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TOPICALITY:

#### ‘Prohibiting’ a practice requires per se illegality.

Lee Mendelsohn 6, Director at Edward Nathan, “KIPA Conduct Amounts to Price Fixing”, Business Day (South Africa), 6/12/2006, Lexis

The first step in any competition law analysis is to define the relevant market. There are two components to an analysis of the relevant market, namely the relevant product market and the geographic market.

The relevant product market consists of those products and services that operate as a competitive constraint on the behaviour of the suppliers of those products and/or services.

The relevant product market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to substitute the product with another product or would cause suppliers of other products to begin producing the product in question.

The relevant geographic market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to purchase the product from other geographic areas, alternatively suppliers of the product in other geographic areas to supply those products into the area in question.

For the purposes of this case study, we are instructed to accept that each medical speciality constitutes a relevant product market and that the relevant geographic market for each of them is Kleindorpie.

The Competition Act provides that "an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if … it involves … directly or indirectly fixing a purchase or selling price or any other trading condition".

An "agreement" is defined as including a contract, arrangement or understanding, whether or not legally enforceable. The term agreement is very widely defined. A "horizontal relationship" is defined as a "relationship between competitors".

The prohibition on the fixing of a purchase or selling price or any other trading condition is one of the so-called "per se" prohibitions which are included in our Competition Act. The prohibition is automatic and absolute and the fixing of prices or other trading condition cannot be justified on the basis of any technological, efficiency or other procompetitive gains that could outweigh the potential anticompetitive effect of the fixing of the price or trading condition. If the capitation plan of KIPA falls within the restrictive horizontal practice prohibiting price fixing and the fixing of other trading conditions, such practice will be a contravention of the act.

#### Violation --- Regulation is distinct from Antitrust prohibitions

Spencer Weber Waller 98, Associate Dean for Academic Affairs and Professor at the Brooklyn Law School, JD from Northwestern University School of Law, Fellow at the Institute of Public Policy Studies, BA in Economics and Political Science from the University of Michigan, “Prosecution by Regulation: The Changing Nature of Antitrust Enforcement”, Oregon Law Review, 77 Or. L. Rev. 1383, Winter 1998, Lexis

The conventional wisdom is that the antitrust laws are the antithesis of pervasive regulation of the economy. Under this view, the antitrust laws seek to perfect market systems by imposing important constraints on anticompetitive behavior, but do not attempt to dictate the terms under which firms enter the market, price their product, or select their customers. Thus, while the antitrust laws may affect a firm's behavior and penalize violations of the rules, they are supposed to operate quite differently from traditional regulation, where all aspects of competition are under the control of an administrative agency and the firms surrender substantial freedom in return for a regulated fair rate of return.

The numerous champions of this point of view come from a wide cross-section of backgrounds and ideological stripes. As then Professor Stephen Breyer noted in Regulation and its Reform:

In principle the antitrust laws differ from classical regulation both in their aims and in their methods. The antitrust laws seek to create or maintain the conditions of a competitive marketplace rather than replicate the results of competition or [\*1384] correct for the defects of competitive markets. In doing so, they act negatively, through a few highly general provisions prohibiting certain forms of private conduct. They do not affirmatively order firms to behave in specified ways; for the most part, they tell private firms what not to do … Only rarely do the antitrust enforcement agencies create the de tailed web of affirmative legal obligations that characterizes classical regulation.

Economists and public policy scholars are even more inclined to draw a sharp distinction between the goals of antitrust and those of traditional regulation. So too, officials of the Antitrust Division and the Federal Trade Commission (FTC) routinely de scribe their mission as "law enforcement" and deny that they are acting as regulators. For all the changes wrought by the Chicago [\*1385] school of antitrust, the law and economic scholars also cling to a model of antitrust that is distinct from regulation.

#### Limits---many standards, requiring distinct answers, make the topic unmanageable.

#### Ground---fringe standards dodge links and allow bidirectional permissiveness.

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#### The investment in competition compels imposition of extractive economic relations which are unsustainable and culminate in existential collapse.

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After three decades of neoliberal economic policies, we are in the midst of a major global economic crisis, which has not yet reached its zenith. Disparities in wealth have increased and living standards of the lower strata of society in many countries have deteriorated, while unemployment, underemployment, and informal work are on the rise.4 The depletion of natural resources and environmental devastation is reaching new heights, indicating that the forms of production and consumption of the developed world are no longer tenable.5 Safeguarding unbridled competition is nonetheless seen as the apex of restoring economic growth and social welfare. Seemingly unconcerned with growing social protests against neoliberal capitalism, policy-makers, business people and academics alike continue to be enthralled by the false promises of “free market” policies and even suggest an intensified neoliberalization as the route to salvation. So far, the chosen course has proven to be a blind alley, aggravating the crisis only further. A new phase of capitalist expansion and economic growth within neoliberalism seems unlikely, and even if it were to take place, it would not tackle today's social and ecological problems successfully.6 Therefore, a transformation of the socio-economic system itself is required—a transformation that takes into account not only the organization of the economic realm but also its relationship with nature. The exaggerated faith in competitive markets as a panacea for economic slump and recession forms however an obstacle to such a transformation. Entangled in the “Third Way” rhetoric of the 1990s, the political center-left in both the US and Europe suffers from internal fragmentation and ideological insecurity and lacks a coherent vision of possible alternatives to the prevailing neoliberal trajectory. It suggests at best mere reformist strategies that aim at rescuing capitalism from its internal contradictions, such as the implementation of “better regulation” or a turn toward some form of post-Keynesianism. The center-left has moreover in large part accepted and internalized the neoliberal pro-competition stance (alongside many other features of neoliberal thinking). Preoccupied with how the respective economies can win (or survive in) the global competitiveness race, it is instead concerned with how the detrimental effects of competition can be cushioned. Likewise, only a few academics and intellectuals have analyzed the downsides of competition, let alone thought about viable alternatives for post-neoliberal societies.7

This article attempts to contribute to fill this void. As stated by Robert W. Cox, an integral part of critical scholarship is not only to explain and criticize structures in the existing social order, but also to formulate coherent visions of alternatives that transcend this order.8 To this end, the article offers first an explanatory critique of capitalist competition from the vantage point of historical materialism and argues that today's crisis is partly rooted in excessive competition, here referred to as ”over-competition.”9 This leads to an analysis of the current economic crisis in the second section, where it is argued that over-competition is one of the root causes of the crisis. The next two sections address alternative forms of organization of economic life and critically engage with anarchist values and principles, culminating in some general ideas for a post-neoliberal competition order. The last section before the conclusion reflects on how this alternative competition order could be achieved. To be sure, the ambition is not to outline a blueprint of a post-neoliberal competition order in rigid and minute detail but rather to sketch out its contours, as well as to discuss what it would take for it to emerge.

Cross-fertilizing historical materialist insights on competition with visions inspired by anarchist thought and praxis might not seem obvious at first glance—given the joint history of fierce antagonism between various strands of Marxism and anarchism.10 There is however also much common ground that deserves to be explored when thinking about alternatives that go beyond narrow-minded conceptions of what is acceptable and feasible. Thus, the purpose of this article is not to (re-)construct orthodox platitudes or to arrive at some sort of synthesis that reconciles what cannot be reconciled, but rather to explore the creative tensions that anarchist thought provides for critical social research and emancipatory practice. Both perspectives, broadly defined, are wholeheartedly anti-capitalist and dedicated to understanding social life and inducing social change. It will be argued that anarchism has much to offer, but by giving ontological primacy to local initiatives for building an alternative economic order, it also suffers from limitations. In particular, the problems created by the destructive competitive logics operating at systemic level require solutions that exceed the local level and that institutionalize higher-order nested governance structures.

Capitalist Competition—An Explanatory Critique

The vogue for competition is not new. Already Adam Smith has claimed that competition is “advantageous to the great body of the people.”11 It drives “every man [sic!] to endeavor to execute his work with a certain degree of exactness.”12 Consequently, “[i]n general, if any branch of trade, or any division of labor, be advantageous to the public, the freer and more general the competition, it will always be the more so.”13 Neoclassical economists frequently compare competition to a Darwinist form of market justice in which the uncompetitive, weak, and inefficient perish and the successful and efficient win. Although the zero-sum nature of competition is generally accepted (not everyone who plays can win), competition tends to be confused with success only. In line with neoclassical economic models, it is widely assumed that competitive markets deliver an efficient and just allocation of scarce resources.14 This view ignores, however, that real-world competitive markets are also highly inefficient, for instance by producing so-called negative externalities on a massive scale and “underproducing” public goods.15 Competition and the freedom to compete are moreover frequently associated with broader notions of political freedom and individual self-determination.16 This view is however equally mistaken as competition essentially negates individual freedom. As Karl Marx noted in Grundrisse: “[i]t is not individuals that are set free by free competition; it is, rather, capital which is set free.”17 Competition, he argued, “is nothing more than the way in which many capitalists force the inherent determinants of capital upon one another and upon themselves.”18 In Marx's view, competition represents “the most complete subjugation of individuality under social conditions which assume the form of objective powers […].”19 Rather than being the Smithian invisible hand, competition is an uncompromising fist, which exerts coercive pressures on “every individual capitalist,” irrespective of his “good or ill will.”20 In addition, competition disintegrates more than it unites, which means that in a competitive setting cooperation and mutual aid—the antithesis to competition—are marginalized as organizing principles. Mutual aid refers to altruistic and solidary practices aimed at enhancing the welfare of economic entities without the aid provider directly benefiting from it, while cooperation refers to voluntary arrangements between economic entities that focus on joint projects and reaching common goals. Without doubt, “one certainly can act in a solidaristic and cooperative manner within a competitive market system, but to do so often means having to go against the grain and place oneself at a competitive disadvantage.”21

Historical materialism captures the ineluctable toll of capitalist competition, namely that it exacerbates the intrinsic social contradictions and class antagonisms in the process of capital accumulation. The consumption of labor power and natural resources is seen as the source of real added value that makes capital accumulation possible.22 In other words, capital can only grow through the creation of new surplus value and thereby the further exploitation of labor and nature. As individual capitalists cannot afford to lag behind the price and quality standards set by competitors, defeating contender capitalists becomes essential for the reproduction of capital. In the struggle for economic survival, this means that economic power ultimately gravitates to those capitalists who can keep down the price of labor and other factors of production. Marx noted that “[t]he battle of competition is fought by cheapening of commodities. The cheapness of commodities depends all other circumstances remaining the same, on the productivity of labour […].”23 Employees feel the direct repercussions of competition in the form of labor-saving technologies or increased pressures on productivity, unpaid overtime, and degradation of working conditions, (below) subsistence wages and redundancies. In the presence of what Marx termed the “industrial reserve army,” competition directly or indirectly creates a chronic insecurity about the preservation of employment, leaving many people in dire straits regarding their future careers and living standards. Thus, competition might indeed lower prices, but one should not forget that people need a job first before they can consume. The interests of the wealthy few and the working many in the surplus created in the production process are incompatible from the outset, and competition further exacerbates this antagonism.

The process of the competitive accumulation of capital is thus neither stable nor unproblematic, nor linear nor infinite but pervaded by a range of contradictions. Marx famously suggested that competition is essentially a self-undermining process, which “pushes things so far as to destroy its very self.”24 Ultimately, all capital would be “united in the hands of either a single capitalist or a single capitalist company,” effectively putting an end to competition (and capitalism).25 Clearly we have not reached this stage and doubts about whether we ever will are more than justified.26 Yet, the expansionist and deepening nature of the capital accumulation process conquering ever more dimensions of the non-capitalist realm cannot be disputed. Marx also saw correctly that in order to secure profits and economic survival, many capitalists seek to evade the vicissitudes of competition by seeking synergy effects through mergers and acquisitions.27 Capitalists can also choose to “cooperate” with their competitors by concluding cartels and other collusive arrangements. However, like economic concentration, collusive cooperation aims at raising profits through ever tighter agglomerations of corporate power, which does not solve the pernicious and highly unequal nature of the social relations of capitalist production.

Because of these and other contradictions, capitalist markets depend on various forms of extra-economic stabilization to ensure the continued accumulation of capital.28 State apparatuses provide various forms of regulatory arrangements in the management of such contradictions and rules on competition can be such a stabilizer.29 Competition rules generally seek to enable competition and thereby protect capitalism from the capitalists and, to some extent, the capitalists from each other. In the most abstract sense, such rules usually define the scope of state intervention, corporate freedom, as well as the possibilities for market entry and the level of economic concentration.30 Importantly, competition rules are never a functionalist response to overcoming what neoclassical economists term “market failures,” but result from political struggles among socio-economic groups with different and sometimes opposing ideas on how to organize the economic realm. Competition rules frequently draw on notions of equity and justice. Through law as a fictitious equalizer, corporations are standardized and made comparable; they are unitized into something they are not, namely equal players on a level playing field. Moreover, competition rules can never cure the inherent contradictions in the accumulation of capital but only offer a temporary stabilization. In fact, rules aimed at preserving fierce competition can even buttress such contradictions.

The frailty of capital accumulation becomes particularly apparent in the event of structural crises of over-accumulation, referring to moments when capital owners lack attractive possibilities for reinvesting past profits.31 If expected profits on investments are considered unsatisfactory, capitalists can decide either to hold on to their surplus capital or invest it in another part of the system. An investment slowdown can occur because of a profit squeeze resulting from rising real wages in times of low unemployment levels, strong labor unions, or previous over-investment that has led to overcapacity in a sector.32 Another reason for a profit squeeze can be excessive competition, here referred to as over-competition.33 Once competition reaches a point where capitalists can no longer exploit labor to undercut the prices of competitors (either through technological replacements or by keeping down wages), profits and profit expectations fall, resulting in diminishing levels of investments in real production capacities. Moreover, as fierce competition and its unforgiving logic to reduce prices negatively affect wages and employment, it can backlash in decreasing levels in the consumption of produced goods and services, and slow down investments further. This is even more pertinent in the case of vast waves of mergers and acquisitions, which generally go hand in hand with rationalization processes and the elimination of duplicate job functions. As Marx pointed out, “the competition among capitals” and “their indifference to and independence of one another,” drives the capital-labor relationship “beyond the right proportions.”34 Over-competition can also lead to what Harvey calls a “peculiar combination” of low profits and low wages.35 Surplus capital that is not invested in means of real production and in labor can seek refuge in mergers and acquisitions or speculation with financial assets. Bubble markets created by speculation may temporarily offer new outlets for absorbing liquid capital. In fact, there “are even phases in the life of modern nations when everybody is seized with a sort of craze for making profit without producing. This speculation craze which recurs periodically, lays bare the true character of competition […].”36 Financial transactions may temporarily be disassociated from the real economy and generate high yields by adding ephemeral value through the mere circulation of capital. However, speculative bubbles always burst once the “perpetual accumulation of capital and of wealth” and “the perpetual accumulation and expansion of debt” become too far out of sync.37 It follows that financial crises are deeply anchored in the real economy and intimately related to competition.

To recapitulate, a historical materialist perspective highlights the contradictory and crisis-prone nature of capitalist competition. The next section argues that over-competition is one of the root causes of the crisis of neoliberal capitalism that we are currently witnessing.

The Crisis of Neoliberal Capitalism and Over-Competition

Competition is crucial to the capitalist mode of production, and has been present during all stages in the evolution of the capitalist system. It should therefore not be conflated with a particular form of capitalism. This said, competition for profits has probably never been fiercer than in the era of neoliberalism, which gained growing prominence on a global scale in the 1980s alongside what is commonly called the Reagan Revolution in the United States (US), Thatcherism in the United Kingdom (UK), and the dictatorial regime of Pinochet in Chile. Neoliberalism is generally associated with deregulation, the rollback of welfare states, a monetarist focus on keeping inflation low, reduced taxes, fiscal austerity, wage repression, and processes of financialization. Although neoliberal policies have been imposed throughout the world, neoliberalism nowhere became manifest in a pure fashion. Variations in contestation by social groups, regulatory experimentation, and inherited institutional landscapes account for the differences in the neoliberal organization of markets and levels of regulation.38 Nonetheless, as a common denominator, neoliberal policies generally sustain the disembedding of capital from the great part of the web of social, political, and regulatory constraints and the separation of key market institutions from democratic processes.39 Legitimated by neoclassical economics, uncontained competition came to be advertised as the chief catalyzing force for the most efficient and most profitable allocation of the resources of the world.

