drawing in experts who have thought about this, written about it, tried to do it in practice. Our technique today is to take specific case studies as a way of starting out the discussion of what we are trying to do in this field: to talk about the famous U.S. *Topco* decision of 1972[3]; to talk about a less-noted-but-important decision in the European Union dealing with washing machines and the control of negative environmental externalities[4]; and to use that more specific discussion of individual cases as a way to get into broader themes.

To do this we have a wonderful ensemble of participants: Sandeep Vaheesan from the Open Market Institute; Tommaso Valletti, Imperial College Business School (London); Carl Shapiro, University of California at Berkeley; Diana Moss, American Antitrust Institute (AAI); Maureen Ohlhausen, Baker & Botts; and Dennis Carlton, University of Chicago.

What do they have in common as a group? I think everybody on this list has written about the purposes of the antitrust laws and their implementation. They have spoken extensively about the subject. They have advised a variety of institutions and enterprises on competition policy cases. And most on this list have actually gone and done it—they have seen theory meet practice, they have crossed the great distance between the broad idea and its realization in practice—and so their views are in many ways leavened by that experience of not just watching the match but playing it as well, to see theory meet practice.

The way we are going to go about this is, in the spirit of our program: the hot tub. This is an innovation inspired by experience in Australia, where experts, instead of testifying seriatim, would be joined up in a discussion of their views supervised by the court, where they get to have a genuine conversation. It's our aim to have that kind of conversation today.

We're going to go about it in three parts: we're going to start by talking about *Topco*; we're then going to move to a discussion of the *Conseil Européen de la Construction d'Appareils Domestiques (CECED)* decision involving washing machines in the European Union; and then we are going to come back from that and ask about the continuing utility of the consumer welfare framework and discuss whether or not we need a restatement of the goals and purposes of competition law.

We start with *Topco*. A group of smaller grocery stores and grocery store chains create an association that is going to act as a purchasing agent. Their aim is to create a private label that would be distinctively the product and the property of the members of the association. They include in their agreement an exclusive territorial licensing provision that says each member will be able to use and offer the Topco brand within a specific geographic region. The Department of Justice challenges this, and the main theory of harm is that this is a per se illegal allocation of territories among direct competitors. The Supreme Court ultimately agrees that that is the appropriate characterization and condemns the arrangement.

I'd like to ask our group to spend a few minutes on the following question, and we'll give everyone a chance to come in on this: Would you reach the same outcome today looking at this set of facts and would you get there through the same process of reasoning?

Sandeep, can you kick this off for us, please?

SANDEEP VAHEESAN: Yes. Thanks so much, Bill. I'm thrilled to be on today's program.

Topco is a decision about which I have very mixed feelings. As a basic matter, I think the DOJ was wrong to bring this case. It was a questionable exercise of prosecutorial discretion. They were targeting horizontal coordination among small players. As you said, Topco allowed small and medium-sized grocery stores to maintain their independence while coming together to develop and market private-label brands in competition with large chains like Safeway and Kroger; so they were collaborating in a discrete area while otherwise maintaining their independence.

I wanted to get a richer sense of the facts here, so I read the district court decision[5] and noticed the district court made an interesting observation:

> The government concedes that if Topco, rather than being a buying organization for smaller local and regional chains, were a single, large national chain, none of its practices would be objectionable under the antitrust laws. It also concedes that Topco's private label program enables its members to compete more effectively both with the larger national chains, as well as with other medium or smaller regional or local chains and independents.

The court recognized something important: antitrust allows large corporations, including large corporate families

composed of many separate corporations, to engage in activities that small firms cannot do in concert.

I think that's a rule that deserves greater scrutiny and has too often been taken for granted. We assume that large corporations are simply more efficient and should have autonomy, whereas small firms when they band together are doing something suspicious. Building on the discrepancy I just described, the district court ruled in favor of Topco and said that on net this is promoting competition; this is not the type of restraint we should be attacking under the antitrust laws.

The Supreme Court reversed and held that Topco and its members committed a *per se* violation, horizontal allocation of markets. The Court made an interesting observation: that the type of balancing that the district court engaged in is really not the appropriate province of the judiciary. The Supreme Court has interesting language saying: "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts."[6] So the Supreme Court recognized its limits as an institution and thought that this type of balancing should be done by the national legislature.

I have two takeaways from *Topco.* We need a more nuanced and subtle approach to horizontal coordination. I don't believe it's "the supreme evil of antitrust"—in fact, Congress doesn't believe that it's the supreme evil of antitrust either because it has granted exemptions to groups like workers, through the Clayton Act and Norris-LaGuardia Act, engaged in horizontal coordination; same for farmers and ranchers through the Capper-Volstead Act—but these are decisions that ultimately need to be made by Congress. The courts have played an outsized role in American political economy in general, and it's especially true in antitrust and we need Congress to decide what is beneficial coordination and what is harmful collusion.

So I think the outcome in *Topco* is unsettling, but the Court was right: antitrust law requires a judgment of the elected representatives of the people and it is too important to be left mainly or exclusively to judges who are neither publicly accountable nor in possession of any particular expertise relative to the field.

BILL KOVACIC: Sandeep, thanks for getting us off to a great start.

Carl, if you could come in on this, please?

CARL SHAPIRO: Thank you, Bill.

As the neo-Brandeisians have come into the ascendency recently, I have had occasion to look very carefully at Louis Brandeis. I think we can learn a lot about *Topco* by quoting him from *Chicago Board of Trade* in 1918:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.[7]

Then he goes on to say you have to look in detail at the effects and what's going on in the industry, which is what he did after all, and he created the "Brandeis Brief."

That's what the district court did here: they looked at what happened. One of the fascinating things about *Topco* is the district court did a rule of reason analysis; they looked closely at what was happening in the market. The Supreme Court then said: "Well, that's not what you should have done. We don't want to look at what actually happened. This is per se illegal."

The Supreme Court quotes the district court for the following sentence: "Whatever anti-competitive effect these practices may have on competition in the sale of Topco private label brands is far outweighed by the increased ability of Topco members to compete both with the national chains and other supermarkets operating in their respective territories"—hence, the balancing that Sandeep referred to. But the Supreme Court does not quote the very next sentence in the district court opinion, which says:

> Moreover, if the testimony of all the live witnesses at the trial is correct, the elimination of the Topco territorial limitations in the franchises would result in the demise of the Topco organization and its private label program with no benefit to competition in those private label brands and with a substantial reduction in the competition between its members and both the national chains and other supermarkets.

So the district court, on the facts, finds there is no balancing needed.

Now, in terms of what I think of all this, if you look at the findings by the district court, it's clear that the Topco enterprise is procompetitive. That was the factual finding.

The DOJ did not put on any live witnesses; they just brought a per se case. They could have brought a case and said, "we don't think these territorial restrictions are necessary for the operation of Topco." Supporting that assertion, there were some co-extensive territories where there was more than one Topco member selling Topco-branded products. If they had brought that case, if they had put on such evidence, we might have a different record. But, on the record, Topco was clearly procompetitive, and the Supreme Court only went the way they did based on legal formalisms—the *per se* illegality of horizontal agreements which is exactly what Louis Brandeis himself rejected.

I would say there is a good way to handle this today. My writings offer a positive way forward to have more vigorous antitrust enforcement but with sound principles. I would say, in response to Sandeep, actually, if a group of smaller competitors gets together and wants to engage in concerted activity in order to better compete against their larger rivals, and in fact very often replicate what the larger rivals are doing on a unitary basis—that's the case of *Topco*—then a rule of reason analysis should apply and not a per se treatment.

Price fixing would still be per se illegal—price fixing is not a way to compete more effectively against your larger rivals—but this type of joint venture or collaborative agreement to compete more effectively should at least get rule of reason treatment. I think the *Topco* Court was in error in that respect.

BILL KOVACIC: Thanks, Carl. That's great. I'm grateful to both of you for drawing out the fascinating foundations in the district court that lie beneath a lot of the discussion and in many ways aren't drawn out in the Supreme Court decision. That's really helpful.

Diana, please?

DIANA MOSS: Thanks, Bill, and thanks for having me on the program today. Good to see everybody.

I want to add a different angle here on what has already been said. That is to ask: How would the case have turned out if it were to play out under today's market conditions in the retail grocery industry?

The hope would be that the decision would be the same—that this is a per se violation with no redeeming procompetitive benefits attached to it—but I think the observation here is it would have been a much tougher case for the plaintiff given market conditions today.

Those are that we have had massive consolidation in retail grocery by large chains leading to higher concentration in regional markets. Enforcement in retail grocery happens at the Federal Trade Commission, as you know. The big boxes and the large chains are known to engage in discriminatory practices which are designed to ice-out smaller independent grocers—things like discriminatory packaging policies, volume discounts, stuff that the independents just can't pull off as smaller-scale market players.

Challenging a Topco-type agreement today would likely be more difficult because of consolidation in the large actors in retail grocery. Namely, the procompetitive rationale that it allows the smaller players to compete more vigorously—could be given even more deference by courts since smaller independent grocers may struggle to compete against larger, consolidated chains. So that's number one: I think that whole balancing under the rule of reason would have been a much more intensive debate if the case were to play out again today.

Second, I think we should ask, for the very small portion of restraints that remain, whether they would be evaluated differently against the current backdrop of high concentration in critical markets. It was really future or potential competition in *Topco* that was at issue, or a prohibition on expanding into other territories.

We see a lot of issues today that relate to potential or future competition, not only in digital tech but in other sectors as well. So, if the case were to be replayed today but in a different industry where the restraint goes to managing potential competition in highly concentrated markets, then it does make us wonder how the arguments would have gone for both sides.

BILL KOVACIC: If I could just ask for a second, Justice Moss, as you sit on this exalted panel, do you cast a vote to exculpate the independents or do you condemn them with another standard?

DIANA MOSS: I would hope the outcome would be the same if this case were to play out again today. Despite the plight of the independent grocers, I would hope that a per se restriction of this magnitude would be viewed similarly by the courts.

BILL KOVACIC: In addition to the hot tub, we could say we're sitting in that wonderful marble building in back of the Capitol. This is the conference of the Court and we are just chatting among ourselves about what we do here.

Thank you, Justice Moss, for responding to that question.

If I could turn next to Maureen, please?

MAUREEN OHLHAUSEN: Great. Thanks, Bill. Thanks for having me in this interesting discussion and interesting format.

A couple things. One, just a fundamental question: I would hope that this case would turn out differently if it were litigated today. I would hope the DOJ would never bring a case like this. I think that the idea of these formalities being placed on what seems to be a procompetitive kind of approach, where you might need some ancillary restraints to allow essentially a joint venture to operate, would get a better understanding in the courts and in the agencies today.

I disagree with Diana about the state of competition in the grocery industry for consumers today. I think consumers have a lot of different options available to them. I know this is all based on the question of the consumer welfare standard, and I think we need to look at the consumer choices there when you look at the ability of new competitors in the market, like ALDI and like Lidl, to come in and really disrupt; and we've seen it previously with Walmart and other players going back in time.

One thing that Sandeep had focused on that also really caught my attention—because I think this is important and will become important even more as we turn to the next case about the washing machines—where even the *Topco* Court said, "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion"—and I would even put other values in another part of the economy—"this too is a decision that must be made by Congress and not by private forces or by the courts."

I think that is very key. Even though I disagree with the outcome of *Topco*, I think that is a very important point to be made that needs to be part of this discussion, which has to do with who is the right decider, who is the expert,

separation-of-powers issues, and legitimacy of the antitrust agencies taking on a wider role.

I think *Topco* has lots of interesting things in it, but I would certainly hope it wouldn't be decided the same way or even brought the same way today.

BILL KOVACIC: Thanks, Maureen.

I'll just note that Justice Blackmun in the case had a concurring opinion where a point that all of you touched on certainly came to mind for him. He says: "The bigs [the other grocery store chains], therefore, should find it easier to get bigger and, as a consequence, reality seems at odds with the public interest," but then he says, "I think I'm cabined by the existing doctrine and I can't do anything else." So there's an evident discomfort on his part as well in deciding that you're going to pull the trigger using a per se rule.

To go through our panel of Justices, we have not had an economist on our Supreme Court—though Fred Jenny shows that courts can do that in other countries and function well—but, Dennis, if we bring you in at this point, what do you think about the outcome and about the reasoning, please?

DENNIS CARLTON: I think the case was wrongly decided for a variety of reasons, many of which have been already touched on.

First, I don't see how this can be considered per se. It is not the type of conduct that is a naked restraint that invariably harms competition. The Court decision makes it clear there are other factors going on. In particular, the district court made it clear that this wasn't a restraint that had no offsetting value; and if there's an offsetting value, it's not the typical type of restraint that a per se rule should be designed to address.

Second, this case—reminiscent, unfortunately, of the recent *American Express* case[8]—is an instance where the Supreme Court seems to completely ignore the district court's finding that in fact the conduct is procompetitive—I agree with the point that Carl made—and that strikes me as not only improper but it is interesting because the dissenting opinion by Chief Justice Burger seems to get it exactly right; he goes through the economic justifications for what's going on. Again, it reminds me of the *American Express* case where I really like Justice Breyer's dissenting opinion because he gets the economics correct.

What's interesting to me, especially in hindsight, in looking at this is we know the Supreme Court subsequently went on—in decisions like, for example, *BMI*[9]—to recognize that coordination among independent parties can sometimes be justified and procompetitive if a new product comes out.

If you look at the history of Topco—and I went back and looked at some of it—before Topco was created, these private-label products didn't exist; that is, the existence of Topco enabled these new products to exist. In fact, Don Turner, the economist-lawyer who brought this case—he was the Assistant Attorney General—appears to conclude that ignoring this fact was a deficiency in the case and that *Topco* was wrongly decided.

That has to do with the per se rules and what the Supreme Court did and how it ignored the rule of reason.

But then, if you just look at the underlying facts—if you believe them; I'll come to that in a second—the market shares are so low, I would say, even though I'm not a big fan of market definition, if you assume that the market definition is meaningful and that these shares are remotely correct, why should I worry about this case as raising competitive issues? I'm worrying about stuff that can't possibly matter very much.

Under a rule of reason I would agree with the district court judge, Judge Will, about deciding the case favorably for Topco, but I might have been even more positive than Judge Will because the shares are so low.

Let me end on something that Diana brought up, kind of an interesting historical note. The question is: Did the economic justifications that Judge Will endorsed, finding that it was procompetitive, turn out to be true? So you can look historically and ask: What happened to Topco; did it disappear? The answer is: No, it's still a thriving firm. So any suggestion that it needed these restrictions to survive is too strong. But still, even if you accept that Topco would have survived, my view is that this case clearly was incorrectly decided because it failed to use the rule of reason and instead used the per se rule and ignored the findings of the district court including the low market shares.

BILL KOVACIC: And as you point out, Dennis, the interesting subsequent jurisprudence might suggest that at least we'd have a different methodology coming out of *BMI* for testing the restrictions.