Rules safeguarding free competition consequently became neoliberalism's juggernaut.40 The expected theoretical benefits of fierce competition and its regulation served to legitimize the opening of markets worldwide: to compete freely eventually requires unimpaired market access. Enforced by “politically independent” (neoliberal newspeak for “democratically unaccountable”) authorities at national and supranational level in the western world, competition rules had to ensure that corporate practices would not interfere with the alleged equilibrium tendencies of capitalist markets (which happen to exist only in the minds of neoclassical economists and their textbooks). Narrow definitions of price competition subsequently received primacy as a benchmark for assessing anticompetitive conduct, supported by sophisticated econometric modeling and complex micro-economic algorithms, leaving no room for social interest criteria or environmental considerations.41 Premised on the idea that economies of scale and scope would be achieved, through competition more efficient corporations would take business away from less efficient ones by decreasing their marginal production costs, which was believed to benefit consumers in the form of price reductions. The particular emphasis on economies of scale and scope implied that economic concentration was not seen as problematic. Neoliberal competition regulation in the western industrialized world hence facilitated a massive centralization and consolidation of corporate power through mergers and acquisitions in nearly every industry, as well as various forms of strategic alliances and joint ventures. Notably, the merger waves that rolled over the global economy in the 1990s and at the dawn of the new century set new records in terms of number and aggregated volume of the companies involved. Under neoliberal capitalism, the conditions once identified by Adam Smith no longer hold: rather than competition between locally based, small-scale, owner-managed enterprises, oligopolistic rivalry of giant transnational corporations constitutes the order of the day.42 Oligopolistic market structures do not however imply that there is no or little competition. Competition between gigantic transnational corporations can be ruthless, as can competition between larger and smaller companies. Indeed, those able to compete set the standards of competition for others: with comparatively easy access to credit and huge advertising budgets aimed at homogenizing consumer preferences across cultures, such corporations can thwart the existence of weaker competitors, including small-scale enterprises at local level.

Alongside the growth of perverse social inequalities, the competitive race to offset products and services to affluent consumers has increased over the past thirty years. In the contemporary context of transnationalized production and geographically segmented, racialized, and gendered labor markets, harsh competition has become an all-pervasive conditioning dynamic. The exhaustion of natural resources, sweeping pollution, and climate change have toughened competition further, and set in motion a vicious spiral causing irreparable damage to the environment worldwide.43 In other words, under the reign of neoliberalism, competition has become ever more tenacious, spanning the entire globe and demanding ever greater competitiveness from capital and labor alike.

#### The alternative is revolutionary optimism targeted at the working class---it overcomes biases towards growth to unleash class consciousness but requires abandoning competition to succeed.

Collin L. Chambers 21, Department of Geography at Syracuse University, “Historical materialism, social change, and the necessity of revolutionary optimism,” Human Geography, Vol. 14, No. 2, 2021, <https://doi.org/10.1177%2F1942778620977202>

The productive forces necessary for socialism exist in the US and throughout the global north. The conditions to eradicate poverty, homelessness, create non-ablest spaces, and so on exist. It just takes the political will to make this material reality free from its capitalist confines. For working-class activists living in the global north, this needs to be emphasized ad nauseum. As Marx says, the bourgeoisie create their own “gravediggers”: “the advance of industry … replaces the isolation of the workers…with their revolutionary combination, due to association (Marx, 1970: 930 FN). However, and most unfortunately, the simple centralization of workers in one place (like a city or a factory) does not automatically produce revolutionary consciousness amongst the workers themselves. Capitalism and all of its vulgarities still persist; something is blocking the transition. Many point to things such as ideology, bourgeois cultural hegemony, “false consciousness,” “desire,” and “mystification” as reasons for the nonexistence of a working-class revolution in the US. The argument goes: the reason feudalism could be transcended was because in feudalism the division between the time when serfs/peasants were working for their own subsistence and directly for the lords was clear as noonday. Feudal exploitation was achieved through “extra-economic” means as Wood (2017) says. In capitalism, “surplus labour and necessary labour are mingled together” (Marx, 1970: 346). “Mystification” is built into the wage-relation itself (see Burawoy, 2012). There is some deal of truth that workers in capitalism can fall for imperialist-capitalist ideology, but I argue that there are actual real material and structural reasons for the nonexistence of working-class revolutions in the US and global north more broadly

If one actually talks to working people, a lot of them know that things in their world are messed up and don’t necessarily buy into capitalist ideology. Though many do not have revolutionary consciousness yet, they are not simply tricked by imperialist-capitalist ideology. “The everyday” for US workers is in the workplace. Many work multiple jobs just to scrape by. Working people just want to come home from work and enjoy the little free time they have, or they are simply working so much that it is almost impossible to have revolutionary consciousness, or if they do they cannot act upon it because they are just trying to survive, and thus doubt better days are ahead. But, these conditions can be overcome.

Truly revolutionary working-class ideas do not arise spontaneously within the working class itself. Marxism has to be learned by the working masses, and it is indeed a science that working and oppressed people can learn; it just has to be introduced. It must be introduced by a revolutionary vanguard party composed of the most advanced and class-conscious working people. Vanguard parties provide the material and infrastructural foundation for working-class people to join the ranks of the revolutionaries (see Dean, 2016). Workers must be able to understand and explain the class character of all political phenomenon—Marxism provides this. In “What Is to Be Done?” Lenin says that a class-conscious worker cannot be left to work 11 hours a day in a factory if we want the worker to develop clear revolutionary class consciousness. Thus, as he says, the party must make the arrangements necessary to ensure that the worker can have more free time for organizing and developing revolutionary class consciousness. The vanguard party form makes joining the revolution truly accessible to the vast masses of people. To paraphrase Lenin (1987 [1929]), the working class left to organize themselves will fall into trade unionism, which is ingrained in bourgeois ideology and thus cannot transcend the capitalist mode of production. A Marxist (i.e. historical materialist) understanding of society can indeed be understood by the masses of people, which will in turn unleash the power of class consciousness itself as a real material power.

The way Marx explains how the capitalist mode of production develops through time empowers workers and provides revolutionary optimism/hope. As the productive forces develop, more and more proletarians are produced and less and less capitalists exist (due to competition and monopolization, etc.). Out of market competition, “[o]ne capitalist always strikes down many others” (Marx, 1970: 929). The means of labor are transformed into forms “that can only be used in common.” Thus, as the capitalist mode of production develops,

The monopoly of capital becomes a fetter upon the mode of production … The centralization of the means of production and the socialization of labour reach a point at which they become incompatible with their capitalist integument. This integument is burst asunder. The knell of capitalist private property sounds. The expropriators are expropriated. (Marx, 1970: 929)

The “immanent laws of capitalist production” itself leads to not only class struggle but also to communist revolution. The laws of competition within the capitalist mode of production have the tendency to constantly revolutionize/ develop the productive forces even in the era of monopoly capitalism. The developed productive forces that are created in capitalism create the foundations from which socialist society can arise (see Phillips and Rozworski, 2019).

In Capital, Marx says it will be easier to move beyond capitalism than it was to move beyond feudalism, for the simple fact that during the transition from feudalism to capitalism “it was a matter of the expropriation of the mass of the people by a few usurpers.” But in the case of transitioning out of capitalism, “we have the expropriation of a few usurpers by the mass of the people[!]” (Marx, 1970: 929–930). Thus, to end capitalist private ownership of the means of production, we only have to usurp a handful of capitalists, which numerically speaking should be easier to do than usurping millions of people as what occurred within the process of primitive accumulation that created the social conditions necessary for the capitalist mode of production.

The inert power working people have exists at all times (even in eras of global working-class defeat and retreat); workers can simply shut production by striking, occupying the workplace, and so on (see Allen and Mitchell, 2003; Glassman, 2003). A nice made-up scenario I like to give students is that no one would really notice if all the bosses/ CEOs did not show up to work for one day, but if all workers did not show up for one day, all of society would simply shut down and reach a standstill. Additionally, and most importantly, the proletariat can use its class power to overthrow and transcend the bourgeois order by seizing political power—that is, the state—and radically transform it to serve the class interests of the working class. This cannot be dismissed as utopian. It has been done in history and it will occur again. This revolutionary takeover allows for the working class to make “despotic inroads on the rights of [bourgeois] property, and on the conditions of bourgeois production” (Marx and Engels, 1978: 490; see also Lenin, 1987 [1932]: 336).

Conclusion

This essay was written with two broad goals in mind: first, to review and reaffirm the central tenants of historical materialism; second, to provide an optimistic and revolutionary outlook for the future using historical materialism. Workers across the capitalist world know that their lives are hard. We do not always need to point out all the evils that capitalism creates. What we need to do is to instill hope and emphasizing how capital provides the material foundations for socialism does just that. Marx “regards communism as something which develops out of capitalism. Instead of scholastically invented, ‘concocted’ definitions and fruitless disputes about words (what is socialism? What is communism?), Marx gives an analysis of what may be called stages in the economic ripeness of communism” (Lenin, 1987 [1932]: 346, emphasis in original). We can say to workers: the material conditions exist to end poverty, there are more empty houses than homeless people, the means exist to end societal degradation, it just takes the political will to do so. Emphasizing this political will is empowering; it says we have the power to change things. We need stop with the talk of how workers and oppressed peoples are chained and have no power. Rather, “[i]t is within the present that the future can emerge,” and we need to force the future upon us (Malott and Ford, 2015: 154).

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#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should implement light handed procompetitive regulation increasing prohibitions on anticompetitive conduct by dominant platforms.

#### State action solves, won’t be preempted, and causes federal follow-on

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Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition.[2] In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions.[3] This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role for the first 30 years after the Sherman Act’s passage.[4] Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.[5]

In the early 1920s, however, state antitrust enforcers began playing a less prominent role because ‘the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws’, made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process.[6] As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States.[7] This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC’s perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.[8]

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring *parens patriae* suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations.[9] Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices.[10] These laws had their intended effect of reinvigorating state antitrust enforcement.

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints.[11] The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’.[12] No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications.[13] To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.[14]

Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices.[15] During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.[16]

Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been ‘under-enforcement’ by the DOJ and FTC.[17] State antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.[18]

In once again flexing their enforcement muscle, state attorneys general have shown a willingness to publicly disagree with the DOJ and FTC on both policy and enforcement decisions, and have also sought to pressure their federal counterparts into more aggressively policing certain industries. Recent examples of the increased independence and assertiveness of state antitrust enforcers include:

* The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting ‘no-poach’ agreements (i.e., where competitors for employees agree not to recruit or hire each other’s employees) in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of ‘no-poach’ clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.[24]
* In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general sued to block the transaction in September 2019 even though the DOJ, along with seven state attorneys general, approved the deal after securing certain structural and behavioural remedies.[19] After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who led the states’ challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: ‘The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger’s harm to consumers, workers, and innovation.’[20] Thereafter, the DOJ opposed the states’ enforcement action by, among other things, moving to disqualify the private counsel hired by the states to represent them[21] and filing submissions that argued against the states’ requested injunction.[22] Ultimately, the state attorneys general were unsuccessful in their bid to block the deal.[23]
* None of the more than 20 state attorney general offices that actively investigated the AT&T/Time Warner merger joined the DOJ’s unsuccessful challenge to the transaction despite the DOJ’s concerted effort to secure their support.[25] In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.[26]
* After the FTC declined to seek any Colorado-related remedies in connection with Optum’s acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: ‘I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.’[27]

After voicing displeasure with federal antitrust enforcement in the technology sector, numerous state attorneys general launched their independent investigations into ‘Big Tech’ companies even though the DOJ and FTC have ongoing investigations into these companies.[28]

### 1NC

#### Dems will pass limited climate provisions, but PC and time are key.

Mike Lillis 2-3, Senior Reporter for The Hill, “House Democrats warn delay will sink agenda,” The Hill, 02-03-2022, https://thehill.com/homenews/house/592594-house-democrats-warn-delay-will-sink-agenda

House Democrats of all stripes are pressing for quick action on the climate, health and education package at the heart of President Biden’s domestic agenda, warning that a long delay in revisiting the Build Back Better Act is the surest way to kill it.

The lawmakers are citing a host of reasons for their pleas of urgency, including the fast-approaching midterm elections, the desperate desire to give an unpopular president a big boost and the party’s fragile Senate majority that’s just one tragedy away from flipping to GOP control — a dynamic highlighted this week when Sen. Ben Ray Luján (D-N.M.) announced that he’s recovering from a stroke.

But the common theme is clear: Time, they say, is not on their side.

“There are great dangers involved in dragging it out, including all kinds of intersecting battles,” said Rep. David Price (D-N.C.), a member of the House Appropriations Committee.

“I, and most members who have been involved in this, who have a stake in it, we have a sense of urgency,” he added. “It’s certainly not an impossible situation. But it’s gone on too long; there’s been too much focus on our internal [disagreements].”

Price has plenty of company.

Last week, Rep. Pramila Jayapal (D-Wash.), head of the Congressional Progressive Caucus, urged Biden and Senate leaders to get moving on efforts to revive the Build Back Better Act or risk its failure this year, while Democrats still control both chambers of Congress. She proposed a specific deadline: March 1, in time for Biden to promote the bill’s many family benefits during his State of the Union address.

“This desperately needed relief cannot be delayed any longer,” she said.

In making their case, liberals like Jayapal are pointing to the economic strains facing families amid the long-running COVID-19 pandemic, including the rising cost of prescription drugs. Vulnerable incumbent Democrats, meanwhile, are eager to have a big legislative victory to take back to their districts ahead of November’s midterms. And environmentally minded lawmakers are warning that a failure to address climate change immediately will only make it harder — and more expensive — to do so in the future.

“The time is now, because the problems are now,” said Rep. Katie Porter (D-Calif.). “I don’t think it’s any particular date. But the answer is: today, tomorrow, the day after — as soon as we can get it done. Because ... it gets more expensive and more difficult and we risk falling farther behind our competitors if we wait.”

Rep. Jared Huffman (D-Calif.) ticked off a host of reasons why a delay is dangerous for Build Back Better supporters, not least the shrinking calendar heading into the midterms.

“Everybody knows there’s a point at which you get too close to the election to do big bills,” he said, adding that “there’s just a bunch of reasons why a four-corner offense is a bad strategy in the Senate.

“You’ve got to move it along.”

They have a difficult road ahead.

The House passed the $2.2 trillion Build Back Better package late last year, but it has stalled in the Senate, where the moderate Democratic Sen. Joe Manchin (W.Va.) has balked at such a massive spending package in the face of skyrocketing inflation and a national debt that just topped $30 trillion.

Manchin had been in talks for months with the White House and congressional leaders in hopes of finding a compromise he could support. But on Tuesday, he deflated hopes that such an agreement is imminent, saying there are no discussions happening at the moment.

“It’s dead,” he told reporters in the Capitol.

The comments have infuriated House Democrats, who were already frustrated with the West Virginia centrist for single-handedly blocking a central plank of Biden’s domestic platform. Some are wondering if Manchin ever had an interest in supporting the legislation at all.

“It’s hard to get inside his head. If I thought he had a strategy, I’d be more comfortable. But I don’t know if he does; he’s just trying to be in the way,” said Rep. Dan Kildee (D-Mich.).

“It raises a lot of questions as to whether there’s anything he would actually be willing to do,” he added. “He’s going to have to show that he’s willing to be for something. And I don’t know why that’s such a hard calculation for him to make.”

To entice Manchin’s support, House Democrats across the spectrum have acknowledged the need to cut a number of provisions from their $2.2 trillion package if they’re to have any chance of getting it through the Senate and to Biden’s desk — cuts they say they’re willing to make.

“I’ve heard the Speaker and others say, ‘This is an agenda that’s big and broad, but if there are pieces that he’s for, we’ll do it,’” Kildee said, referring to Manchin.

Manchin has been nebulous about his demands, suggesting he’s interested in a deal one day and lashing out at reporters for seeking updates the next.

Still, both Biden and Speaker Nancy Pelosi (D-Calif.) have made getting some version of Build Back Better enacted a top priority this year. With that in mind, House Democrats remain optimistic that something will be done, even if they don’t know yet what it will be.

“I don’t know what the deal’s going to look like, but I don’t think in principle it is a multiweek, complicated deal,” Price said. “It’s a matter of getting agreement with the key people on the key points.”

#### The plan saps both

Peter C. Carstensen 21, Fred W. & Vi Miller Chair in Law Emeritus at the University of Wisconsin Law School, LL.B. from Yale Law School, MA in Economics from Yale University, “The “Ought” and “Is Likely” of Biden Antitrust”, Concurrences – Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Failure to rescue negotiations causes extinction-level climate change.