I guess what is intriguing about the case is that in the 1990 *Palmer v. Bar Review* case,[10] which didn't seem to involve any plausible justification, the Court says horizontal allocations of territory are per se illegal—and what case does it cite? *Topco*, as though that were the only thing going on in the case—which makes one wonder: as they have written later decisions, how do they situate these cases in the stream of jurisprudence? *Topco* is cited as a case regarding a horizontal allocation of territories. Is that all that was going on, or was the Court writing a per curiam opinion just having sort of a bad day at the office and not thinking very hard?

Tommaso, the notions at issue in these U.S. cases are not completely alien to global experience, and the European Union has a large jurisprudence and experience with the rough Section 1 counterpart, Article 101 (TFEU) and the criteria that allow some relaxation of the categorial ban on object defenses in Subsection (3). As you read this decision, what do you think about the result and what do you think about the methodology in *Topco*?

TOMMASO VALLETTI: Thank you, Bill, and hello, everybody.

I don't know much about the case run in the United States half a century ago—it's a bit old, I think—so we can move on to some other questions.

I will just comment that we don't have large disagreement on the panel on this one. My view is that today we would not run a similar case in Europe, for sure. This is not one of the priorities that we have in general in the European Union or in competition policy.

From the economics point of view, there is alignment on the panel that territorial restrictions with such a per se treatment don't come out of the economic literature at all, plus there is a common sense that with small market shares what is the harm? So I don't think a case like this one would ever be run today. If anything, we have a different problem with the large retailers now, certainly not with the small ones, so the emphasis would be in a different place.

Also, I think the European system is flexible enough to accommodate this. You mentioned that of course we have restrictive practices that are sanctioned by Article 101, but then there is Paragraph (3), which gives exemptions; so this can easily be one of those instances where an exemption could be sought in order to be approved, as we have done on several occasions.

The only thing that Europe is very keen on is preserving the single market; so if these territorial restrictions were to affect the integrity of the single market—for instance, if a restriction could affect the trade between Germany and France or something like this—that would be seen in a different perspective. I don't think that the *Topco* case has any such features, so I don't think it's particularly controversial nowadays.

BILL KOVACIC: Thank you, Tommaso, and we'll come back to you very soon on one of the interesting applications of this concept, the *Washing Machines* case.

I'd like to ask the whole panel, and any of you who want to come in on this, please do just jump in: Justice Marshall has a very gloomy take on the capacity of the courts to deal with what he refers to as "difficult economic problems." He says, "The fact is that Courts are of limited utility in examining difficult economic problems."[11]

Is that a fair assessment in your eyes in watching courts—and some of you have watched courts from the witness box—and you have watched them in formulating enforcement programs. How true is his assessment of the capacity of our judicial system to deal with any factor you want to choose, but to deal with the analysis of complex economic problems? Is that a fair take and is that a good justification for using bright-line rules to decide antitrust cases?

DENNIS CARLTON: I think bright-line rules make it easy for the judge, but it means that you could well be giving up a lot in situations where you think discretion would allow someone to improve matters competitively. I mean there's no doubt it's difficult for judges and juries to evaluate complicated economic cases, and you often have cases where well-respected experts appear on opposite sides. One of the values of a hot tub, like we're having here, is when that happens, you can try to narrow why the experts are disagreeing. There's no question there can be hard, complicated decisions, but I don't think just because the world is complicated that we should do things like say you have to have very bright line rules that prevent discretion in circumstances where you hope reasonable people would come to the right conclusion.

The only thing I would add is I have found the FTC and the DOJ are obviously more sophisticated—because they have staffs of economists—than a jury or a judge. Carl and I both teach in a course where we teach antitrust to district court judges, and I recognize the difficulties they face.

My experience is that a good economist should be able to translate into common sense what he thinks is going to happen based on sophisticated models. If you can't do that, if you can't explain something to your parents for example or your kids who aren't economists, there may be something wrong with your economic case.

I think the sophistication can help buttress common sense and that's what an expert should be doing, using sophisticated models and then being able to explain them in commonsense ways. That's my hope; otherwise, you'd really have to give up.

BILL KOVACIC: Go ahead, Tommaso. You're next.

TOMMASO VALLETTI: I will disagree on this one with Dennis in the sense that, coming from an academic environment but having seen the practice of economics at work, I do favor more and more the use of bright-line rules as a response to a political economy environment where theoretically reasonable economic approaches have yielded distorted and typically underenforcement outcomes. There are resource constraints and enforcers do not have the same firepower that many of the consultants have, and so we see some discussions that are led just by the number of people you can put in the discussion.

As an economist, I see the advantages actually of having bright-line rules in order to avoid discussions that have nothing to do with realities. Very different from what Dennis said, they become over-sophisticated discussions that judges do not understand and they yield the result that they have yielded, which is, in the past thirty years, progressive underenforcement of antitrust in our economy. So we have seen in practice how this has panned out. Therefore, because of the practicalities, bright-line rules are the way to go, and this is coming from a very orthodox economist actually.

BILL KOVACIC: I've got Carl, then Diana. Carl, go ahead.

CARL SHAPIRO: I have testified in a good number of cases, almost all for the government in recent years, and I see a

wide variation among the district court judges in how they handle or process quantitative information and economic arguments.

I hesitate to generalize because there are so many differences, but I certainly have seen cases where I thought the courts had difficulty. And, as Tommaso says, they often see perfectly well-credentialed economists on both sides and they don't know what to make of it; so that's just kind of this "battle of the experts."

But I'm not willing to go with a whole bunch of per se rules. I just think we'd give up too much accuracy. It would just be a step backwards.

So what do I recommend?

First, some degree of judicial training helps.

Perhaps—and this has been proposed—specialist panels to handle some of these cases. Consider what the United Kingdom does. I testified once in front of the Competition Appeals Tribunal. I was very impressed with the three-judge panel there. So that's another way to go.

All that would be a big change, obviously, procedurally, and require Congressional intervention. But working within the existing system, I see a series of rebuttable presumptions with more focus that would favor plaintiffs and government enforcers more, that's my response.

I agree with Tommaso that we've had this drift in an anti-enforcement direction, but you can reverse that without going to per se illegality. You can have rebuttable presumptions.

A good example would be the *Actavis* case,[12] where I really appreciate the Supreme Court ruling that favored the FTC being able to bring pay-for-delay pharmaceutical cases, but they could have been so much sharper, by establishing there's a rebuttable presumption that any transfer of value from a branded to a generic is anticompetitive, with a very limited ability to rebut that for the defense. They didn't go there at all. They threw things wide open and have made a mess in the lower courts as a result. That sort of thing could and should be avoided.

BILL KOVACIC: Yes. I flinched at the missed opportunity there, Carl, for the Court to have said more. I see in the reverse payments Supreme Court opinion the frustration of Justice Breyer being unable to get the additional vote to go with him to provide the guideposts and thinking: "this is the best I can do." Exculpation is not the answer, but I can imagine him saying, "I teach this stuff for a living; this has been my whole life; for God's sake, I know what I'm doing here. Give me the benefit of the doubt," but not getting the additional vote on that.

Diana?

DIANA MOSS: I just want to point out that the economics of the *Topco* case weren't very complicated. If only those judges could be around today and looking at the Big Tech cases—*Facebook, Google*—looking at some of the big vertical merger cases—like *AT&T/Time Warner*—boy, it makes you wonder how they would view the complexity of the economic landscape behind these cases today.

You know, there's no doubt in the *Topco* case that an association that was designed to ensure quality control and to reap the benefits of both purchasing and the consumer bump in demand for trademarked products—that's all absolutely legitimate stuff. The key question in the case of course is: did they have to engage in territorial restrictions to deliver that?