Jordan Weissmann 12-23, Senior Editor at Slate, “Up in Smoke,” Slate, 12-23-2021, <https://slate.com/business/2021/12/manchin-build-back-better-environment-biden.html>

The Build Back Better Act might be dead. Or maybe it’s just on life support. Nobody but Joe Manchin can say for sure. The West Virginia senator ambushed his party on Sunday by announcing he was a hard no on the bill, imperiling the core of the Biden administration’s domestic agenda. After the initial furious reaction, both the White House and Democrats in Congress have begun trying to rescue negotiations, but their chance of success is unclear.

One thing is quite certain, though: If the defibrillators fail and President Joe Biden can’t resuscitate a deal, it will be an absolute catastrophe for America’s attempts to combat global warming. The bill that House Democrats passed in November was not everything clean energy and environmental activists had hoped, since some of its most aggressive proposals to limit greenhouse gases were stripped to appease Manchin. But by providing hundreds of billions of dollars to speed up the country’s green transition, it would have been an absolutely crucial and historic step toward meeting the climate goals Biden announced when the U.S. rejoined the Paris accords earlier this year. Without it, the country is unlikely to come anywhere near those targets, even if in an abstract, technical sense they’d still be within reach.

“Let me put it this way. The U.S. can still achieve its [Paris commitments] through pathways that don’t require Build Back Better, which lean heavily on federal regulation and state action,” Anand Gopal, executive director of strategy and policy at the climate think tank Energy Innovation, told me. “But it will be damn hard.”

Here’s a simple way to think about the blow U.S. climate policy is facing. The Biden administration has pledged to reduce U.S. emissions 50 percent from 2005 levels by 2030. Under the House legislation, the United States would cut its carbon footprint by 44 percent, according to an analysis by the REPEAT Project at Princeton’s Zero Lab. But under current law, the U.S. would only cut emissions by 27 percent—not even in the ballpark.

It is possible that the Princeton analysis is overly optimistic about the impact Build Back Better would have. For instance, it factors in reductions from a fee on methane included in the House bill, which looked like it would be pared back in any final version. But almost every analysis of the bill’s key pieces has found that it would have a dramatic impact and potentially put our Paris targets within reach, thanks to roughly $325 billion of green energy, electric vehicle, and other tax credits that anchor its climate section (the bill’s total spending on climate amounts to $555 billion). Those subsidies would bring down the cost of a new solar or wind plant by 30 percent and shave thousands from the price of an EV, making clean tech even more competitive than it already is.

Without Build Back Better, the Biden administration will be left to rely almost exclusively on its regulatory powers to curb emissions. This is the strategy that some progressives already seem to be preparing for. “Biden needs to lean on his executive authority now,” Rep. Alexandria Ocasio-Cortez tweeted earlier this week. “He has been delaying and underutilizing it so far. There is an enormous amount he can do on climate, student debt, immigration, cannabis, health care, and more.”

There are certainly important ways Biden can flex his executive authority on climate. His administration has already announced a strict new rule on methane leaks and tougher fuel economy standards that it could ratchet up again in the future. States could also contribute significantly if, for instance, California follows through on its promise to ban the sale of new gas-powered cars by 2035.

But there are legal and political limits to what Biden can accomplish through regulation alone. The Environmental Protection Agency is often required by statute to weigh the cost to consumers and industry when crafting new rules. And the administration may blanch at pursuing aggressive new regulations on power plants that might increase electricity prices at a moment voters are worried about inflation (and are as sensitive to gas prices as ever).

The tax credits in Build Back Better were meant to lower both of these hurdles by making green technology less expensive. Without them, Biden has less room to be bold. “All of these regulatory actions and state actions are more politically feasible and easier when there’s half a trillion dollars in subsidies to smooth the way,” John Larsen, head of energy systems research at the Rhodium Group, told me. “Without those subsidies, maybe executive actions could make up some of the tons [of CO2 reductions] you don’t get from Build Back Better. But it’s a very big ask from the executive branch to deliver all of the tons without the financial support.” Congress’ failure to legislate will also make it harder for Biden to regulate.

And that’s before you factor in the Supreme Court. In 2016, the justices stayed President Barack Obama’s Clean Power Plan, suggesting they were ready to hem in the administration on climate. Since then, the court has moved further to right with a 6-to-3 conservative majority, and its members have shown an interest in rolling back the power of federal regulators across the government. At the moment, the justices are preparing to hear a case, West Virginia v. EPA, in which they may decide the administration does not have the authority to limit emissions from power plants. In an absolute worst-case scenario, they could revive a version of the nondelegation doctrine, a pre–New Deal idea that would essentially hobble the entire structure of modern administrative government by holding that Congress simply can’t hand certain decision-making powers to executive agencies, which would kneecap the EPA’s authority on climate and other issues.

We might not get to that point. But it’s not unthinkable. “Everyone from me to my first-year law students is guessing what this court is going to do,” Nathan Richardson, a University of South Carolina law professor specializing in climate policy, told me. “It seems inclined to constrain the administrative state more broadly, and the sharp end of that spear is climate.”

Given that Biden’s ability to regulate carbon is limited and vulnerable to being struck down by an activist court, passing Build Back Better may be our last shot at serious climate policy for the next decade. One of the questions hanging over the negotiations is whether Manchin is actually open to a serious green energy plan or has simply pretended to be in order to run out the clock on negotiations. Before talks exploded, he reportedly made a counteroffer to the White House that included $500 billion in climate spending. But the specifics of what the money was for are unknown. Manchin is also tightly connected to the coal companies that dominate his state, still has a financial interest in the family coal brokerage on which he made his personal fortune, and has lately adopted the industry’s talking points criticizing Build Back Better’s energy section. It’s possible he simply doesn’t want a deal, in the end.

If Manchin is still open to something that looks roughly like Build Back Better’s climate plan, though, Democrats should be willing to give up a lot to get the deal. Because when it comes to the future of the planet, our plan B doesn’t look so promising.

### 1NC

#### The plan’s new scope trades-off with FTC’s ongoing outreach to globally coordinate investigations---that crushes cooperative controls of AI

Matthew Boswell 19, Commissioner of Competition of the Competition Bureau Canada; Laureen Kapin, Practiced Consumer Protection Law with the U.S. Federal Trade Commission, Molly Askin, Counsel for International Antitrust at the U.S. Federal Trade Commission’s Office of International Affairs, Fiona Schaeffer, Antitrust Partner at Milbank LLP, Maria Coppola, Counsel for International Antitrust at the U.S. Federal Trade Commission, Marcus Bezzi, Executive General Manager at the Australian Competition and Consumer Commission (ACCC), “FTC Hearing #11: The FTC’s Role in a Changing World,” 3/26/19, https://www.ftc.gov/news-events/events-calendar/ftc-hearing-11-competition-consumer-protection-21st-century

MR. BOSWELL: Oh, okay. Well, I'll go back to what has been a common theme, which is supporting the ongoing personal relationships between people around the world. You know, people move in and out of jobs. You have to keep those relationships, and it can be expensive. And it can be to certain outside parties hard to justify to expend those resources on having people attend, for example, ICN workshops so that they know people around the world, they're sharing best practices, we’re not reinventing the wheel. Somebody has come up with a good way to do something, we should have those relationships where we can learn it, but it costs money to invest and to always invest in relationships.

MS. KAPIN: Well, I want to thank everyone. I think we heard a recognition that we should recognize the value of infrastructure, some common protocols and definitions and best practices can also help us overcome the challenges for international cooperation. But first and foremost, what I heard echoed was the recognition that this human glue really is the stuff that lets us stick together and accomplish our common goals. So, Molly?

MS. ASKIN: I think one thing I've also heard is the importance of the networks that we have seen evolve over, if we’re looking at the past 25 years, either be founded in the first instance or have changed in their mission to really be able to be nimble enough to address some of these important issues and give agencies a forum for interaction that can facilitate both the tools and the relationships. So thank you all very much for participating. And we are now going to go into a 15- minute break and return for the next panel at 11:30. Thank you.

MS. KAPIN: Thank you.

CONSUMER PROTECTION AND PRIVACY ENFORCEMENT COOPERATION

MS. FEUER: Okay, it’s about one minute early, but we’d like to get started. I’m Stacy Feuer. I’m the Assistant Director for International Consumer Protection and Privacy here at the FTC’s Office of International Affairs. This entire morning we’ve heard about a number of very interesting enforcement developments and challenges all over the world. Now we’re going to take a deeper dive into enforcement cooperation in the area of consumer protection and privacy. One of the most interesting aspects of our work here at the FTC on international consumer protection and privacy matters is the very wide range of issues we cooperate on, everything from telemarketing scams to online subscription traps to cross-border data transfer mechanisms, and to other privacy law violations. Equally remarkable to me is the incredibly wide range of authorities that we cooperate. So, for example, we cooperate with not only consumer protection agencies but data protection authorities, criminal regulators, and sometimes telecommunications and financial regulators. Our panelists that we have here today represent these different strands of our enforcement cooperation activities. They will highlight the issues involved in some of these different cooperation strands, and I will introduce them individually as we move through this panel. I do want to remind you at the outset that we have comment cards available, and please do send up questions. We’ll try and be a little interactive and ask some of your questions during the panel and not just wait until the end. So please ask away. So we’ve segmented our panelists into mini- groups so as to better draw out some of the cooperation strands. I’ll turn first to James Dipple- Johnstone who is the Deputy Commissioner at the UK’s Information Commissioner’s Office and ask him, and then followed by Deputy Assistant Secretary Jim Sullivan from the Department of Commerce’s International Trade Administration for their thoughts about cooperation and particularly focusing on the privacy sphere. We are so pleased that you are both here. So, Commissioner Dipple-Johnstone, can you begin?

MR. DIPPLE-JOHNSTONE: Yes, and thank you, Stacy, and thank you to FTC colleagues for your invite and the opportunity to speak with you today. I’m looking forward to our discussion of these important issues, and it was interesting to hear the different perspectives from the previous panel. A little bit about the Information Commissioner’s Office first, given there’s a range of different types of organizations on the panel, in case it helps with my comments later on. With the implementation of the GDPR, which has already been referenced this morning, I’m pleased to hear, and the new equivalent legislation in the UK, the ICO has been through a significant growth process over the past 12 to 18 months. We’ve taken on new powers, and as has been mentioned this morning, as many other organizations, we’ve been through a capability growth over the past few months, which has begun to see us work more internationally and deal with more complex and challenging caseload. This reflects in part the importance the UK Government places on data protection and consumer protection, but also the seriousness of some of the recent scandals we’ve seen, for example, that involving Cambridge Analytica recently. In granting powers, the UK Parliament has gone further than many other EU legislatures to ensure that the ICO has both the funding through its funding regime to give us the financial resources, but also the new powers to do its work in the digital age. There was significant national debate in the UK about these new powers, many of which are actually quite intrusive and are more common in law enforcement agencies than in a traditional data protection authority and the balances in checks and balances being put in place to go with those powers through the UK’s Information Rights Tribunal who oversee our work and our individual case judgments. I couldn’t come here and talk to you without recognizing there’s quite a lot of difference within the ICO as well. As well as our data protection remit, we have a remit for access to information. So one part of the office is working very hard around keeping privacy concerns and how data can be safeguarded and secured and only disclosed where appropriate; another side of the office is hearing appeals about how to make public information more widely available. We have around 700 officers and new powers to seize equipment, search premises, examine algorithms in situ for bias to make sure that they are working effectively, and audit company systems and processes. We also have powers which were touched upon this morning as well, around the power to compel provision of information from wherever and whomever holds it, which is quite a wide remit for an office of our type. We deal with around 50,000 citizen complaints each year and undertake around 3,500 investigations across different parts of our office. And we cover both the commercial sector, but also the public and law enforcement sector. In many ways, as colleagues are, we're learning as we go with these powers and these new resources. And one of those key areas of learning has been that which has been touched upon this morning. And that’s the importance of working collaboratively with others internationally. Many of the most significant files on my desk -- and I have responsibility for the enforcement and investigation arms of the office -- in the last 12 months, we’ve engaged with 50 international colleagues on various different files. And most of the major cases we have on at the moment are involving international colleagues, either as joint investigations, seconding staff to and from other offices, or sharing information and intelligence about the work we're doing. As our citizens become more aware and concerned about the use of data and as the digital economy becomes the economy, people expect this kind of international engagement. And with this in mind, we value hugely the UK's positive relationship with its colleagues on this side of the Atlantic, the FTC, but also our colleagues in Canada who have been speaking this morning. We value the different networks we're involved in. There have been mention of some of those networks already, but in particularly GPEN, the Global Privacy Enforcement Network, but also those networks which involve looking at unsolicited communications, which continues to be a significant part of my office's work. We learn a huge amount from these relationships, as well as the sort of human glue that was described this morning, just the opportunity to discuss tactics, approaches, to understand how each other work is a real positive that comes out of that work and allows us to do our jobs more effectively. To support this, we have a number of legal gateways to share and receive information. These are backed by strict protections within UK domestic law, which bite both collectively on the organization but also the individual officials within that. They are backed by criminal sanctions, and nothing focuses the mind like those. In the course of our investigation, we could use one or any of MOUs, MLATs, and we’ve heard about the challenges with the time scales that MLATs take. Membership arrangements, such as GPEN or the International Conference of Data and Privacy Commissioner arrangements or, indeed, Convention 108. This very much depends on the exchange of information, what's involved, who it’s going to, who’s asked for it, and what we need to do our work. Of particular note are the DPA 2018, which is the Data Protection Act in the UK. That contains formal information gateways. That allows us to share information for law enforcement purposes or for regulatory purposes where there’s an overlap and there’s a public interest. Of relevance to the FTC in particular is Schedule 2 of the DPA. That sets out the conditions for public interest and information- sharing within the UK law. And I understand the UK has been working through these for a number of years from the 1998 act and now into the 2019 act and working with colleagues at the FTC through the SAFE WEB Act provisions and the criteria for sharing information there with foreign enforcers. And that's been a huge positive. Just in the short time I've been with the Office over the last two years, there have been a number of cases that we've been working on, on sharing information and understanding. And, of course, this goes alongside our EU work. We mustn’t forget that. We are a competent authority under the GDPR, the EU provisions for the one-stop-shop mechanism. And around a fifth of those cases in the mechanism over the past year have involved the UK as either a lead supervisory authority or a concerned supervisory authority. Many of the big issues we are grappling with is privacy authorities, algorithmic transparency, adtech, microtargeting and profiling of citizens, part of the bread and butter of those cases we're working through. And our ability to work with international colleagues, in particular the FTC, has been really helpful in us discharging our role, notably on the Ashley Madison file, but also on other confidential matters more recently, where we found the insight afforded by our bilateral arrangements with the FTC help us fill in the missing pieces. They help us make better investigations. We know that the FTC has helped us by using its SAFE WEB powers to obtain information for us, in particular with some of the -- I think you call them robocalls here, but unsolicited communications in the UK, and that information has been hugely beneficial in protecting UK citizens. And we hope the reciprocal has been helpful to the FTC and colleagues here. And I’m mindful of time, but in closing, I'd just like to say we're very keen in the ICO to continue to use these positive engagements and continue to build them, particularly as you come to look at the renewal of the SAFE WEB Act. Thank you. MS. FEUER: Thank you very much. Deputy Assistant Secretary Sullivan, how does the issue of privacy enforcement cooperation come within your purview at the Department of Commerce?

MR. SULLIVAN: So in my role, I'm in the International Trade Administration, which is one of the agencies at the Commerce Department, and one of the offices that I oversee is responsible -- they are the US Government Administrator for and our interagency lead on different privacy frameworks -- international privacy frameworks, including both privacy shield frameworks, the EU and US Privacy Shield and the Swiss-US Privacy Shield. We're also very actively engaged in promoting the expansion of the Asia-Pacific Economic Cooperation and Cross-Border Privacy Rule system, APEC CBPR as it’s called. And we work extremely closely with the FTC on those issues around the world as we see a growing number of countries grappling with privacy while trying to balance innovation at the same time, which as everyone here knows, I'm sure it's not always the easiest formula. So that's a quick summary of what we do at Commerce. I'll leave it at that for now.

MS. FEUER: Great, great. Well, it's interesting to hear you both speak about the importance of enforcement cooperation in the privacy area, James, for your agency on many, many individual files and Jim as the sort of overarching systemic systems for cross-border transfers. So I want to follow up with a few questions. So, James, sort of the elephant in the room, we've heard a lot this morning in the first panel about privacy as a "barrier" to regulatory enforcement cooperation. And I’m wondering what your view is of that statement or assertion and what kinds of tools do agencies need to cooperate effectively given some of these limitations and, of course, in privacy enforcement investigations?

MR. DIPPLE-JOHNSTONE: Yes, yes. And it's not something we've -- you know, which is uncommon to us. We get that call often. I mean, we want to be clear, we're not the “ministry of no.” But, actually, what’s really important in this space is to do that groundwork and that thinking about what information do you need, how is it going to be transmitted, how is it going to be secured, what purpose is it going to be used for. And we often find there are many avenues and routes to be able to share information. We also get the -- interesting when we ask for information, we sometimes get from colleagues internationally, we can't because of privacy. And, oh, that's an interesting concept. How do we work through that? We've often found there is a way through. Sometimes where these arrangements are being agreed internationally and where, for example, it was mentioned this morning about the challenge with the advent of the GDPR, IOSCO working with colleagues at the EDPB and needing to sort of tease through that, it can sometimes be tough to be the first going through that process, but once those processes are in place, people understand how they work, those relationships are built, that common understanding is built. Things do flow a lot quicker and a lot easier in subsequent cases. And so very much it’s that sort of keep talking, keep engaging. And, importantly, I've recently come back from an international conference working group, where one of the key challenges has been that with the scale and pace of change internationally with enforcement agencies and enforcement bodies, some of which, again, was referenced this morning, just keeping pace of who can do what where and with what data is really important. So if those international networks can really help their members understanding where the right levers are and how their respective national laws work, that can only be a good thing.

MS. FEUER: Thank you. Well, Secretary Sullivan, in your experience, how important has the issue of enforcement cooperation been with the foreign governments and stakeholders that you have negotiated these international data transfer mechanisms with, and how important are the powers that the FTC has in those discussions?

MR. SULLIVAN: So, again, I'm going to refer to the three frameworks that I cited just a moment ago. And both the enforcement power and the international cooperation authority granted to the FTC under the SAFE WEB Act are both integral to the functioning of those frameworks, I think. Without them, they would lack legitimacy or credibility. You have to have some teeth behind these frameworks so that folks know that companies are going to be held accountable for the pledges and the promises and commitments they're going to make to comply with the principles or the practices that they have pledged to comply with in accordance with these frameworks. I don't know how that would be possible without what we just cited to, both the powers to enforce but also to coordinate with other enforcement agencies cross-border.

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

MR. SULLIVAN: I don't want to generalize. We certainly hear a lot. I think there's a strong recognition among most of the stakeholders that we engage with, sort of along the lines of what I just said. I mean, first of all, what would be the incentive to comply with something that really didn't have any teeth? I think they know increasingly how important it is to align their practices with these frameworks, given a lot of the developments. We’ve seen recently, and it's I think -- they generally -- and I am generalizing -- they do want to see strong frameworks that are actually enforceable and, they do want to see, as I think James just alluded to, greater collaboration because that’s going to lead to more consistent best practices or principles and approaches to a lot of these issues as opposed to just this fragmented, diverse, ad hoc approach to a lot of these same dilemmas that we're all facing.

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

MS. BENASSI: Yes. What I would like to say is that we should make a difference between issues related to privacy and to the confidentiality of investigations. And very often, indeed, it is quite a common answer to refuse cooperation, to say, oh, no, we cannot share information because of problems of privacy. But in the European Union, first of all, I think we have solved this, and I think that our GDPR itself helps a lot to clarify that authorities can exchange information, including information which contains personal data. And so this enables, in principle, very seamless type of cooperation in the European Union, because for law enforcement purposes, we can exchange this information between authorities in one member state or in other member states. And this -- I think in this way, the GDPR is an enabler. And when we look into the implementation of the GDPR for international cooperation, we should also look at it in the same way as an abler and enabler, because if it is respected; then exchange of information for law enforcement purposes should be facilitated. And, for example, we are also doing adequacy decisions, for example, with some other countries in order to also create the seamless facilities, including for law enforcement purposes.

MS. FEUER: Thank you. Anyone else? Kurt.

MR. GRESENZ: So I agree with Marie-Paule's sentiments there. You know, the issue that we encountered at the SEC as a civil agency with administrative investigatory powers, while the Department of Justice was out in front with an umbrella agreement to facilitate cooperation in the criminal sphere under the public interest mechanism, which is something that James talked about at the beginning, it was less clear how that applies in the civil or administrative context. So the step that IOSCO took to negotiate what is the first administrative arrangement under the GDPR will enable the second step of what Marie-Paule talked about, which are transfers of personal data from the EU to jurisdictions and authorities outside the EU. And now with that process, as Jean-François in the earlier panel talked about, having been blessed by the European Data Protection Privacy Board, we in the security space are looking forward to the data protection authorities in the 28, possibly 27, EU members states adopting that and approving that and so it can be the standard with the securities authorities who are IOSCO members.

MS. FEUER: Thanks. So I want to shift us now from what has been a privacy-heavy conversation to more of a focus on consumer protection. Our second pair of panelists represent two of the different strands of the kind of consumer protection enforcement cooperation we do here. So to hear about the EU enforcement model, we'll have Marie-Paule Benassi from the European Commission’s DG Justice, and to hear about our cross-border work with our Canadian criminal counterparts, we'll hear from Jeff Thompson, Acting Superintendent in Charge of the RCMP's Canadian Anti- Fraud Centre. So, Marie-Paule, can you start us off?

MS. BENASSI: So thank you, Stacey and thank you for the FTC to invite me. So, first of all, I would like to remind you that the European Union is currently counting 28 member states, and it's very well known for being something very complicated, and I would like to try to break that myth. But unfortunately, I think, or fortunately for a better understanding of the complexity of the Union, I think that Brexit and the interest which this is bringing in the headlines is also maybe shedding some light on why it is so complicated. So we have an integration of EU-level and national laws, a model, and this is where I think it’s simple. It's based on a very simple principle. We have one EU law in a certain domain, and it tries to harmonize national laws using key high-level principles. What is not harmonized is how this law is implemented. So it is -- except in a very few cases, it is implemented nationally. It is enforced nationally, and we try to do this in a way which preserves the diversity of the enforcement model in the member states. And so in the area of consumer protection, it is how it works. And the European Commission for which I'm working has no direct enforcement power. It is the member states which have the enforcement powers. So when I speak of enforcement, it means enforcement of the law towards businesses and other possible subjects because the European Commission is in charge of checking that the member states are enforcing the laws correctly, but we are not directly involved to stamp out illegal practices. In the area of consumer protection, so we have a strong role. And this role has been strengthened in the recent past. What is our role? Our role is to facilitate the cooperation of the member states because this is a EU, I would say, a harmonized law, and we want it to be implemented in a consistent manner in all the member states. And to do this, the only solution is cooperation. So we have a long tradition of cooperation inside the European Union and now we are doing it via a law which is called the Consumer Protection Cooperation Regulation. This law is establishing the framework for cooperation. So we start by first saying even if the member states are very different, they should have similar type of powers, so investigative powers. For example, the power for mystery shopping, the power to request information on financial flows, the power to obscure illegal content online. Another thing, also, is the framework for cooperation. So we have two types of cooperation now in our new legislation. One is what we call the bilateral cooperation, the more traditional cooperation, where one member state asks -- requests enforcement cooperation from another member state. But now we have this new system which is E- level coordination. And there, the European Commission has a new role because we have a role of market surveillance. And from this role, we can ask the member states to check some practices that we think are likely to be illegal. And if the member states find that there is sufficient evidence to start an investigation, then the Commission is coordinating this investigation. We also have a new power in terms of intelligence I mentioned. And we are also doing coordination of priorities. So, in fact, the role which we have is quite strong. And the new model, which we are going to implement from January next year, in fact, is already functioning, maybe in a lighter way. And it's working. So we have in the past done some coordinated actions, which are concerning. For example, illegal practices by big companies operating at the level of the European Union. Today, we are publishing a press release on an action done in the field of car rental, for example. So with the authorities, we have been working together with the authorities to find -- to analyze bad practices of the five leaders of this sector, and we wrote a common position asking these companies to change their practices. They made commitments, and now we have been monitoring the commitments and concluding that finally these companies are implementing these commitments. This is a negotiated procedure, so this is another element I would like to stress. These EU-level actions are not based on strong enforcement means because they don't exist at the European level. They are based on a coordinated approach and the cooperation with the traders. If the traders refuse to cooperate, do not cooperate sufficiently, or do not follow their commitments, then what is going to happen is coordinated enforcement action by the member states. And we have just added something very recently which is a system of fining that can be applied for this kind of EU-level infringement and coordination of the fines. And this is a big -- it's not yet completely finalized, but it's going to be a big step forward because in certain member states, they don't even have a fining system for consumer offenses. So we are building the system. So for the future, what is -- what can we do? We can do international agreements. So there is a possibility on the basis of this framework to agree international cooperation agreements with certain countries. And the framework which I've described can be applied also with the said countries to the extent possible, of course, depending on the type of base laws that exist in the member states. And what I could say is that we would like to start discussing on the basis of this new regulation with the FTC, if we can progress such an agreement. Why an agreement would be necessary? Because it's important that the formal part is there. Because as we heard from various speakers, the formal part is an enabler also for an efficient cooperation. This system, however, has several challenges. One of the challenges, as I said, it’s based on negotiation with traders. So it doesn't work when there is fraud, fraudulent operators. This is really required to develop additional cooperation, for example, with police forces because in most of our EU member states, they don't have this possibility of going against fraudulent operators. They need the cooperation of police, so this is an area where we need to develop in the future. And then relation with competition, relation with data protection, these are the future avenues for our cooperation. Thank you.

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

MR. THOMPSON: Sure. Thank you, Stacy. It's a pleasure to be here today to talk about international cooperation and consumer protection. Since the start of my career, I've learned that cross- border fraud was an evolving criminal market that cannot be tackled by any one country alone and even more so today. Consumer Sentinel reporting shows more than 1.4 million reports were received in 2018, up from 433,000 in 2005. Similarly, the Canadian Anti- Fraud Centre data shows annual losses to fraud continues to increase, reaching 119 million in 2018, a 495 percent increase since 2005. So it's easy to say that mass marketing fraud and cross-border fraud continues to be a threat to the economic integrity of Canada and the US, furthermore, if you consider technology, voice-over- net protocols, social media, virtual currencies, money service businesses, and other key facilitators that continue to provide criminals and criminal organizations behind a scam opportunities to operate across multiple international jurisdictions. And as we heard this morning, while this is an evolving threat, there is good news. There are, indeed, existing strategies that do exist and tools that provide an effective approach to attack on this criminal market. In fact, as we heard this morning again, the history between Canada and the US is long. It dates back to 1997, when Former President Clinton and Prime Minister Chretien met at the first US Cross- Border Crime Forum. It was at this meeting that telemarketing fraud first got identified as a major Canada-US cross-border crime concern. And it also made a number of recommendations, including the establishment of a multiagency task force, the development of consumer reporting and information- sharing systems, enforcement actions, and better public education and prevention measures. Since then, both US and Canada cooperate to implement and refine a number of these strategies, and while all recommendations made are important, I'm going to focus my discussion on the existing multiagency task force, or in today's terms, strategic partnerships. This case and work that the partnerships have done showcase an effective enforcement approach. They highlight intelligence-led policing and integrated policing models, along with providing insight into some of the tools and approaches to consumer protection. So if we consider the cross- border fraud partnerships as an intelligence-led approach, what we see is a group of key stakeholders joining efforts to achieve a common enforcement objective, namely, reducing fraud. To give you a practical idea of this, I think back to some of my early meetings at the Toronto Strategic Partnership. I did not fully recognize or appreciate the significance of the discussions held around the table. Members from several different agencies and organizations discussed top reported scams, scam trends, top offenders, current investigations, and gaps and challenges in enforcement options. Oftentimes, this intelligence-led approach was started by members from the Federal Trade Commission or the Canadian Anti-Fraud Centre, bringing intelligence developed from their respective central databases, Consumer Sentinel and the Anti-Fraud Centre database. This dialogue helped identify the new and emerging scam trends and discussion around the key facilitators to the scams. It also helped to coordinate joint priority setting, identify lead agencies, investigative assistance, and actions required to complete the files, and in many cases helps with deconfliction amongst the agencies. Sharing information around the table was a key factor, and as long as there’s a willingness to share, there is a way to share. There is also a common trust and understanding amongst the partners to share information within the confines of law. Thus, the partnerships serve as an intelligence-led approach in as far as they create a platform to share and synthesize information from multiple perspectives. Turning now to consider the partnerships as an integrated policing approach, we begin to realize that criminals and criminal markets can be disrupted through civil, regulatory, or criminal investigations and that different agencies and different laws all play a role. If we dissect again the Toronto Partnership, we have a minimum of eight different organizations: the Federal Trade Commission, the Royal Canadian Mounted Police, the United States Postal Inspection Service, Toronto Police, the Ontario Provincial Police, the Ministry of Consumer and Government Services, the Competition Bureau of Canada, and the Ministry of Finance. The FTC alone has 70 different laws that it enforces. Who really knew that the Ministry of Consumer and Government Services enforces numerous consumer protection laws such as the Loan Brokers Act, which can be used to go after the advance-fee loan scammers? Or that, again, as we heard this morning, CASL legislation also has clauses that allow for foreign enforcement to request assistance from respective Canadian law enforcement partners? At the heart of an integrated policing model is a give-and-take approach. And in the US-Canada cross-border partnership context, this approach is formalized by MOUS. As recent as 2017, the Federal Trade Commission and the Royal Canadian Mounted Police formalized an MOU that identifies best efforts that participants can use to further the common interest of combating fraud. The language used highlights the foundation of information-sharing and cooperation. Participants shall share materials, provide assistance to obtain evidence, exchange and provide materials, coordinate enforcement, and meet at least once a year. So, again, if we take a practical view, the strategic partnership model against cross-border fraud uses intelligence-led and an integrated policing approach that allows investigators from Canada and the US to move beyond simply coming together to talk about cross-border fraud concerns to developing investigative plans that identify investigative steps and processes needed to gather that evidence. Each participant brings a range of tools that can be leveraged to ensure the effective cooperation. One such tool that we’ve heard plenty of today is the US SAFE WEB Act. From a Canadian-US perspective or from the Canadian perspective, I mean, it provides us an avenue to formally seek investigative assistance in the US from the FTC. It also formally acknowledges by name some of the regional partnerships that exist today. This act alone has assisted strategic partnerships in countless cases, at least 22 by my count since 2007, and as we’ve heard, a lot more. These cases have led to arrests -- civil arrest charges, civil forfeitures, and, most importantly, victim restitution, which in the Canadian context is often rare to see. This includes Operation Telephony, which involved more than 180 actions brought by the Federal Trade Commission, including actions in Canada and the US, and it also includes the Expense Management Case that we heard about in the last panel involving $2 million that was eventually turned over to the FTC for consumer redress. And while there's a history of success and continuing work and outcomes to look forward to, we know that the criminals adapt. Today's frauds typically involve solicitations coming from one country targeting consumers in another country and funds going to yet another one. Mass marketing fraud is truly a transnational crime. We know that in a number of cases, the criminals and criminal groups involved are deeply rooted in Canada and the US and that moreso today, the work being done by these partnerships exposes these international networks who are also providing each other an opportunity to leverage our international networks to tackle this problem collectively. And we’re already doing this to some extent. The International Mass Marketing Fraud Working Group is another example of how Canada and the US cooperation has extended beyond North America. As recently as March 7th, this group announced -- or the US Department of Justice announced the largest ever nationwide elder fraud sweep, and the International Mass Marketing Fraud Working Group played a role. At least eight different countries were engaged. At the same time, there are other challenges, such as the willingness of other countries to identify mass marketing fraud as a transnational threat, whereas in many cases fraud or financial crime is not a priority. And this even holds true today to some extent. The parties and law enforcement agencies are subject to change, and the ability of any one agency to solely lead a partnership can be impacted by this change. Albeit, there's still partnership models that work in which chairs to partnerships rotate and changing priorities are acknowledged. In May of 2018, the RMCP coordinated a national mass marketing fraud working group meeting whereby we acknowledged the changing nature of mass marketing fraud and sought to renew our efforts. We also sought input from key US stakeholders. The Federal Trade Commission and the United States Postal Inspection Service were at these meetings. And while work continues to renew this renewal, such as the emergence of a Pacific partnership to replace Project Emptor, there's still work to be done. So in concluding, there’s a long and successful history of Canada-US enforcement in consumer protection, and that demonstrates effective cooperation through integrated and intelligence-led approaches and that this continued cooperation is integral to combating this transnational crime today. Thank you.