I want to also point out that the major reason they engaged in this restraint was so that they could compete better against their larger rivals. That is a very slippery slope argument, namely, that certain forms of anticompetitive conduct are necessary to counter the market power or bargaining power of other market participants. We see it in Section 1 law and we see it in Section 7 law, and this is where judicial education is really critically important.

For example, mergers that are justified primarily on the basis of bulking-up to be able to better compete against your other rivals are commonplace now. Look at the recently announced merger of Spirit and Frontier; that merger is motivated entirely, if you read their public reports, by a need to bulk-up to be a better competitor.

Okay, so when does that all stop? That's the slippery slope. As consolidation and concentration increase and this justification is offered up again and again and again, ultimately you could end up with a duopoly in every market.

The same thing on Section 1: If this restraint in *Topco* was allowed to move forward for the reason that they needed to be stronger, more insulated competitors, then other agreements would slip under the radar screen; and eventually we could see rivals colluding or coordinating in fundamentally anticompetitive ways.

So I think when it comes to the role of economic analysis and how judges view this, the "snapshot in time" approach is becoming more of a liability, because as we see markets consolidate and concentration grow—not in every market, but in some really critical markets—it is going to be really important for judges to consider what the motivations for these types of mergers and conduct really are, which is to be bigger so you can compete better. That's not a particularly legitimate justification for those types of economic activities.

BILL KOVACIC: Go ahead, Carl.

CARL SHAPIRO: It seems like you are rejecting the findings of fact in *Topco* about the necessity of the territorial restrictions based on the testimony of two experts on supermarket merchandising and no live witnesses by the DOJ. I agree that's an important finding, but that was the finding. So I'm not sure what you're saying when you say "the economics here is straightforward." That was a factual finding about economic effects. Is your whole view based on rejecting that?

DIANA MOSS: No. I should have been more clear. I'm not rejecting that. I think the economics of this case are very straightforward. I'm thinking more about the increasing complexity of cases over time. This includes, for example, nonprice effects and quality effects in digital tech Section 2 cases and elimination of double margins in vertical merger cases, which as you know, Carl, are controversial. So it wasn't so much a fact-specific comment, but more of a larger observation about growing complexity in business models and economic behavior.

DENNIS CARLTON: I'd like to add something different than I thought you were saying, and I've written about this, so I wanted to get your view.

I don't think this has anything to do with *Topco*, but you do see a lot of justifications for mergers where the merging firm says, "I have to get large because I have to negotiate with the other side and they've gotten large." And then of course you hear the other side saying, "Well, I have to get large because the other side is getting larger, so that I can bargain better." That makes me a little nervous because you wind up with one firm on each side if you believe that argument; so that is almost saying, "I don't believe in the process of competition, that competition is going to work."

I think that is a concern in some of the cases that I've seen and when you listen to justifications for why people are merging. I think people should pay attention to where that leads in a dynamic sense.

In terms of having presumptions, it's right to have them, but there's a point I want to make about that. You can modify presumptions over time in light of the accumulated evidence, and this is what I think is critical. What is scholarship telling you about what happened—what happened in this case; what happened in that case? As you learn over time, that's how your presumptions should change about what you think is acceptable behavior and what you think is not acceptable behavior.

It also changes the confidence you place in the methodology that economists are using. Are they using a methodology that in the past turned out to be correct or not?

So on this issue of bright line per se vs. discretion, I think it's best not to have lots of bright line rules—other than for behavior that courts know from experience can only harm competition—and instead have judges use discretion based on presumptions that are based on the continuing accumulation of knowledge based on past behavior, past cases.

BILL KOVACIC: I'd like to ask Sandeep and Maureen if you'd like to come in on this issue of institutional capacity—that is, who should do what? What's the appropriate role for the courts? Whatever our aims or objectives are, do we have the right technology in the field of decision-making to come up with good answers here? Again, is Justice Marshall's lament correct that it's just too hard so we need really clear rules; or are there methodologies and institutions we can use to take into account more fully other considerations; and maybe, on Tommaso's point, by bolstering the capacity of the institutions entrusted with enforcement and decision-making? Do you have thoughts about this institutional question about the capacity of our system?

SANDEEP VAHEESAN: Yes. Like Tommaso, I strongly favor bright-line rules and have deep concerns about the rule of reason.

Part of my objection to the rule of reason is courts are forced to make extraordinarily complicated decisions, often weighing unlike quantities and qualities against each other; and these judges are generalists who generally don't have specialized training in economics, finance, or accounting.

But I think it goes beyond that because judges are being asked to make value judgments: how can firms cooperate; how can they compete? I think Justice Marshall got it exactly right in *Topco* when he said:

> To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

He realized these are not technical questions that can be resolved purely through technical means; we're implicating normative questions—what does our economy look like?—and we live in a representative democracy, and these questions should be answered by Congress.

This is a problem that extends beyond antitrust, but the American judiciary is extraordinarily powerful in deciding these basic questions of political economy.

This week, I came across a good quote from Sabeel Rahman and Kathy Thelen. They said, "Compared to other rich democracies, the American judiciary is more powerful, more politicized, and more directly involved in shaping outcomes in the political economy."

I think that's probably most acute in antitrust, but we're punting important questions to the courts in general. I think we saw this in the recent *NCAA v. Alston* decision,[13] where the Supreme Court as well as the lower courts weighed the demonstrated injury of the college athletes against the purported benefits to college sports fans. These are decisions that the courts shouldn't be making. Congress should be making these decisions one way or another.

BILL KOVACIC: Thanks, Sandeep.

Maureen?

MAUREEN OHLHAUSEN: Pulling this back to the question of the consumer welfare standard, I think trying to adopt a standard that accounts for all other societal values only exacerbates that problem of making a difficult decision and a more politicized decision. I have definite concerns about that.

But I also think one of the great strengths of our historic approach to antitrust has been the flexibility that was built into it. This is not formalistic, and we have moved away from strict formalized rules.

I also think one of the other things that's a little bit misunderstood is: have some of these presumptions worked? They don't work in isolation. Christine Wilson and Keith Klovers have an excellent piece about how, as we've gotten more and more narrow market definitions, these presumptions have made antitrust enforcement even more strict, more rigorous, and the challenges of showing out-of-market efficiencies, because the market is so small, even higher.

I don't like the idea of saying, "Well, let's do that even more, and let's take the flexibility out of our system," because I think we have had a very dynamic economy with a lot of flexibility as we've moved away from some of these economically untethered kinds of approaches.

But on your point about institutional capability, you mentioned *Actavis* and how the courts made a mess of it. Well, the FTC should never put those cases directly into court. They should have brought them in the Part 3 process and given more content to what a rule of reason approach in a pay-for-delay case ought to look like.

BILL KOVACIC: Part 3 is the administrative adjudication mechanism at the FTC.

MAUREEN OHLHAUSEN: Right, exactly, administrative adjudication.

I don't think that's a reason to say, "We need more bright-line rules." I think it's a reason to say the FTC should have used its comparative advantage to do that.

And in the *AMG* case, Justice Breyer cited a speech that I had given, called "Dollars, Doctrine and Damage Control: How the FTC's Pursuit of Disgorgement Impacts its Competition Mission," which essentially made that argument that I just made, which was: by pursuing money in court, the FTC really lost an opportunity to define what a rule of reason approach in a pay-for-delay case should look like.

When you're talking about some of the institutional capability, I put in a plug for the FTC's much-maligned Part 3 process. It has that kind of benefit.

BILL KOVACIC: Let's go to the washing machines case for the next segment.

This is a case from the late-1990s from the European Commission's DG COMP, where we have a collaborative effort by appliance manufacturers to withdraw the production of more energy-intensive models to encourage consumption of more energy-conserving models, with the effect of taking what would have been lower-priced washing machines out of the market, replacing them on the whole with higher-priced machines, declining to import the more energy-intensive models, with the rationale being this will serve a valuable purpose of reducing a serious negative externality associated with energy consumption. Using the methodology that Tommaso referred to before, the Commission found this to be an appropriate form of collaboration.

I guess there are a couple of questions that *Washing Machines* raises, Tommaso. One is, from your perspective in Europe, is this a sound analytical approach for the Commission and other decision-makers going ahead? Does this foreshadow the greater consideration in competition cases of negative externalities that arise—for example, in the environmental policy area, as a way of asking: "What do consumers want? Consumers want a clean planet; they want to be able to live"—and are we going to see the incorporation of these kinds of concerns more generally into the decisions of competition cases?

Tommaso?

TOMMASO VALLETTI: Thank you, Bill. I'll respond to that, but sorry not to play according to the script.

BILL KOVACIC: You can go off-script. It's okay. It's a rule of a good seminar.

TOMMASO VALLETTI: The discussion is a bit weird, I think. We are discussing *Topco* and we are discussing the washing machines case. I think these are really narrow cases. I think we do need a system of bright lines, a system of rebuttable presumptions, but where the problem is. The problem is not *Topco;* the problem is not *Washing Machines.* The problem is very large dominant firms with market power; that's where I want to have a system of rebuttable presumptions—I mean I don't care too much about *Topco* because there is not an economic nor a political priority there.

And I'm very happy to have also on the side a system of safe harbors for firms with very small market shares. That's absolutely fine by me because we cannot go on and say, "Let's analyze case by case" because enforcers do not have the resources to do that.

Let's prioritize what's relevant to our society. I know that people love to talk about precedents and weird legal cases, but I want to be more pragmatic and see what the problem in our economies currently is.

When it comes to sustainability, Green stuff, and the washing machines—in *Washing Machines*, indeed it was seen that the environmental benefits to society were larger than the possible costs of withdrawing some washing machines. It's a case from 1999. There hasn't been anything of this kind in the next twenty years. I think the pendulum is shifting again.

But let me say a few things up front because I would like people to be aware there is another dimension of this discussion here.

First, when we are talking about the environment, obviously we are talking about a gigantic problem that involves externalities, and it involves also inter-generational transfers, current generations versus future generations; so there

we need a system of taxation and subsidies. Maybe it's one of the few areas where there is agreement among economists that this is the way to go. And I do see a big risk of greenwashing here.

All of a sudden, it has become of interest to see whether we can relax competition policy to take into account environmental concerns, and usually it's in the direction of having less enforcement; because otherwise we cannot allow firms to do fantastic things, let's have less enforcement, as if we have had a lot of enforcement until now.

That's exactly what British Petroleum, Exxon, and these other companies want to hear because otherwise there are political priorities to set high carbon taxes; but they don't want to have carbon taxes, so this is diverting the attention by saying, "Don't impose carbon taxes because we can do marvelous things via competition law if you allow us to. Let us talk to each other and we will find a solution for society." This is very dangerous, and I hope the profession is aware of that, that we have economic and political priorities and we should spend our resources where the problem is.

Second, there is the very curious fact that the legal profession of antitrust is super-interested in relaxing competition policy in this respect. Surprisingly—or maybe not surprisingly—in Europe it's the same lawyers from the big law firms that were attacking the Commission for adopting, within the consumer welfare standard, things that were not only limited to static price effects. This happened when we were introducing an innovation theory of harm in mergers; or when we were doing consumer choice in *Google.* The same lawyers of those companies are now there to say we should relax competition policy to take into account environmental externalities.

It's curious by their own standards. They were asking us: "Are you sure that the burden of proof was really met when the Commission analyzed patents as a measure of in innovation for a firm? That's not enough to measure the impact." Now, instead, they can go all the way without any estimation of anything because that's convenient for the client.

The other thing that I should say, which is really curious intellectually: When we are talking about adoption of greener technologies that obviously are bringing positive externalities to society, a market system basically is not enough; you want prices to be low to encourage adoption. How on Earth by allowing less competition are you going to have a positive impact on adoption? The narrative that we are being told is that firms fear the impact of competition policy if they talk to each other, which is really funny to me.

So I would shift the burden of proof to those who want to relax competition enforcement, which is already lacking by a lot, and to see why I need to listen to them and to understand what their fear is. Is it really that they fear these super-enforcers and that's why they are not bringing products into the market? Competition to me is a way of bringing prices down, of bringing more innovation, including innovation in the greener technologies.

So I'm surprised that this conversation is happening. In fact, the conversation is not being led by Greenpeace or advocacy groups; it is led by the very conservative lawyers who are defending the corporate giants, and they see this as a useful tool to relax an already very lax competition enforcement field that I have personally witnessed over the past many years.

BILL KOVACIC: On that, Tommaso, I've seen recent presentations by folks like Michelle Meagher and Simon Holmes, whom I would not associate with that cohort, who are fairly adamant in saying that competition policy has to take into account the externality concerns and that it deserves to be front and center in the analysis.

Am I misinterpreting them?

TOMMASO VALLETTI: I don't think you are misinterpreting them. They are saying that we should do a different type of economics because economics allows also to put a price on the value of clean air and also other things that exist. These are not tools that are used in antitrust analysis.

They generally are saying that the standards used should be more open than the usual price effects. I'm totally in line with Michelle and Simon, but also I don't think they see the other aspect that I was mentioning earlier, which is the greenwashing effect.

I am currently not involved in any antitrust case, but I am on the board of the Financial Conduct Authority and I see the same thing happening there. I see there are new financial instruments that should be approved by the financial regulator in order to improve our society from the environmental side, and this is constantly pushed in order to delay the adoption of a more serious discussion on carbon taxes.

BILL KOVACIC: Sandeep, do you have some thoughts about taking on the kinds of concerns about environmental externalities in deciding what kind of collaboration is appropriate?

SANDEEP VAHEESAN: I echo much of what Tommaso said.

I reject the idea that we should be doing open-ended cost/benefit analysis on a case-by-case basis under the rubric of the rule of reason. I think it's completely unworkable, it's a really absurd way to administer a system of law—this is antitrust law, not antitrust applied economics. A much better approach would be to have a series of per se rules and presumptions, and yes safe harbors. And I agree with Tommaso we also need per se rules and presumptions for dominant firm behavior, not simply for horizontal coordination.

The *Washing Machines* case in an interesting one. For me it's on the borderline between beneficial cooperation and harmful collusion. My understanding of this case is that the firms were trying to shift competition away from sticker-price competition, in which consumers are looking for and buying the cheapest washing machine. These often use

a lot of electricity, not particularly good for the environment, and they are trying to shift competition more toward life-cycle costs: how much it costs to not only purchase but operate a washing machine over its entire ten- or fifteen-year lifetime. It seems desirable in a sense that they are trying to shift competition to a more socially beneficial dimension.

But part of me wonders: Why aren't they already doing this? Why isn't one of the big manufacturers leading by touting the energy efficiency of their washing machines? Why do they need to come together to achieve this industry standard? So, at a minimum, this type of coordination among firms is an oligopolistic market that needs to be subject to some type of public oversight to ensure that they are coordinating on what they stated that they would coordinate on rather than the price or other terms that might be more suspect. This could be handled through something like the Business Review Letter process in the United States, and I gather there's something similar in the European Union.