MS. FEUER: Thank you very much, Jeff. So I think that we now have a couple of very interesting issues out on the table about consumer protection and enforcement cooperation, both the EU model of the CPC network and the FTC Canada model, which focuses on these seven strategic partnerships that exist in Canada. So I want to ask a few questions of our panelists, Marie-Paule and Jeff Thompson, and then I do want to turn back to Secretary Sullivan. But, first, Marie-Paule, I did want to ask you one thing. I know that the CPC network uses a technological tool to facilitate the cooperation among the 28 member agencies. I'm wondering your thoughts about how well that works and how it might work in a more multilateral context.

MS. BENASSI: Thank you, Stacy, for this. So, first of all, I think I would like to make two types of tools. One is the system which we use to network, and I would say this is based on technologies of collaborative websites. And we have been using them now since several years and we are quite confident that it is safe for exchanging information and including information on containing personal data, for example, on businesses or on witnesses, and also it can be adapted. But currently, the CPC system doesn't contain a lot of cases. So it's growing organically, I would say. And it's also very much used to exchange information, best practices, for example. In the future, we are building something which is going to be a case management system and it will contain several modules, including a module for our external [indiscernible]. So we are going to open this to various entities -- NGOs, entities. And so we are going to build doors, in fact, in such a way that the two systems can communicate, but without having [indiscernible] you know, for -- so that the stakeholders will only see their external areas. And I'm quite confident that we can build the same type of modules for international cooperation with our technology. But what I would like to say is that we are also developing technologies for online enforcement tools. And what we want is to create, for example, a system where we would have an internet lab that could be used by the various member states, and we are also building capacities of administration in the EU countries. We are developing training, and we think also that this kind of tools could benefit from pooling of expertise from various agencies, including in an international context.

MS. FEUER: Thank you. So I want to turn -- before I turn back to Jeff Thompson, I want to turn back to Secretary Sullivan and ask what are the tools that can be used to facilitate cooperation under the various cross-border mechanisms? And why are they important?

MR. SULLIVAN: So in terms of why they’re important, I mean, again, a lot of this is probably self-evident to those in this room, but the data explosion we've seen is only going to continue. And we now have these cross-border data flows that really do benefit stakeholders across our societies and our economies. So you’ve seen these cross-border data flows help enable consumers, for example, to access more and better services and products. They help our companies to increase the efficiency of operations and innovation, and they help nations in terms of their competitiveness and their ability to help create jobs and facilitate economic growth. So this is all great. The problem we're dealing with is that different counties now take very different approaches to how they regulate these data flows specifically on privacy. And so what I wanted to just touch on a bit was what we do, the Commerce Department, in conjunction and partnership with the FTC to deal with this issue, this dilemma. How do you continue to facilitate these cross-border data flows when you are dealing with countries that have all adopted varying approaches, legal regimes, or policy priorities. I touched on the three frameworks, and I just quickly wanted to go through some of the tools within those frameworks, if I could, which from our perspective are absolutely critical to digital trade because, again, right now, there is no single comprehensive binding multilateral approach governing these cross-border data flows. So you know, again, I'm repeating myself a bit but we have stakeholders that we meet with all the time coming in, telling us about this constantly shifting and evolving and rapidly accelerating policy landscape that they have to deal with. So in response to this challenge, one approach that we've taken, as I alluded to earlier, for example, is the APEC CBPR system. And it's basically a voluntary enforcement code of conduct based on internationally recognized data protection guidelines. It establishes principles for both governments and for businesses to follow to protect personal data and to allow the data flows between APEC economies. To join this system, an APEC economy has to designate a third party called an accountability agent. And that accountability agent is empowered to audit a company's privacy practices and take enforcement action as necessary in some instances, but if that accountability agent cannot do that, resolve a particular issue, an APEC economy, their domestic enforcement authority serves as a backstop for dispute resolution. And in the United States, the FTC is our designated regulator, obviously, and enforcement authority for the CBPR system. And they enforce the commitments that are made by the CBPR participating companies to comply with the principles that they have committed to comply with. I do want to note all CBPR participating economies also have to join the cross-border privacy enforcement arrangement, CPEA, to ensure cooperation and collaboration among their designated enforcement authorities. To date, if memory serves, I know the FTC has brought four enforcement actions against companies for making deceptive statements about their participation in CBPR, and it’s also used its authority under the SAFE WEB Act to enhance cooperation with other privacy and data protection regulators within APEC. So, again, as I noted at the outset, FTC enforcement and international cooperation are absolutely critical to the credibility, to the integrity, and the success of the CBPR system. There are currently eight economies in APEC of the 21 economies participating in the system: the US, Japan, Mexico, Canada, South Korea, Singapore, Australia, and Chinese Taipei. And the Philippines is currently working on joining the system as well. I want to underscore that if this system were to scale across APEC, the framework would help underpin over a trillion dollars in digital trade. So we regard that as a very big priority and, again, we cannot emphasize enough just how critical the FTC is to that framework. And it's also a similar dynamic with the EU. It's been, the FTC, extremely integral to the success of both privacy shield frameworks. We all know, and it’s been touched on, about a year ago, GDPR was put into effect in Europe. And like the predecessor directed before it, it imposes certain restrictions on the ability of companies to transfer certain data from Europe to other jurisdictions, so we have Privacy Shield. And, again, like CBPR, it's a voluntary enforceable mechanism that companies can use to promise certain protections for data transferred from Europe to the United States, and the FTC enforces those promises made by Privacy Shield-participating companies in its jurisdiction. Again, I talked about how big APEC was and how these data flows underpin trade there. The EU is actually the largest bilateral trade investment relationship with the US in the world. That, too, is valued at over a trillion dollars. And I know the Transatlantic economy accounts for about 46 percent of global GDP, about one-third of global goods trade, and the highest volume of cross-border data flows in the world. And the Privacy Shield program is absolutely key to underpinning this economic relationship. We have about 4,500 companies now participating in the program. They've all made these legally enforceable commitments to comply with the framework, and they range from startups and small businesses to Global 1000 and Fortune 500 companies across every sector, from manufacturing and services to agriculture and retail. And I do want to note that about 3,000 -- nearly 3,000 -- of those companies are actually SMEs, so it’s not just the big tech companies that we're talking about. So to help protect data against improper disclosure or misuse, the Commerce Department and the FTC do work together, and they move swiftly to ensure that participating businesses who join Privacy Shield and certify under Privacy Shield are complying with their obligations. And over the last two years, Commerce, for example, has implemented a buying arbitration mechanism and new processes to enhance compliance oversight and reduce false claims. And by the same token, the FTC has enforced companies’ Privacy Shield declarations and commitments by bringing several cases pursuant to Section 5 of the FTC Act, which prohibits unfair and deceptive acts. We also refer false claims participation in the program to the FTC, which have often resulted in FTC settlement agreements. And under those agreements, the FTC can obtain certain remedies such as remediation measures and compliance monitoring that are, I think, generally otherwise unavailable in an enforcement action. And to date, the FTC has brought about four false claims cases. So, again, as with CBPR and APEC, the FTC has been just an essential element in bridging the gap between the EU and the US approaches to privacy. And, again, I'll just end by saying you're not going to get buy-in legitimacy or credibility without that enforcement power and that collaboration and cooperation that we're all talking about today. So thank you.

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

MR. THOMPSON: Sure. Thanks, Stacy. So, yeah, the status of the partnerships -- as I mentioned, the partnerships stem from a 1997 meeting. There were three partnerships created across Canada -- one in Vancouver, one in Toronto, Ontario, and one in Montreal, Quebec. At one point in time, we saw this increase to seven Canada-US cross-border partnerships, but that wasn't maintainable for a number of reasons, primarily being there wasn't a lot of enforcement work in Atlantic Canada and Saskatchewan, for instance. So, I mean, things changed. And, again, as I said, priorities change. So right now we have three partnerships, including the new Pacific partnership which replaced Project Emptor. The Montreal Canada project, Project Colt is also defunct currently, but I mentioned we're working on renewing these efforts and coordinating something there. So, right now, as it stands, there’s the Alberta Partnership and the Toronto Strategic Partnership, and the Montreal Partnership. As far as improvements go, one area for I think more global enforcement cooperation that we discuss a lot at the office is disruption. And by disruption, I'm not talking about actual enforcement action. I'm talking about cooperation with private sector partners, using the data that we capture in our central fraud databases to block, say, shut down foreign numbers, to get bank accounts blocked. In Canada, we're sharing information with banks and credit card providers to go after the subscription traps, the continuity schemes, the counterfeit sales of other goods online and nondelivery goods. So the information we house that there's other alternatives to enforcement, and those are some of the areas that need to be improved on internationally.

MS. FEUER: Thank you very much. I now turn to Kurt Gresenz, who is the Assistant Director at the SEC’s Office of International Affairs. And, Kurt, as we heard earlier from Jean-François Fortin, securities enforcement collaboration is truly global and truly impressive, I have to say. I'm interested in hearing more from your perspective to inform our thinking about the cooperation in the areas that fall within the FTC's jurisdiction.

MR. GRESENZ: Thank you, Stacey. Let me start out by giving the disclaimer I’m required to give, that these are my views, only my views, and not necessarily those of the Securities and Exchange Commission, its Commission, or its staff, which I like doing because that frees me up now to say what I would like to say, which hopefully follows what the SEC would say. Okay, so let me start out with building on some of the themes that have been talked about. One of the reasons, I think, that we have been successful in forging a pretty broad alliance of securities authorities around the world that are cooperating is by virtue of the fact that the IOSCO principles of securities regulation are part of what national economies are assessed against as part of the financial sector assessment program that is done by the IMF. So essentially when the IMF and team comes into a jurisdiction to grade you on your financial resiliency and financial regulation, they're going to look at the IOSCO principles. And the IOSCO principles say that your securities has to have certain minimum powers and also the ability to share information across borders for enforcement purposes. And I think that has been one of the key tools that has caused one of the things that Jean-François talked about from early adoption, say two dozen countries in 2002 under the MMOU to where we are now as 121, that it's an easy way to getting a failing grade by not being signed up to the MMOU. And national legislatures have, for the most part, made the amendments to their domestic law to enable them to meet the MMOU standards. So in the scale of cooperation, Jean- François talked about over 5,000 requests that were made under the MMOU last year. The SEC is, as you might expect, a big user of those, probably 600 to 800 of those were ours. So we have an incentive in that process working smoothly. And where the parallels are, I think, for me is when I talk to my colleagues at the FTC, we're talking about consumer protection. And the concept of investor protection is essentially the same concept. The investor is our consumer. And one of the focuses of our enforcement priorities is on the mom-and-pop investor, the retail investor who really is somebody that will benefit from an active securities authority acting in their stead. In the securities context, one of the things Jeff talked about was he mentioned you have people set up in one country, you have targeting of investors somewhere else and then you have sending the funds elsewhere. I would actually build on that. In an ICO case for example, the entities might be incorporated in two or three different jurisdictions. The investors might be targeted in the UK, Australia, and the US. They might be storing their documents in a fourth or fifth jurisdiction or in the cloud so it’s very difficult to, you know, figure out where those are to begin with. So those are the challenges, and building through those, and I think we've had a good discussion of the privacy challenges, but two things I want to mention that also came up in the earlier points is one is what I call regulatory arbitrage, which somebody called regulatory competition. Cooperation works very well, but we also have to be cognizant that there are competing policy concerns with how we approach our enforcement tasks. So for example, a sophisticated fraudster is going to have some basic awareness of what the regulatory scope is in a given jurisdiction. And these people may set up shop in particular places and do things in particular places for taking advantage of whatever the legal system is there, and often that legal system may be one that is less conducive to cross-border sharing. So then as we advance down the path of the investigation, either related to that or other things, regulators move at different speeds. They may have different approaches as to how they approach witnesses. Are we going to go let everybody know in advance? I will tell you that from an SEC investigative perspective, which I'm sure people around the room and at this table would share, that people acting in a manner that is entirely consistent with their own investigative processes and procedures, but that may be contrary to what somebody is doing elsewhere. Those are things that are going to almost always result in people wanting to control their own investigation, perhaps at the expense of greater coordination. And I think that's where, you know, discussion is certainly important. And I don't know if this is really privacy. Maybe this goes to confidentiality. Also, different authorities have different legal requirements when it comes to what types of information they have to disclose in a particular setting. So let's say that we transmit files to an authority who assigned assurances of confidentiality and then we read a newspaper report that talks about things that we disclosed on a confidential basis, and then we drill down and it turns out that, well, yes, they kept it confidential but not from a lawful request, and it might be a Freedom of Information Act request or something like that. So that’s obviously going to be something that maybe you don't anticipate on the front end, but it might chill information exchanges going forward. And then the case of the ambitious prosecutor, he or she who may leak to the press. I know that that’s always a source of great consternation, whether it's the SEC or DOJ or elsewhere, when you read confidential details that are unattributed by a source who’s not authorized to speak about something that you thought you transmitted in confidence. So I do want to talk about those. I think the last thing I want to talk about in challenges is one of the things that we are dealing with frequently at the SEC, and I think we sort of have a little bit of a handle on it, and I know it must be something that the FTC confronts, also, but the law has been unsettled for a number of years as it relates to the Electronic Communications Privacy Act and what type of records we can get from internet service providers, and maybe who a subscriber is, who is the identity of a particular account. Maybe that’s something that is reachable, but what about the cases where you know there's communications and you want those communications, and maybe there's impediments there. I know that the criminal authorities can go through a warrant process for things like that. What is the recourse of an administrative agency where we don't necessarily have recourse to a criminal mechanism to show just cause, due cause, probable cause, reasonable suspicion, whatever the standard is. So cooperation works, but we have to be, I think, vigilant of the challenges to that, and like we’ve already talked about in the GDPR space, how do we get to a solution that works for most people most of the time.

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

MR. GRESENZ: So there are three sections that I'll talk about. And absent these three things, we would not be able to meet the IOSCO principles, which means we wouldn't be able to sign the MMOU, which means the Treasury Department would be unhappy when we were adjudged to be noncompliant in an FSAP in these areas. The first one is what I call our access request authority, and what this says is the Commission has discretion to share confidential file materials with any person, provided that person demonstrates need and can make appropriate provisions of confidentiality. And I think more or less that tracks what the FTC can do, although maybe the Safe Web is restricted to regulatory authorities, where the SEC, in theory, has discretion to share with any person. Our Commission has delegated that authority to exercise the discretion to the staff in the area where I work with, which is cross-border enforcement cooperation. Now, typically, my office will look at any request for access for SEC files that comes from a foreign authority, and we will make a baseline determination of whether sharing is appropriate with that organization or not. Obviously, if they’re an MMOU signatory, that question is easier. So that's the first one, the ability to give access to materials and files. The second one is to use our compulsory power on behalf of a foreign authority. And I think, again, here, there's probably parallels all down the line with the FTC's existing authority, is we have to make sure that there's -- well, for us to start with, the requesting authority has to be a foreign securities authority, which means do they enforce laws that fall within their securities regulation. Number two, the authority has to be able to provide reciprocal assistance. And, again, if it’s an MMOU party, that's already written in and baked into our principal cooperation mechanism. The sharing has to be consistent with the public interest of the United States, and we go through that process of the deconfliction process with the US Department of Justice. So that's something else that is taken care of. And one interesting fact here is it's not necessary for the conduct to be a violation of US law. So, for example, if it's illegal in Country X but it may not be illegal here, we do have the authority to assist in appropriate circumstances. The third piece after the access request and the compulsory authority, you know, of course, you list three and then you forget the third one. Let me come back to that one. I should have made a note when I was thinking about this.

MS. FEUER: Okay. Well, that's great. So we have a lot here to work with to start us off on questions, and there are so many strands to the strands that we've brought out that it's hard to know where to start, but I am going to start with two questions that have come in. And the first really builds on, Kurt, what you were just talking about, that your investigative assistance power doesn't require the law violation to be a law violation in the United States if it is a law violation in another country. And we actually have a question on that. And this is, I think, to the consumer protection and privacy areas where I think laws diverge more than they do in the securities arena. But the question is this, when an act or practice would violate consumer protection law in a consumer's home country but it isn’t against the law in the seller's country, should agencies cooperate? When there is a conflict of laws, what should consumer and privacy agencies do? And I'm going to throw that out to the panel and see who hops on it. James?

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

MS. FEUER: So that's helpful to know. By way of background, the FTC's -- yes, I work for the FTC -- the FTC’s authority to obtain investigative assistance for foreign counterparts relates to unfair or deceptive acts or practices, as well as violations of laws that are substantially similar to those that the FTC enforces. So we have a little bit more defined statutory language, although as you can see here, it allows to us cooperate with a wide variety of agencies. Anyone else want to opine on this first question from our audience? Marie-Paule?

MS. BENASSI: Yes, thank you. It's a very important and interesting question. So in the European Union, we have laws which are harmonized, fully harmonized, or minimum harmonization. So our system of cooperation for enforcement actions are based on the minimum harmonization, when it is minimum harmonized. So it means that you cannot take an enforcement action for a violation which goes beyond the minimum harmonization and which would not be the same in one -- in your member state where the trader is established compared to the member states of the consumer. But requests for information and other types of assistance I think can function. And what we see when we work with cooperation in an informal setting with other jurisdictions outside of the European Union is that very often the principles -- at least the principles are quite the same. And so it’s on this basis, I think, that in many cases exchange of information can be possible.

MS. FEUER: Jeff.

MR. THOMPSON: Yeah, I think this touches a little bit on what I was referring to with disruption as well. Enforcement is not the only answer where we can't enforce the law in another country or a law doesn't exist that prohibits a certain action. However, we may be able to work with, again, private sector partners or other agencies to block these services from being offered in Canada. Binary options was a great example in Canada where we worked with credit card companies, and Canadian law prohibits the sale of securities if somebody is not registered. So, therefore, there was no binary options. Companies registered in Canada, therefore, any sales to Canadians are against our laws. So we're able to work with Mastercard and Visa and the credit card companies to prevent any Canadian transactions for binary options.

MS. FEUER: So that’s very interesting. So there are really a range of options here from a very broadly defined public interest standard to the European Union's concept of minimally or maximally harmonized laws, which essentially means whether every EU country has the exact same law or whether they have more leverage and freedom to implement laws differently. To the example that Jeff has given with disruption and also being able to cooperate across the civil and criminal divide, because we obviously cooperate with the RCMP as a criminal agency, and many of our colleagues, for example, the UK ICO, has criminal authority as well as civil authority. Kurt, I saw you want to say one more thing here.

MR. GRESENZ: Yes, I was actually thinking about a topic that you and I have talked about. So one of the questions that can come up in the work that I do is there might be a hesitation on the part of some of our foreign counterparts to work with us in some cases if they are afraid that an SEC outcome will foreclose them from acting. And I think this is the result of different legal interpretations of what amounts to double jeopardy. So you know, in the US, depending, we have different sovereigns for different purposes. What some of my colleagues overseas have said that essentially should the SEC take some action, even administrative action against an actor where the conduct is based on something the foreign authority is looking at that that could potentially preclude the foreign authority from doing any action at all? So that's in one direction we have to be sensitive to that. You know, the question there is let's say we ask for help in a case and they're looking at it and they say, well, we don't want to tell you because you're going to take action and then we're going to be left with nothing. And, again, we would work through that stuff, but it's a real issue. You know, from our side, we take Foreign Corrupt Practices Act violations seriously. And from an economic perspective, my personal view is there's a really good strong reason to do that. That's not always the approach that some foreign jurisdictions take. And we have from time to time encountered hesitancy to help us on our FCPA investigations on the SEC side, not speaking for the Department of Justice, because of a view that well, you know, I don't understand how that falls into a securities violation. It could be just code for, well, we don't really look at it in that way from our country. So we don't think we can help you. Again, people have to decide are they going to step up and are they going to help.

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

MR. DIPPLE-JOHNSTONE: Okay. Well, I think in many ways, you know, we should look at the opportunities. There are many countries around the world which are looking either at their first data protection act or privacy act or enhancing the one they’ve got. And I think the key things are to make sure that, you know, as referenced by the international conference, that there are those opportunities to collaborate and cooperate to ultimately do what we’re all there to do, which is to keep our citizens safe. And this will continue to be a theme as we go forward. Countries like India are looking at the data protection bill, going through their Parliament and their legislative process. They will be significant, given the scale and size of their economies and their country. So we should look for the opportunities to work better together.

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

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

MS. FEUER: So any other observations on the question? It focuses on whether changes in privacy laws might affect cooperation, but I think the question is really broader. As we talked about this morning, many countries are in the process of updating their laws, whether it be consumer protection laws, privacy laws, securities laws, maybe? And so I wonder how this whole issue of changing laws, changing standards affects the way or the opportunities or the challenges for cooperation. And I'll throw that out to whoever wants to go first. Secretary Sullivan.

MR. SULLIVAN: So I'll just say, we in the International Trade Administration have been working with the National Telecommunications Information Administration and the National Institute of Standards and Technology, also sister agencies at the Commerce Department, to evaluate what, if anything, the Federal Government should do to address some of the privacy concerns that have certainly captured a lot of attention in the last couple of years. I think this goes back to what I was talking about. This is my personal opinion. I think we're probably quite a long ways off from any global standard. I think -- you know, you talked about India, Brazil. A lot of countries, you know, many have been looking to GDPR as an example, but no one is replicating GDPR exactly. There are still these differences, and those are going to continue because, as I think I said earlier, different countries have different cultural norms and legal traditions and histories, and they have different policy priorities that are all going to, you know, result in differences of kind if not degree. Again, I sound like a one-trick pony, but this goes back to the APEC CPBR system because what that basically is, is it takes these internationally recognized norms that we all agree on, which came from the OECD guidelines and the fair information principles before that and said let's all agree to these baselines, because you are going to have these differences. And we have to find a way to bridge these differences between these different regimes that countries have. I think, again, you know, there are aspirations for a single global standard. I don't think that’s about to happen anytime soon, so we’ve got to figure out, you know, how these different regimes can be made to work together. The approach in APEC is this interoperability approach, which I really think has a lot of appeal, is very well developed, and has been embraced, as I said, by a lot of countries in APEC, and we’ve heard a lot of interest from other countries around the world because it really is very flexible and can be adapted. On the one hand, it definitely protects privacy, but it can deal with technology because we in government are always going to be one step behind in regulation and legislation to begin with, but in this space in particular with the technology evolving so quickly, I really think there’s great appeal there.

MS. FEUER: Thanks. Anyone else? Marie-Paule?

MS. BENASSI: I agree with what James Sullivan said. I think it's going to be really incredibly difficult to sort of have a very harmonized universal framework for that data protection but also for consumer protection. And in the European Union, we are -- we have these principle-based laws and even in case of maximum harmonizations, there remain some differences. So our reply is to work on common enforcement actions and develop these actions in a way that they have become also guidance in a way. So -- and they are less theoretical than the law because they are applied to practical problems, practical practices. And in the future, what we want to do is to do more of these actions where, in fact, we have -- we publish the common position of the CPC network in the form of a guidance that can be applied by all the different operators in a certain industry. The other point I wanted to mention is notice and action procedures. So in the European Union, we have a law which is called the E-Commerce Directive, and which provides that marketplaces and social networks do not have a duty to monitor illegal practices, but they have a duty to act upon notification against an illegal practice. And this means, for example, withdrawing the account, obscuring the information. One of the problems of these operators, because we are now discussing a lot with them, is that, first of all, the domain of laws, which should apply, which is enormous and then it's -- for them, it's very difficult in a way to have an efficient action when the domain of law is so big and also the enforcement type are very big. And so I think that also cooperation on common notice and action procedures at the international level with a certain level of recognition, so this is what Jeff is saying about this disruption, so looking into also other type of models which are more based on practical enforcement tools, systems.

MS. FEUER: Thank you. Anyone else? So in the few minutes we have remaining, what I'd like to do is turn to each of the panelists and, similar to the first panel today, ask for a one-, maybe two-minute takeaway of what you see as the most important tools for international cooperation, what you see as your main challenges, and how you might remedy them. So I'm going to put Kurt on the spot and ask our SEC colleague to start first.

MR. GRESENZ: So when you started with tools, I did remember the third tool that was so important that I forgot it, but it actually is very important. So we have two provisions of law which help us protect information we receive from foreign authorities. The first one is a statutory protection that protects from any third parties any materials that we receive from foreign securities authorities. So outside of the litigation context, that essentially gives us ironclad protection for SEC files for enforcement purposes. But more recently, we added a legal amendment, a new tool that protects in litigation any material that would be privileged in the foreign jurisdiction. So let's say, for example, we get confidential financial intelligence from a foreign authority, and as a condition of receiving that, the foreign authority makes a good faith representation that this is for intelligence purposes, and it is privileged from disclosure in our jurisdiction. Under Section 24(f) of our 34 act, that protection would carry over into US law, and there is an absolute privilege it would stand discovery, for example, that it will carry over the foreign privilege to US law. And it could be anything. It could be financial intelligence, it could priest-penitent. I mean, if there is a privilege that is recognized in the foreign jurisdiction and we receive materials pursuant to that privilege without waiver, then there's no examination behind the statute for the court to make. It just has to be the representation. So that, I think, gives us added teeth when it comes to representations that we, in fact, can protect things in our files. So, you know, the takeaway for me is the big difference that I see is it looks like what we do in the security space is much more concentrated. You know, we know exactly who the players are. We see them all the time. There's crossover to some criminal authorities and other domestic agencies, but by and large, we seem to be in a more narrow lane. And I think my takeaway would be that listening to my colleagues here is there's a lot of lanes running in parallel and overlapping and overpasses and other sides that I think that we just don't have that much of in the security space in my view.

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

MR. THOMPSON: At the end of the day, what I got out of this is, I mean, there's an increasing abundance of information in the world, and we need to be able to prioritize our enforcement efforts. So it's processing all that information that’s certainly a challenge, and there’s all kinds of technology tools to help us. But not only that, it’s setting the right priorities and working smarter. So the intelligence- led approach, where we’re using the central fraud databases such as Consumer Sentinel or Anti-Fraud Centre to start driving enforcement action in a more targeted and effective manner.

MS. FEUER: Thank you. So intelligence is key to international cooperation. Marie-Paule?

MS. BENASSI: So I wanted to say two things. The first thing Jeff said it already, which is about prioritization. And I think that fraud is becoming internet fraud, all the different facets of it, and its internationalization, I think, is becoming a very big problem in terms of the harm caused to consumers and collectively in the world. And also in this respect, the role of the big platforms, you know? And if we don't prioritize and don't find efficient ways, building also on what this platform can do, I think is going to become more and more difficult to prevent fraud. And we see organized crime moving into these kind of activities, which seems to be giving them the possibility to earn a lot of money very easily. But then we have a different type of problem which we didn't discuss much, because also we have a bit -- had discussions a bit in silos here, but which is how to tackle the new types of misleading practices which are developing and which are based on the data economics. So on this we need to build links between competition, data protection, and consumer protection in order to understand this and see how -- what are the impact on consumers in terms of also the possible harm and also for businesses, possible lack of competition that this type of new data models are creating.

MS. FEUER: Thank you. Secretary Sullivan.

MR. SULLIVAN: So, again, for me, my perspective, the biggest challenge we're dealing with right now is the fragmentation or the vulcanization of the internet around the globe. You're seeing rising delocalization, which, again, I think that just impoverishes everybody, those within the country that have imposed delocalization measures, those that have overly strict restrictions on data flows. I think certainly we share a legitimate and strong desire for consumer privacy with a lot of other countries. And as I noted earlier, we take different approaches. I do think we need to be very wary because these issues, the way we're headed and in the coming years, we're going to be looking at, you know, more and more connected devices that are transmitting data, and this data has to be protected on the one hand, but it can lead to such tremendous opportunities. I mean, in the public sphere, in terms of smart cities and efficiencies and health breakthroughs and precision medicine and detecting disease patterns. And we want to be very wary of going too far in one direction, I think. So I agree with you about the balancing of these interests. And, again, I'll go back to my -- I really think, you know, the EU, for example, and the US do take different approaches, but we ultimately share, at eye level, the very same goal. And I think interoperability between GDPR on the one and CBPR on the other could be a very positive development. I know there was a referential a few years ago with BCRs, binding corporate rules, which is an EU proof mechanism for data transfers and mapping it relative to CBPRs. And, again, these all derive from the same OECD guidelines, and I think there's a lot of overlap. And I know GDPR allows for certification mechanisms, and I think there's a tremendous opportunity there for us to make these systems work together and make sure that we are extending privacy protections around the globe, while at the same time making sure that we're not quashing or squashing innovation and, again, doing damage to our long-term interests. So I think interoperability would be my solution there. And as, again, I've said a couple times already, you know, the FTC is probably the preeminent privacy data protection authority, as it were, in the world going back to the 1970s, has been a great partner as we go around the world and talk to countries on this. And so we should continue to do that. And I hope we can partner with other like- minded countries to that end.

MS. FEUER: Thank you. And the clock is quickly counting down, so I’ll ask Commissioner Dipple-Johnstone to say a final word.

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

MS. FEUER: So thank you very much to the panel for some incredibly thought-provoking ideas. Before we break for lunch, I just want to mention that the Top of the Trade on the 7th floor has catering available for you to purchase. There's a handout on the table just outside with information about nearby restaurants. If you leave the building, you will have to go through security again unless you are an FTC employee. And be mindful that there is a small group of protesters outside the building, so leave ample time to get back in for our fascinating afternoon panels. Thank you. (Applause.)

AFTERNOON SESSION

COMPETITION ENFORCEMENT COOPERATION

MS. COPPOLA: Okay. I’m getting the green light from Bilal Sayyed, our head of Policy. So I think we should get started. Thank you all for coming to this afternoon’s panel. Today, we’re going to talk about enforcement cooperation on the competition side. You’ve just heard, in the break before lunch, about cooperation on the consumer side. It has a very different nature on the competition side. So we’ll be talking about that this afternoon. I’d like to introduce my panelists briefly. Starting with -- going in alphabetical order, Nick Banasevic. Nick is from the European Commission’s DG Competition where he heads the unit that covers IT, internet, and consumer electronics. So we’ve had the very good fortune to cooperate with Nick on a number of cases. Next to Nick is Marcus Bezzi. He is the Executive Director at the Australian Competition and Consumer Commission, where, among other things, he oversees all of the ACCC’s international engagements. So I also have had a great time working with him, even though very often the calls were extremely early for us and extremely late for him. We still have a terrific relationship. Then we have Fiona Schaeffer, who is an Antitrust Partner at Milbank LLP. She has practiced on both sides of the Atlantic. So she brings unique perspective in that sense and has lot of experience in multijurisdictional mergers in particular. Then just to my left -- I was a little thrown off because I thought it was alphabetical and that’s why I was -- yeah, you didn’t look like Jeanne, anyway. So Jeanne Pratt, who is Senior Deputy Commissioner from the Canadian Competition Bureau. She oversees their abuse of dominance and mergers and noncartel horizontal conduct matters. She also has experience at the ACCC. So I’m sure that she will bring that to the discussion today. So those are our panelists and you’re going to hear from them, not from me. Just by way of background, a lot of the cooperation issues that are relevant to the competition enforcement discussion were addressed in this morning’s session. So we’ll try to get into a little bit more granular level so that we don’t repeat what was discussed this morning. Just I guess to set the stage in thinking about cooperation in general, we engage in enforcement cooperation for a number of reasons. Often, we find that it will improve our own analyses. It allows us to identify issues where we have a common interest, it allows us to avoid inconsistent outcomes, and perhaps, most importantly, for the outcome to coordinate remedies. So with that in mind, I have asked the panel to start off -- we’re trying to understand strengths and weaknesses of enforcement cooperation, get some advice for the FTC. So before we delve into specific questions, I’ve asked each of the panelists to deliver the headline of their story. What is your elevator speech? Starting with Nick.

MR. BANASEVIC: Thank you, Maria. Thank you to you and to the FTC. It’s really a great pleasure to be here and, hopefully, share some interesting insights. My elevator ride is 27 floors up and it takes about half a minute. So I don’t know if that’s how long I’ve got. But I think my five-second message is don’t neglect cooperation, it can really bring benefits. Of course, I think the first instinct that we have and what we’re responsible for by definition is our own jurisdiction, and the bread and butter of that is doing individual cases and that’s what we focus on. That’s, as I say, the bread and butter of our work. Beyond that we have our policy, guidance, soft law role which is complementary to the actual case enforcement. I think my core message and, hopefully, I’ll illustrate it during the panel is, although you’re not going to necessarily spend the majority of your time, although you might spend a lot in an individual case on cooperation, I think it’s trying really -- in terms of what agencies can gain and benefit mutually. Don’t view it as add-on activity, something extra that you have to do. It can really bring organic benefits to either an individual case -- and, hopefully, I’ll give some examples -- and also to policy to avoid misunderstandings, to converge where possible. It’s really something that should be fostered over the years. I’ve known Maria and her colleagues and colleagues at the DOJ for many years, and it’s really very useful in terms of building trust, facilitating relationships, and understanding where each of us are coming from. So from my perspective, I’ve had very good experiences over the years and I will give some more insights as we go on.