This is very much a borderline case. In an ideal world, national legislatures and regulators would be mandating these energy efficiency standards and we wouldn't be outsourcing basic questions of public policy to manufacturers. However, given that we are not in the best of all possible worlds, I think sometimes the regulators, when exercising their prosecutorial discretion, need to recognize that this type of coordination might be beneficial—not necessarily worthy of protection, but deserving of inaction.

BILL KOVACIC: I'd just note that, again, I mentioned a couple of people who have been involved in the debate would say: "Ideally you'd have good carbon taxes, ideally you'd have good energy efficiency standards, ideally you'd have the first best solution at work; but they're not working, and that competition law ought to be a supplement to back that up," just to note their observation on that.

Carl?

CARL SHAPIRO: I would take a much more strict antitrust enforcement approach than Sandeep. I don't think this is a borderline case. I think this is an easy case in which this type of agreement among competitors to withdraw products from the market should be condemned.

To be clear, the agreement was to stop selling certain inefficient and low-priced washing machines. There is a lot of horizontal collaboration that is quite beneficial; a lot of standard-setting, for example. In my view this is not all that complicated for the courts. If horizontal collaboration is to better serve customers, to compete more effectively against others, then that's good; if it's to withdraw products or raise prices, that's bad. So it's not that hard, I think.

Now in terms of the goals here, there are a number of things that they could have done that I would think would be perfectly allowable in terms of horizontal collaboration. Sandeep mentioned moving away from sticker-price competition; okay, it would be perfectly fine as far as I can see to have a group say, "We are going to establish an energy efficiency standard, we are going to have an Energy Star-type label on these things, and we're going to all agree what that looks like, and we'll all agree that in order to get this label you have to meet certain performance standards;" but not "We're going to stop you from selling less efficient washing machines." That's the difference. The energy label gives more information to consumers and then facilitates competition on that dimension to get the label with a logo, etc.

Likewise, it could be perfectly fine, along the lines of what we actually have when you buy an automobile, to have a label that says "total cost of ownership for this washing machine over the next five years" or how much electricity it uses for a year, all that stuff, and that could be done collaboratively. I think that would all be fine. It's more information for consumers in a standardized format so they can make better decisions. So these goals can be achieved to some degree.

Now, what about going the next step and just saying: "No, that's not enough. People won't respond. We need to actually withdraw those products from the market?" That could be a good thing. Of course, the government could pass a rule saying "you can't sell a washing machine that's very inefficient"—we have that with automobiles pretty much, with fuel efficiency standards.

What I cannot accept, will not accept, is that we are going to cede private companies the power to make those decisions. Those should be public decisions. Goodness knows, we have ceded way too much power to private corporations both because they have too much influence in Congress and because billionaires can do all sorts of stuff and it seems like they have too much power in our society.

I want to take away the power from the private companies, and this power to withdraw these products from the market should be something for which the public or Congress has control—or state legislatures; I would say too this could be done at the state level.

Where does this stop? Okay, the oil companies get together and say, "We are going to form a cartel because we are going to raise the price of oil and gasoline because it's very good for the environment." Is that going to be allowed? What about the coal companies and they're going to shut down mines? What about tobacco companies? There's no end to this.

We learned in the 1930s this didn't work. After the National Industrial Recovery Act, there were all sorts of permissible cartels; and it actually prolonged the Depression.

So stop. No, Sandeep, this is not a tricky case; this is an easy case.

BILL KOVACIC: Diana?

DIANA MOSS: A couple of thoughts on this one.

First of all, I think this *Washing Machines* case in the European Union was really clever. They managed to exempt an agreement that posed relatively straightforward concerns over anti-consumer impact but shoehorned in

environmental policy issues that were really at the heart of the case.

I don't think you would have seen a similar situation in the United States. Let's go back to *National Society of Professional Engineers*. That was really all about limiting competitive bidding for the sake of producing very safe and high-structural-integrity buildings. But the Court said the purpose of the analysis is about forming a judgment about the competitive significance of the restraint, not to decide whether a policy favoring competition is in the public interest or in the interest of members of an industry. While it's not an exact parallel, I think if you re-enacted the washing machines case in the United States it would have been a very different process and likely a very different outcome.

But even so, to the European's credit, in the analysis over there, they did manage to sneak some non-competition goals in under a traditional type of consumer welfare standard. For example, they used the "lifecycle" cost of owning more efficient machines essentially as a proxy for price. That's one way to get the analysis to reflect more embedded environmental concerns.

Other examples outside of washing machines would be looking at degradation of environmental quality as a result of livestock mergers or mergers that consolidate livestock-related facilities.

When I was at the Federal Energy Regulatory Commission working under a public interest standard for merger reviews, we looked at traditional competition concerns, such as the effects of withholding electricity output to drive up price. But under that standard, we also assessed the effects of mergers on reliability.

So, even working within a consumer welfare standard, I think there are creative ways to shoehorn in these non-competition concerns.

If you're talking about policy, then there are three choices: (1) to let antitrust do what it does best under a "no harm to competition" standard; (2) to change the antitrust standard to resemble more of a public interest standard, to include social, and environmental, and other goals; and (3) to rely on other complementary policy tools, as we have just heard several people discuss here.

If the decision is going to be to change the antitrust standard, then I think we have to ask: Where do these non-competition goals fit into the analysis? I think that is after the burden-shift in rule-of-reason cases, or on the efficiency side of the equation, where non-competitive benefits might enter. That's where the hard thinking would have to happen. But by doing so, we open up a Pandora's Box of how to measure non-competition-related "efficiencies" and is the standard adequate for that or not?

I think it also raises questions of administrability: How are courts going to look at non-competition goals as part of traditional antitrust analysis?

I think this is a very difficult debate. We, inside the antitrust community, and certainly those outside the antitrust community, haven't really given enough thought to what other policies could be used or deployed to work in tandem with antitrust to achieve non-competition goals.

BILL KOVACIC: Thanks, Diana.

Maureen?

MAUREEN OHLHAUSEN: Let me say that I agree pretty strenuously with Carl about the fact that this shouldn't be a close case at all, the idea that these competitors would get together to take essentially a lower-cost product off the market. I agree with Sandeep, too; I think that there are other ways that they could have pursued doing this through certification or what have you, and the idea that they were going to step in and take over the decision that I think should be made by a different part of the government that has more expertise and more of the public interest in mind would make sense.

But, building on something Diana said, I think it is really important to look at this through the lens of the *Professional Engineers* case, because when I was head of the Office of Policy Planning and when I was Acting Chair, I focused on getting rid of unnecessary occupational licensing restrictions. Actually, I was very pleased to see that those kinds of efforts to focus on unnecessary occupational licensing also made it into the President's Executive Order.

But the justification that is so often used for the private actors to get together is a quality one; they say, "Well, we can't let those consumers make that choice to pick something less expensive or lower quality; that's not the best outcome—and, by the way, in our own self-interest as the Dental Board or the Cosmetology Board or whoever else; it just happens to fence out competitors and reduce competition." I would really have concerns about allowing this type of defense to take root.

In the *South Carolina Dental* case that was settled at the FTC, the legislature had made a decision that dental hygienists could go in and do cleanings and screenings in schools, and this was very helpful particularly to lower-income populations and minority groups as well. The dentists said, "Well, that's not the best quality, so we're going to pass an emergency regulation that says that's not allowed."

When you start allowing private self-interested actors to make that kind of decision, I just really fear for where that ends up. I think what we really need to do is say those kinds of quality arguments and balancing need to be made by the legislature or the regulatory body, the Environmental Protection Agency or whatever, that has expertise in that rather than purely made by the self-interested private parties.

BILL KOVACIC: Thanks, Maureen.

Dennis?

DENNIS CARLTON: I agree with Maureen and Carl. I am highly skeptical that it would be desirable to allow voluntary

cooperative action among profit-maximizing firms that results in, say, an increase in price from a restriction on competition, to be defended on the basis that it "achieves a social goal," that the firms define.

Let me just give an example. Suppose a bunch of profit maximizing firms get together and say, "Let's form a cartel to engage in price discrimination. We are really going to raise the price on the rich and we'll cross-subsidize and give it to the poor." I would not be in favor of allowing such behavior. (I note that similar justifications have been used in some hospital mergers, though if those hospitals are not-for-profit, that raises separate issues on which I have written, where I conclude that there is no justification for different antitrust treatment of mergers involving for-profit versus not-for-profit hospitals.)

I don't want to allow profit maximizing firms to engage in collective decision making that impairs competition based on the justification of achieving some social goal. Profit-maximizing firms have an incentive to maximize their profits, and I'm worried they will come up with all sorts of justifications for behavior that benefits themselves.

Now, there are well-known ways for horizontal collaboration to occur that can help competition. Standard setting is a good example. We know you can misuse the standard-setting process to harm competition—that's sort of *Radiant Burners*[14]—but it's also the case that standards can promote competition. I think courts can figure that out, and I'd allow that certainly; but I would not allow profit-maximizing firms to define social goals and allow them to achieve those goals through horizontal collaboration that restricts competition.

I know time's running out, so I'll just add one additional thought. When legislation is being considered for types of regulations that could restrict competition and raise price—say on the environment—and firms go and consciously mislead legislatures either by lying to them or misrepresenting what they'll do under a certain regulation, that too should be attackable as an attempt to restrict competition. I'm not a lawyer, but I know that behavior may be protected under *Noerr-Pennington*, and that troubles me.

When I was at the Department of Justice, I forged a collaborative relationship with the Council of Economic Advisers, and also we had someone at the Office of Information and Regulatory Affairs, which is the branch of government that looks at regulations. I said, "a lot of these regulations raise competition issues. Ask us for our advice before you make proposals, and we'll help you." I think that is the way to deal with these problems, not to allow voluntary associations of profit-maximizing firms to say, "don't worry about legislating us; we'll solve it ourselves." I wouldn't trust them to do that.

BILL KOVACIC: Tommaso, could I come back to you with one question before our last round? Am I right that you see a deeper concern throughout the system that; that as you expand the range of considerations, that process is terribly prone to capture, that our institutional framework now does not have adequate safeguards to avoid the inevitable capture by the bar that you describe, the corporate interests? Is that a fundamental vulnerability for our system, and how do you address it?

TOMMASO VALLETTI: This vulnerability I have encountered personally on many occasions. It is a difficult one to solve. There are a few ways.

First, by being more transparent. We lack transparency, starting with ourselves. The academics will never disclose that we do consulting, although we always refer to when we were back working for the enforcers. For some reason, our work for the enforcers is always mentioned, but our work for private companies never is. That's just a bare minimum.

The other way of addressing it is, as I said earlier, to reinstate a system of bright lines, some rebuttable presumptions. I really want—also economics is telling me—that it should be the large firms that have to tell the enforcers what they are going to do, why they need it, and to prove it, instead of the other way around. To me the burden of proof has to change quite substantially if we want to move on.

The United States has also not a very healthy system of revolving doors. While in Europe it is slightly better, in the United States it is pretty bad. But it is very difficult.

Academia is not engaged because academia is working in different ways, to input publication in a different way, so academia is underrepresented; and, instead, you have a set of think tanks and lobbyist associations which are overrepresented in this space because it's a collective action problem. We are as academics independent, and there is not such a thing as an opinion of the academic community; instead, there are think tanks, which are funded by Big Tech or by the Koch brothers, that are prepared to be in front of every discussion that is happening in front of the FTC or the DOJ. Therefore, people who are not versed in economics hear that and they think that they are bringing to the fore what is the economic consensus.

This is a very difficult problem to resolve, and it's a fundamental one. It's what academics have called a problem of thin political markets: "Antitrust, in a sense, is not salient enough, it's very technical, so let's leave it to the experts, let's leave it to us." But we are subject to influence like anyone else, and it's not in the more general discussion which is led around taxation or immigration.

I think in the past three, four, maybe five years the debate has changed, so the discussion among civil society has changed; and it has become more salient, and I think this is great. I don't think this is about populism; it's about politics, and it has always been about politics. I think it's great that a larger number of people are forming views related to this.

I want to say a last thing, Bill, back to the *Washing Machines* case in Europe. First, I disagree somehow that this would not be an antitrust case in the United States. First of all, it's a case from twenty years ago. It has not had

an impact afterwards. In fact, in the successive Horizontal Merger Guidelines it was mostly buried and ignored; so it hasn't made an impact until now. Things are changing now, so maybe we are back to that.

In European antitrust terms, this is really an example where you can evaluate in-market efficiencies because the claim in *Washing Machines* was that indeed there was a price effect of withdrawing some certain low-priced inefficient machines; however, the same users of washing machines would benefit from a cleaner environment if such methods were used, so this is a typical efficiency within our tools.

It would be more difficult, instead, to run a case if there were out-of-market efficiencies. Let me make a couple of examples.

If two energy producers in the United Kingdom where I live were to meet in order to decide to adopt a fuel that was more environmentally friendly, that would impact on a large population because everybody is an energy user, and therefore that would be an in-market efficiency that could be addressed. Instead, if two airline companies were to do the same on a certain fuel that, despite being energy-friendly, could increase the prices to some passengers but, however, the whole world would benefit from less pollution because these are gigantic flying objects which pollute a lot, that would be much more difficult in the current European framework to include it. That is clear.

My last comment is that Europe—and I think the United States too—has political priorities, which is fine; I think it's fine to have political priorities. In the European Union—unfortunately, the United Kingdom is not part of it any longer—the Commission sets political priorities, and then the directorates implement within their tools the political priorities that the European Commission has set. The European Commission is actually voted for by the European citizens.

Environment is one and digital is another of the current political priorities; so I expect DG COMP going forward to allow more and more thoughts about environmental concerns, which is probably fine. It means that we will have to evaluate sometimes in quantitative terms—using tools not in economics as we do in antitrust but economics in environmental application, which has a lot of those tools—or qualitative instruments, and then it will be a matter of judgment.

Going back to your previous point about people like Simon Holmes or Michelle Meagher, Bill, I think what they are saying is that it will be up to judges to make judgments and there will be more judgments that will be made in the next few years on environmental matters, including judgments on competition laws.

BILL KOVACIC: Thanks, Tommaso. Actually, they were talking about the Competition and Markets Authority being more involved. I can come back.

We have about a minute each for our other five panelists. A final reflection that you would like to offer for people to think about on the question of why we do this and how the framework for doing it might be improved?

Sandeep, please?

SANDEEP VAHEESAN: Thanks so much, Bill.

I think it's important to reflect on something Tommaso mentioned. This is all fundamentally political—What does our society look like? What types of competition are businesses allowed to engage in? What types of coordination and cooperation are businesses allowed to engage in?

There is no escaping that. Normative judgments need to be made. Given that the United States is a representative democracy, these judgments, as far as possible, should be made by Congress and the role of congressionally created agencies, such as the Federal Trade Commission. A corollary is that the role judges who are neither popularly accountable nor in possession of relevant expertise in general should be kept to a minimum.

BILL KOVACIC: Maureen, please?

MAUREEN OHLHAUSEN: We have a common-law system in the United States; and Congress did set out some very general parameters and the courts have interpreted them over time. Over time, they have moved toward the consumer welfare standard, even though, undoubtedly, there were different motivations initially to some of these approaches to antitrust law.