MS. COPPOLA: Thanks. Marcus?

MR. BEZZI: Well, if Nick had been standing next to me in the elevator, I would say I agree with all of that. I’d also say -- make the point that was made a lot this morning, that commerce is now more global than ever and, indeed, that’s a trend that’s significantly enhanced by the digital economy. And the corollary of that is that enforcers have to respond to the pace of change and globalization by working more closely together. We have to be more joined up and timely. And we need to do this for three reasons. Firstly, because I believe that in doing so, we will facilitate more efficient commerce. It will actually be better for the commercial parties if we are more joined up. Secondly, it will make us better at our jobs. We’ll be more effectively able to police compliance with laws in our jurisdictions. And, finally, because we’ve got scarce resources and working closely together is likely to prevent us from reworking issues, from seeking to reinvent the wheel or overlapping each other’s work. It will make us more efficient. Thanks.

MS. COPPOLA: Great.

MS. SCHAEFFER: Well, hopefully, we’re not in a Dutch elevator so there’s room for me as well. I certainly agree with everything that both Nick and Marcus have just said. I particularly like the idea that cooperation is not the icing on the cake, but, hopefully, the glue, as Kovacic would say, or the icing in the middle. What does cooperation mean? It doesn’t mean achieving the same result on the same timetable in every transaction or investigation. That’s not cooperation. That’s utopia. And that’s never going to exist. But I do think it can and often does mean a greater understanding of the issues, an enhanced understanding, as you said, Maria, for your own investigation and how to address concerns. And it, hopefully, can be used to maximize all of the efficiencies in the process given the substantive constraints and the procedural limitations that each jurisdiction has to live within. So I think from a private practitioner perspective, I agree there is a lot to be gained from cooperation. And I would love to use this panel to talk about practical ways that we can enhance cooperation, again using Kovacic’s human glue analogy, more at that human level than at the formal, procedural MLAT kind of level that I think we’ve all worked with or had our frustrations with over the last decade or so, and have found that it is these informal connections and understandings that have facilitated greater cooperation more than the very formalistic process.

MS. PRATT: Well, I agree with everything that everyone said. The only thing I would add is I don’t think cooperation is only good for enforcement agencies, I think it’s good for business. It allows competition law enforcement agencies to benefit from the experience of one another, reach conclusions quicker, and with less probability of conflict and ultimately, hopefully, increased timeliness and effectiveness of the outcome. But it’s -- as all of these people have said, it’s more than about sharing information, it’s that human glue. It’s having the trust amongst agencies to be able to have productive discussions, to be able to exchange theories of harm, to talk about what they’re hearing from the marketplace, to sort of be in a united front with the businesses so that they understand that it is in their benefit and it will be more efficient for them to cooperate with all of us together. And so I think the result, hopefully, is that investigations aren’t longer, are more focused, and the probability of outcomes being conflicting outcomes is minimized, and ultimately for all of us, the predictability, consistency, and effectiveness of outcomes across jurisdictions is maximized. The Canadian Competition Bureau, as you heard from Commissioner Boswell this morning and as you heard from some of my colleagues from the RCMP, I think Canada generally is a strong advocate for international cooperation and we’re always looking for opportunities to cooperate further, including with respect to not just merger cases, but unilateral conduct cases as well.

MS. COPPOLA: Thanks, Jeanne. Okay. So there’s a lot of human glue. So we seem to all agree that there’s a lot of great things that come out of cooperation, cooperation is very important. I guess drilling down to the next level, what can parties expect for agencies, and I guess for Fiona, what can agencies expect at a more detailed level from cooperation. Why don’t we start with Marcus this time.

MR. BEZZI: Thanks, Maria. Well, there are things like sharing case theories, if waivers are given there will be sharing of information. If we use our formal processes, they can expect them to take a long time. In our experience, MLATs -- well, I’ll just relate one story. We used an MLAT in a criminal matter recently and were absolutely stunned to get a result from the process in one year or a little bit less than one year. That’s the fastest that anyone can ever think of. Mostly, they take two years, three years, four years. We’ve got 19th Century formal cooperation procedures, 19th Century timetable for our formal cooperation procedures. So really we spend most of our time on the informal. And I must say, I listened to some of the sessions this morning and heard people talking about the IOSCO MMOU. I was very envious hearing about how quickly their processes work. They really do seem to operate at a more reasonable speed given the speed of commerce today. I should say that in mergers, the informal cooperation works extremely well and we don’t have to rely upon the formal. A lot of the time in Australia, we use the processes to coordinate remedies and people can reasonably expect us to do that in a fairly efficient way. I think that is a good aspect of the current system.

MS. COPPOLA: Thanks. Jeanne, do you want to –

MS. PRATT: Sure. I mean, we cooperate very closely with the Federal Trade Commission and with the US Department of Justice and the DG Comp. Those are the three jurisdictions or three agencies that we cooperate most with. And if you’re a party either on the merger side or on the conduct side, you can expect that we would have in-depth discussions related to investigative approach, theories of harm, market definition, concerns expressed by market contexts in the various jurisdictions and, frankly, our analysis of the data and evidence that we’ve seen. In some cases, you will see us do joint market interviews of joint market context. We’ll have sometimes joint calls with the parties and we’ll coordinate that interaction with the parties to make sure that the risk of uncertain or conflicting messages is minimized. And where cross border competition concerns are identified, you can expect the Canadian Competition Bureau to engage agencies in remedy discussions, because we need to make sure that those remedy discussions are considered in the broader context, including the need for remedies in one or more jurisdictions and whether a remedy in one jurisdiction may actually be sufficient to address concerns in another, so that we may not need our own consent agreement in Canada. We also look at whether a common monitor should be appointed or looking at the consistency of the language around preservation of assets or hold separate arrangements. And in some cases that cooperation with the Canadian Competition Bureau may ultimately lead to us accepting a remedy that is proposed from a sister agency and it can, where appropriate, ensure the most efficient and least intrusive form of remedy for market participants. So we do cooperate very deeply with our agency. And that, again, is based on a strong foundation of trust that has been built over 20 years of cooperating with the counterparts with whom we cooperate most frequently.

MS. COPPOLA: Thanks, Jeanne, very much. I’m very sorry to have to ask Nick to add to that because I think you about covered the universe. But, Nick, what do you think that parties can expect from cooperation and thinking specifically about your perspective from a shop that deals with conduct matters?

MR. BANASEVIC: I agree with everything so far. So not –

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

MR. BANASEVIC: In the post-panel, perhaps. No, but I think, as Jeanne said -- and perhaps -- and this is something I think we’ll develop perhaps as a difference in terms of incentives in conduct in mergers. Most of what my experience, in terms of what parties have incentive-wise, is in conduct. I’ve worked on a few mergers where the incentives have been aligned. We’ve had issues with parties where sometimes they don’t want to give waivers in conduct cases because they feel that that would somehow not be beneficial to them. That is, of course, their prerogative. My personal view is that actually, you know if they’ve got a good story to tell, there’s no issue with giving away, but because it’s precisely those things that we can discuss openly with them and with our colleagues, our sister agencies. But I think exactly the kinds of things that -- whether or not there is a waiver, because I think even without a waiver we’re able to, from our perspective, in terms of what we can gain, talk about theories of harm in the abstract and general levels, test, test theories, test realities. So I think if we’re doing that anyway, there is an interest for parties to give us a waiver. Again, that’s my personal view. But as I say, we’ve had some cases where we haven’t had waivers. To switch, in terms of what -- because I think we do have that responsibility ourselves to parties. And, again, maybe it’s more in mergers that it happens that they have these incentives where they’re aligned in terms of timing, coordination. In terms of what we can expect as an agency, just to develop a bit what I was saying at the beginning, I think, again, it’s not that we must always dream of having the uniform solution worldwide. We all have different legal traditions, different systems. Having said that, I think where we can achieve at least a high level of convergence where possible, I think that’s something that is desirable. So I think we, in terms of both policy development -- and then when we’re doing cases, I think it is invaluable and we each have a lot to gain in terms of, again, coming back to some of the things I’ve said in terms of case specifics, theories of harm, making sure that we’ve got a reality check on whether something is correct or not, testing these theories with each other, and if appropriate, moving the cases forward in the same or similar direction. If not, at least understanding the background to where we’re each coming from and why we may take a different approach. And I found that invaluable over the years in many cases, and I’ll develop that a bit more a bit later.

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

MS. SCHAEFFER: Sure. Well, I think from the parties’ perspective -- and my comments are primarily in the context of merger reviews -- the goals of what can realistically be achieved from cooperation include reducing duplicative effort, reducing the burdens of investigation, convincing the agency, through cooperation, that just because there is a hill there to climb doesn’t mean that everyone has to climb it. One can climb and report, assuming, of course, it is a similar hill. We hope to have consistent, if not identical, outcomes and that includes, where possible, hopefully convincing an agency that they don’t need to have the same remedy as everyone else just because someone else has a remedy. We don’t have to have every jurisdiction reviewing, believing that it needs to have its pound of flesh in order to believe that it’s conducted an effective review. And that, of course, involves some levels of trust between the different agencies as well, that the enforcement of a remedy in one jurisdiction is going to be sufficiently robust to protect others. And, you know, that may not always be the case and it may vary by jurisdiction. We hope, also, that through cooperation we will, if not have a shorter overall timetable, certainly not a longer one. I think that is sometimes a concern that private parties feel is that a potential cost of cooperation is that you may be put on, in essence, the timeline of the slowest jurisdiction, rather than promoting efficiency throughout the process. I guess a word on waivers just to Nick’s point. In principle, I agree that knowledge is power and I like everyone at the table to have a similar level of knowledge, if we have good substantive points and arguments and documents to share, or even if not so good. The agency can do a better job armed with that knowledge than if there is some game-playing and trying to orchestrate the process and manage who knows what. I do think that that calculus is quite different in merger versus conduct cases. And it’s not a question of giving different agencies the same level of knowledge, necessarily, although in some cases it can be. But I think for us there is a bigger concern in conduct cases that information provided to one regulator and then shared more broadly increases the risk of discovery obligations and private class action consequences that aren’t so much of a practice concern in a merger context. So it’s not the sharing within the agencies necessarily that is the biggest challenge there; it’s what can be done with the information once it is within multiple agencies. We know that we’re dealing with jurisdictions that have very different levels of confidentiality protection, and in some instances, for example, are required to give third parties due process or other government agencies access. So I think there’s a greater feeling of concern about being able to manage the flow of that information in the conduct arena.

MS. COPPOLA: Thanks, Fiona. I think we’ll come back to that point about information exchange in a moment. But I think, before that, I want to pick up on Marcus’ point about keeping pace. I don’t know that -- the 19th Century might be a bit of an exaggeration, but I think even 20th Century tools are not fit for purpose. Last night, I was watching All the President’s Men with my 12-year-old son and they were trying to find the phone number for someone and they had a room full of phone books, and he just kind of said, what’s that, what are they doing? Anyhow, what types of things, what kind of -- what would a tool look like that was fit for the 21st Century? Are these more in the realm of informal cooperation? What tools do you use? What tools do you wish you had? What can we learn from you?

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

MS. COPPOLA: Yes. That’s why I’m looking at you. I’m sorry. (Laughter.)

MR. BEZZI: Well, where do I start. So informal -- I’ll start on the informal. And, look, I should say 95 percent of the cooperation that we’re involved in -- probably more than 95 percent is informal and it’s very effective and it involves engagement with the various agencies that we’ve got excellent relationships with. We have many counterpart agencies that we’ve got second generation cooperation agreements with or first generation cooperation agreements with. And they help to create a formal framework in which we can engage in informal cooperation. And I should actually just go back a step. The formal arrangements really do enhance the informal. We have a very formal arrangement with the United States. We have a treaty with the US. I think we’re the only country that has an antitrust cooperation treaty with the US. We rarely use it. I think the number of times it’s been formally used you could probably count on probably less than two hands. But I believe that it promotes the use of waivers, it promotes the cooperation of witnesses, the cooperation of parties with our investigations, and it really facilitates and creates the atmosphere in which informal cooperation works very, very well. So what does that actually mean? It means that we can have case teams that have regular phone calls if we’ve got a common investigation or we’re investigating common or related issues. We can talk about case theories. We can talk about practical things like when we’re going to interview common witnesses. We can talk about lines of inquiry that have not been successful that have been a waste of our time and suggest to each other perhaps don’t bother going there, it won’t lead anywhere or, actually, look here, it’s a better place to look. Those sorts of discussions happen between case teams and they are really valuable. The exchange of information when we’ve got waivers -- confidential information when we’ve got waivers is very, very useful. I should emphasize that we very, very rarely -- in fact, I can’t think of a single occasion that we’ve done it using a waiver, but we very rarely exchange evidence. I can think of two cases where we’ve done that using formal processes. If we want evidence, we will go to the source and get the evidence from the source if we possibly can. It’s much more valuable to us that way, anyway. So I think you said, what would be better? Well, some of the processes that exist under IOSCO where -- and, indeed, exist under the antitrust treaty that we have with the US -- where we can ask counterpart agencies to compel testimony, we can ask counterpart agencies to compel the production of evidence or production of information and to do so in a very timely way, to put in a request that can be responded to in days or weeks rather than months or years. Those sorts of things are things that we aspire to. We get a lot of it informally, I should emphasize that. I don’t want to understate the importance of the informal. But having a more formal framework which would enable more of that -- and I think they have in IOSCO context -- would really be a facilitator of even greater informal cooperation.

MS. COPPOLA: I think we heard on the consumer protection and privacy panel that some of that investigative assistance is already happening on that side. So it’s –

MR. BEZZI: Very much so, yes.

MS. COPPOLA: Since we’re all -- many of us have it housed in the same agency, you would hope that we can have that transfer over to the competition side. Jeanne, could you pick up a little bit on the informal cooperation point and tools?

MS. PRATT: Yeah, I’ll try not to do –

MS. COPPOLA: So we can just –

MR. PRATT: I, again, agree with everything that Marcus said. And I think what I would say is it only works -- those informal cooperation tools, again, only work if you’ve got trust in the legitimacy, the competence, the candor and, frankly, the ethics of your counterparts in the other agency. And you can’t develop that necessarily in the context of just having a case discussion. You’ve got to take the time to have the conversations to understand different frameworks, to understand how they go about doing their work. And, frankly, that in our experience has led to us getting to learn some of the lessons from our colleagues so that we don’t have to repeat the same mistakes and, hopefully, we have also shared some of those with our foreign counterparts. So some of the mechanisms that we use outside of informal cooperation on a case to try and do that are the case team leader meetings that you heard Commissioner Boswell talk about this morning, which I find incredibly useful because it is our officers who are doing the work, that are leading those cases, that will take some time out to talk about how they do their work, what issues they are facing. Sometimes it’s talking about a particular case development or a lesson learned that they have from their jurisdiction. And that builds relationships amongst our staff, it builds trust, it builds confidence in our counterpart’s abilities as economists and lawyers doing the same type of work. Exchanges are another tool. And as was mentioned this morning, I am the very lucky candidate who got to go to the ACCC for a full year and see how they do their merger work, and I benefitted greatly as an individual. But I also I think benefitted the Bureau because we got to see not just how a particular case unfolds, but how you actually manage the organization, how you do your work, what tools you use and, frankly, seeing how something can be so different in some areas, but there’s a lot of commonality in the analysis that we do in mergers.