I am actually a fan of the common-law system, and I think it is perfectly appropriate for different voices to be part of that. I don't like the suggestion that if you have a conservative voice you are suspect, or if you previously were in the government and now you represent private parties that you should not be allowed to be part of that debate.

I support having this kind of ongoing, iterative process, not that there can't be corrections. One of the important things that I found over time in my role at the FTC was the need to ask, "Are we using the right tools? Are there anticompetitive things that we're missing and how do we identify those?" There are some really good examples of new approaches in hospital mergers that Tim Muris did. I am a big supporter of the *Actavis* case, but I think we could have done a better job getting it interpreted, what it means in practice.

So I have concerns about moving away from that case-by-case common-law approach to one that seems, to my mind, to be a little out of step with the U.S. tradition in antitrust law and in other law. We generally do have that common-law tradition, and I like the flexibility there; but the tradeoff for that often is complexity or some uncertainty.

BILL KOVACIC: Dennis, please?

DENNIS CARLTON: I'd summarize my views by saying that the goal of antitrust should be the preservation and

protection of the process of competition. I don't like to get involved with labels like "consumer welfare," "total welfare," this and that. I think they have been misinterpreted in the current political climate, even if among economists we could agree.

Why do I think preserving the process of competition is desirable? Because it generally produces outcomes that have been viewed as favorable—lower prices in the short run and the long run, increased wages, new products, incentives for innovation, and efficiency.

Competition does not necessarily lead to the correct income distribution, whatever you mean by "correct;" does not lead to a decline in pollution; does not lead to paying attention to Green policies necessarily; does not stimulate the macroeconomy necessarily; does not lead to optimal privacy controls necessarily. I think it would be a mistake if you bring all these other features—which are admittedly important—into the antitrust tent.

The reason is courts, the FTC, and the DOJ have a hard enough time figuring out effects of conduct on prices, wages and innovation. All these past cases have been about that, and there's a lot of disputes, and we've talked about some today. If you start adding topics like income distribution or climate change and ask people to put that into the decision-making, you are going to get a muddle, you are going to get unpredictable decisions, and my fear is they will be subject to huge swings based on the political party in power.

My own preference would be to deal with those important concerns and other concerns in a different way, through different agencies and legislation, but don't muck up antitrust with that; otherwise, you're bound to wind up harming what antitrust policy has so far achieved toward its goal of protecting the competitive process. That doesn't mean antitrust shouldn't be improved. But harming what antitrust has already achieved towards the protection of competition would be a big mistake.

BILL KOVACIC: Thanks, Dennis.

Carl?

CARL SHAPIRO: I think Americans have always placed a great value on competition and have never liked monopoly. Our antitrust statutes going back to the Sherman Act talk about monopolization being illegal and they talk about the benefits of competition, and the Clayton Act talks about preventing mergers that "substantially lessen competition." With that guidance from Congress, from the American people, these are economic concepts, and that is what we should continue to promote through the antitrust laws, following those statutes.

The consumer welfare standard was helpful because it made clear that when a firm, even a large firm, introduces a better product, for example, and that harms its competitors, maybe it takes even a bigger share of the market, that is not illegal; that is part of competition, even though it may lead to a more concentrated market. That was unclear to the courts, and the courts fixed that eventually. Such product improvements are a healthy part of the competitive process.

The consumer welfare standard as a term has outlived its usefulness. I have been saying this for about five years. I made this point when, I testified at the FTC hearings in November 2018. I explained this in some detail in my paper last year in *Antitrust* magazine, "Antitrust: What Went Wrong and How to Fix It."

I think Chicago School ideology has led the courts astray. Our goal should be to protect and promote competition. Those are economic concepts, that is what the statutes talk about, that's what we should keep doing. Protecting and promoting competition should be our north star.

We don't really have a consumer welfare standard. A firm raises its price; that's bad for consumers—but that's not illegal. The standard we are using is not based on a consumer welfare standard. It is based on protecting and promoting competition.

But, that does not mean protecting small or inefficient businesses. There are many other values that competition does not necessarily promote, as Dennis said. Those goals require other statutes, such as environmental regulations and sector-specific regulations, or income taxes—I could go on and on.

We should continue to do what the statutes say until Congress provides other instructions: protect and promote competition.

BILL KOVACIC: Thank you.

Diana, please?

DIANA MOSS: I'll be really interested ten years from now to look back on this debate over competition enforcement and policy.

I have to say, despite the richness of the discourse and the important conversations that we are having, and will continue to have in events like this, there seems to be a lack of recognition that declining competition is really a public policy problem. Public policy problems require public policy approaches, which means multiple tools in the toolkit.

We got off to a start, at least in the United States, where antitrust was identified as the lead dog, the tip of the spear, to solve all problems, including problems that pose non-competition concerns.

The debate in the U.S. has not been well informed by this toolkit approach, which is: How do we tap into other, complementary policy tools—intellectual property law, labor law, consumer protection law, sector regulation to bootstrap and support a public policy decision and approach to promote competition in this country?

We are burning a lot of fuel on this debate. The American Antitrust Institute has advocated against enforcement approaches and judicial outcomes that have weakened antitrust over the past forty years. We do worry that tasking

antitrust to achieve things it is not designed to do will exacerbate that problem.

BILL KOVACIC: I do wonder if out of the larger discussion comes a restatement of aims—that is, the abandonment of formulations that have become sterile—and, along with the discussion of aims, a discussion of how one goes about doing it, both the conceptual framework of purposes and the mechanism for actually carrying them out, with an extensive discussion about how each of those aims and objectives is likely to play out in practice based on what we've done in the past.

I am grateful to all of you for participating in the discussion, to look back for a bit as a way of looking ahead at what might come in the future; I see some overlapping segments of the Venn diagrams from the conversation; and I wonder about the larger institutional issues that all of you have addressed—some of them with more than a bit of gloom, others with more optimism—but the healthy concern, not simply in concept of what we should do but how we should go about doing it. What our system can absorb, how it functions, how it can be improved, I think is a very important ingredient of the discussion going ahead.

Finally, let me give a vote of thanks to those who made this format and this discussion possible: Fiona Schaeffer in the Antitrust Law Section of the ABA; Adam Biegel, who did so much with the organization; and Svetlana Gans—just to name three who were instrumental in putting this together—and others in the Antitrust Section who threw themselves into this.

And again, our panelists. I wanted you to join in this because you have thought about this so much; and, again, so many of you who have actually had to do this in practice, which is an enormous challenge as well.

It certainly was a part of my greater education to go from a classroom to being a public official and, instead of watching the game, have someone say, "Okay, smart guy, why don't you go and play yourself?" The policy game is a difficult and challenging one.

Thank you all for this. I see this as a useful step ahead in the future discussion of what we do, so thanks again to all of you. ■

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[1] United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945).

[2] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[3] United States v. Topco Assocs., 405 U.S. 596 (1972).

[4] 2000/475/EC: Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV.F.1/36.718.CECED).

[5] United States v. Topco Assocs., 319 F. Supp. 1031 (N.D. Ill. 1970).

[6] *Topco*, 405 U.S. 596 at 611.

[7] Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

[8] Ohio v. American Express, 138 S. Ct. 2274 (2018).

[9] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

[10] Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990).

[11] *Topco*, 405 U.S. 596 at 609.

[12] FTC v. Actavis, Inc. 570 U.S. 136 (2013).

[13] National Collegiate Athletic Assoc., v. Alston, 141 S.Ct. 2141 (2021).

[14] Radiant Burners v. Peoples Gas Co., 364 U.S. 656 (1961).