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

MS. PRATT: It was a tough winter in Ottawa, I have to say. The other thing that we have found valuable is taking some time out, maybe more publicly, to have workshops on particular issues. The FTC and the DOJ and the Competition Bureau in 2018 had a joint workshop on competition in residential real estate brokerage. And, you know, we had eight years of litigation in the real estate industry surrounding the use and display of critical sales information through digital platforms that wasn’t resolved until years after the US. But because we had taken so long, there had been a lot of evolution in the law and the economy. And so some of the lessons that we learned along the way were also informative to update since the fight in the US. So the only other formal thing that I think I would I say, not the informal, is we have a gateway provision in the Canadian Competition Act, Section 29. So when we’re doing mergers, we don’t ask for waivers in Canada. As long as we’re working on a case and we feel that that cooperation is necessary for enforcement of the Competition Act in Canada, we feel that that gives us the ability to have that conversation with our counterparts. So if you -- and I think this would be particularly useful in the unilateral conduct side where you may be looking at different incentives. The merging parties may want to get through our process as quickly as possible. They, I think, have come to see more of the benefits of our cooperation to get them where they need to get to with less conflict and quicker results. But, you know, that kind of a gateway provision could allow us to have discussions on the unilateral conduct side because the discussion is only as good as the two-way communication allows.

MS. COPPOLA: Thanks. The senior level exchange, I think, would be a big hit here if the destination was Australia. But I guess kidding aside, it’s interesting because what you learn there, you’re coming back and you’re in charge so you can actually implement the changes. So that must have had a terrific effect. Okay, Nick, just thinking a bit more about cooperation in conduct investigations. I almost said antitrust investigations because I was looking at you. What kind of practical experience tips do you have that you would like to share?

MR. BANASEVIC: So I’m going to go back in time a bit and give you a couple of examples of very intense cooperation with the FTC and the DOJ. Actually, let me first say, to go back a step even, for us, cooperation starts at home in the sense that we’ve got the European Competition Network, which in -- I don’t know if “unique” is the word, but it’s the network of us, the European Commission with all the national member state competition authorities in the EEA, the European Economic Area, all applying European competition law. And so we first need to cooperate at home in terms of both just allocating cases and, of course, generally the European Commission does the cases that are over a broader geographic scope, whereas the national agencies tend to focus on more national ones and in terms of substance coordination as well. Beyond that, I think we have extensive international cooperation with all the major competition authorities around the world, including Canada and Australia. But to give the two examples that, for me, have been personally particularly instructive over the years, going back to the beginning of the century is first the Microsoft case with DOJ, where, as background, you remember that the D.C. Circuit Court of Appeals affirmed a monopoly maintenance finding here under Section 2. And that was while our case was still ongoing in Europe. We had an interoperability and a tying abuse, tying of Media Player. And then there was a remedy implemented in the US that changed the way that some things were done. So it had a kind of factual impact on some of the things that we were doing in our case while it was still ongoing. And the issues were also -- even though the liability case here was little bit different, through the remedy, there was an interoperability element as well. So the kinds of issues were very similar. We met, I think, for a period of a few years twice a year. We would come here once a year and the DOJ would come to see us in Brussels. And it was invaluable just to exchange theories, to understand where each side was coming from, and to develop a trust and understanding over the years. So I think it’s fair to say that even though the issues were different, there wasn’t always perfect agreement, but it was a relationship that we valued and that really brought a lot in terms of understanding where we were coming from and in my view, at least, having a solution that was not necessarily exactly the same, didn’t lead to an overt situation of conflict, which, again, in my view was greatly facilitated by these contacts. The second example is the kind of policy and case area standard essential patterns. This goes back to even Rambus with the FTC where we had a similar case ourselves in Europe. But more generally and more recently, or five, six years ago, I guess, this issue of injunctions based on standard essential patterns. The FTC -- I think it was 2013 you had the consent decree with Motorola and we had a prohibition decision against Motorola a year earlier on the same kind of issue. And, again, take a step back or try and remember, this is a very -- I don’t know if “novel” is the word, but it was a controversial area of law. And perhaps it still is. For us in Europe, at least, we adopted a prohibition decision, which said that injunctions against willing licensees, based on standard essential patterns where you’ve given a commitment to license on FRAND terms, are an abuse. That was confirmed by our Supreme Court, the European Court of Justice, in a separate case, but the principle was confirmed. But it was, and still is, a subject that attracts a great deal of attention and a great deal of controversy. There were many people -- and that debate still goes on. But there were many people saying, how can you possibly do this? There are some people saying that. But against that background of that -- again, I’m not sure if “novel” is the word, but a very complex, important issue, it was really invaluable to have both the case coordination with the FTC on Motorola, where we had regular contact in terms of meetings and calls, and then on the policy level with both the FTC and the DOJ, where essentially we were on the same page in terms of developing this policy and this approach towards how we deal with the specific issue of injunctions based on standard essential patterns. I think particularly because it was an area that was so complex and controversial, my personal view is that we all mutually benefitted from being able to really share these experiences and insight. So those are two examples and there are many more, but it’s really, for me, a manifestation of just concrete case teams talking to each other regularly, being open, exchanging ideas, evidence if appropriate, if you have the waiver, and it’s been a great benefit.

MS. COPPOLA: Yeah, I think interplay of the case level and the policy level is a really good point that really deepens greatly the discussion and understanding. Fiona, we’ve heard kind of rah-rah-rah cooperation and lots of pluses on cooperation. You’ve talked about how cooperation doesn’t mean getting to the finish line at the exact same time. What are some of the practical limitations on cooperation from a private practitioner’s perspective?

MS. SCHAEFFER: Well, I think we start out with very different procedural frameworks in different jurisdictions. We happen to have probably two of the closest jurisdictions here in Canada and the US, on process. But others look quite different in terms of the amount of prefiling work in a merger context that needs to be done, the time that that will take, the uncertainty around when you actually get on the clock in say Europe or China versus in the US. And all of that leads to, you know, in many cases, if not an impossibility, certainly, all of the stars would have to align for the timing to actually be the same. So we are working with different processes, different timetables, and I think we have to accept that the timing is not going to be the same. The question is, can we make it sufficiently compatible that we can have substantive discussions at a similar time frame, particularly on remedies. That will, you know, minimize inefficiencies and maximize the ability to have a consistent compatible remedy. And even when you’ve done all of those things and there’s been I think an earnest, concerted goodwill effort to align those discussions, you’re inevitably going to have cases where, you know, something surprising happens like one jurisdiction decides, yes, we like the remedy package that everyone else has agreed to, but lo and behold, we think there ought to be a different purchaser in our jurisdiction, which shall remained unnamed, than in the rest of the world, which as you can imagine when you’re dealing with products that are sold around the globe under one brand name can be pretty challenging. I’m not sure that cooperation could have changed that result. But you’re always going to have these unpredictable aspects of a multijurisdictional merger review that can occur right up until the end. What can we do to enhance practical day-to- day cooperation, I think your earlier question. A lot of the time when we talk about cooperation, it’s really in a bilateral context. You’ve got parties speaking with Agency A, parties speaking with Agency B, parties speaking with Agency C, and then similar conversations happening between those agencies who are essentially, you know, in some cases, playing Chinese whispers, but reporting on conversations they’ve had trying to find common approaches, common understandings. I wonder sometimes can we expedite -- streamline those conversations to have fewer bilateral conversations and more multilateral conversations in the same room. Just as when we are faced with a conduct or a merger investigation ourselves, trying to understand better the facts, what’s going on, where, we often have multijurisdictional, multicounsel calls. I don’t see why we couldn’t do more of that involving multiple agencies on the same video conference or the same phone call. There is a limit, of course, where you get these huge conversations that, you know, are impossible to schedule, and no one says anything because there’s 100 people on the line. So yes, that level of cooperation can be unwieldy, but I think we can do more to explore having simultaneous conversations. I think there’s been a mindset probably maybe more in the minds of -- well, maybe equally in the minds of the companies and counsel, as well as agencies, that everyone needs to have their kind of process, everyone needs to have their separate meeting, everyone needs to have the merger explained to them, you know, Australian or in Canadian or in -- (Laughter.)

MS. SCHAEFFER: But I don’t think that that’s necessarily the case, not for all meetings or forms of cooperation. So that’s something I think we could do more with.

MS. COPPOLA: That’s a really interesting idea. I mean, we’ve heard earlier, and on this panel, that there’s a lot of joint third party calls. I know at the FTC we have limited experience with joint party calls, but that’s a really neat idea and it’s certainly very 21st Century if it’s video. So thinking I guess -- so those are some of the practical limitations on the practitioner’s side. Thinking about some of the practical limitations on the agency’s side, it seems like the one that has appeared a few times in this discussion is confidentiality. Nick has already talked a little bit about what we can exchange when we don’t have waivers. So what falls within the realm of public or agency nonpublic information, so, as he said, theories of harm, market definition, kind of basic thinking on remedies. But, of course, those discussions are much more robust when we’re saying because of evidence of X, Y, and Z. Marcus, you had mentioned that you have an information gateway in Australia. What does that mean and what can the FTC learn from that?

MR. BEZZI: So an information gateway is a legislative provision that enables our Chairman to make a decision to release material that we’ve obtained through some confidential process either a compulsory power, exercise of a compulsory power, requiring compelled production of information, or otherwise, and it enables us to release that information without the consent of the party whose information it is. So it’s something we don’t do lightly and it’s something we don’t do often. And it’s something we’ll only do if there are -- if we’re really 100 percent confident that people are going to comply with the conditions that are imposed on the release of the information. So if we’re dealing with a trusted agency, and we are confident that they will maintain the confidentiality of the information that we disclose, then we have got the capacity to release it. As I say, it doesn’t happen very often. There will be more than just a set of conditions imposed. There’s usually a fairly rigorous process that we put in place to ensure that the conditions are complied with. So there’s reporting. And after the agency that’s received the information has finished with it, we’ll require them to give the information back. And I should say this is a very similar provision to a provision that the CMA has in the UK and that Canada has. And it, as I say can be -- it’s more useful in being there than in being used, if I could put it that way.

MS. COPPOLA: Right, right. Thanks, Marcus. I think, Jeanne, I’ll have you answer next because he’s just talked about your information gateway. Does this have an impact on kind of target parties, third parties’ willingness to provide information, and what kind of notice do they get before you share the information? What are some of the consequences?

MS. PRATT: Yeah, I mean with great -- it’s -- we have to take that very, very seriously. So when we’re using our gateway provision, we have very transparent policies to stakeholders. It’s written in a confidentiality bulletin what the conditions of sharing are. Every time we do a market contact, it is disclosed to that market contact that we do have the information gateway, that we may use it obviously in an international merger context, that we may share it with our counterpart agencies and discuss it where they have waivers. So I think the lesson for us is transparency is really important to maintain your reputation because without our reputation to maintain the confidential information, we won’t be able to do our job and the effectiveness of our agency is diminished. It’s fundamental, frankly, to how we do our job. So in our confidentiality bulletin, we do set out the conditions quite clearly and we do say that we will seek to maintain the confidentiality of information through either formal international instruments or assurances from a foreign authority. And the Bureau also requires as a condition that the foreign authority’s use of that information is limited to the specific purpose for which it was provided. So our information gateway provides that we can use it for enforcement of the Act, which, for us, means if we’re working on a common case with an agency with whom we have a foreign -- or an instrument and we’ve got those certainties that that is when we will do so. Where there is no bilateral-multilateral cooperation instrument in force, the Bureau does not communicate information protected by Section 29 unless we are fully satisfied with the assurances provided by the foreign authority with respect to maintaining the confidentiality of the information and the uses to which it will be put. And this, again, is where trust becomes key for us, we’re not going to put our reputation and our effectiveness on the line if we are not certain that those conditions will be satisfied. In assessing whether to communicate the information and the circumstances, we do also consider the laws protecting confidentiality in the requesting country, the purpose of the request, and any agreements or arrangements with the country or the requesting authority. If we are not satisfied that it will remain protected, it is not shared. Likewise, when foreign authorities are typically communicating confidential information to the Bureau, they are doing so on the understanding that the information will be treated confidentiality and used for the purposes of administration and enforcement of the Act. I should mention, too, we do have another provision in our Act which ensures that all inquiries conducted by the Competition Bureau are conducted in private and that provides some legislative certainty that it will be maintained in confidence on our end. So I guess I would say the gateway for us, while similar to Australia, I think has been used a little bit different and that mostly is a result of practice, our transparency, the market having a lot of faith in our practices and procedures, to maintain confidentiality. And without it, I don’t think it would be as effective.

MS. COPPOLA: Thanks very much. Nick, turning to the European Commission, I mean, you have sort of the highest level of information sharing and investigative assistance with the ECN and you also have things like the second generation agreement that you have with Switzerland. Do you want to share a little bit of your experience with those?

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

MS. COPPOLA: Right, right.

MR. BANASEVIC: There’s automatic transmission of everything, there is -- I mean, that’s a consequence of what the EU or the EEA is in a sense. So it’s critical that we share up front information just about who’s got what case so that we can allocate them most efficiently and to coordinate on issues of substance because we’re all applying the same law. In terms of outside the ECN and outside the EEA, I -- as a general point, I think the main issues have been outlined in terms of maybe there being different incentives -- I’m talking outside Switzerland, which I’ll mention briefly now in terms of different incentives maybe between mergers and conduct. I take Fiona’s point about -- concern about disclosure in another jurisdiction. I understand that. I think the instances that I have referred to in some conduct cases have rather been a concern about not wanting agencies to discuss theories of harm even. So that’s a different thing. And in terms of Switzerland, actually, I think it resonated. I mean, we have a second generation agreement with Switzerland, which means in practice that we can transmit evidence between us without consent. Obviously, we’re talking about where the same conduct has been investigated. And what we found -- and this resonated when Marcus was talking about it -- is actually we haven’t needed to use -- to invoke those provisions. And it’s actually encouraged that that framework, and maybe the trust or the mechanics of how things work, have encouraged information provision without needing to use the formal provisions under the agreement. So I think that’s an interesting point.

MS. COPPOLA: Right, yeah, yeah. Fiona, you’ve touched on this a tiny bit already, but what are -- can you bring out a little bit some of the concerns that agencies might have either about these types of agreements or about granting waivers in the nonmerger context? What are some of the red flags?

MS. SCHAEFFER: From a merging party’s perspective or from an investigated party’s perspective?

MS. COPPOLA: From both.

MS. SCHAEFFER: Yeah, I think there is -- certainly in terms of the exchange of confidential information as opposed to permitting agencies to discuss case theories, I think there is an understandable sense that if an agency really needs that kind of information and has a right to obtain that kind of information domestically, then they should just ask the parties for it directly rather than get it -- you know, it sounds a bit pejorative -- but through the back door. I do think, on the merger side, the incentives are greater to provide it anyway. But I think, also, at the same time, the actual exchange of confidential information is relatively rare and I think its use is overrated. I think the biggest benefit that I’ve seen from cooperation from a private party’s perspective -- and I suspect the agencies might agree with this -- is just being able to discuss the case, the theories, the investigation, the legal analysis, the basic understanding of how the products work, what third party concerns are without, you know, revealing any confidential information. And all of that dialogue I’ve found in all of the deals I’ve worked on, and maybe I’ve just been lucky, but I can’t recall a single case where we facilitated cooperation and we suddenly found that Agency C, that had been going on its normal course of business and investigating without big concerns, suddenly had a new theory of the case that was going to put them into an extended review. I’ve always had the opposite. Namely, Agency C, when we have facilitated contact with Agency A and B, typically has been relieved to know that Agency A and B is investigating these particular various areas, that it doesn’t necessarily have to cover all of the same ground. And I have found that it’s expedited, not prolonged, the review or started new lines of attack that didn’t exist before. And I think that could also hold true, although it’s less tested in conduct cases where some of the theories of harm are just more wacky or radical. And I think agencies that have been at it for a longer period of time, in that investigation or generally, may be able to help other agencies understand what are the real issues here, what are some of the false paradigms or paths that, you know, we looked at five years ago but discovered really weren’t productive.

MS. COPPOLA: Right, right. Sometimes that thinking can go the other way, too. The learning can go the other way. I think I want to circle back on your point on forbearance. But before I do that, does anyone have any reactions to what Fiona was saying about information sharing and thinking of it as a backdoor way when it’s done -- the confidential information between agencies?

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

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

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

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

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

MS. COPPOLA: Right, right. Nick, do you have anything you wanted to add here?

MR. BANASEVIC: Nothing spectacular.

MS. COPPOLA: Okay. I have one question from the audience, but before we -- and I encourage other questions. So now is the time to write them. But before we get to that, I wanted to talk, I think because at the end of the day, the immediate goal in a particular case of cooperation is making sure that you don’t have conflicting remedies, that you have remedies that are, if not identical, at least interoperable. And we’ve heard some discussion today that, you know, there’s been a lot of agencies, more agencies looking at things than there used to be. And sort of the question about should we be giving more attention to cooperation, in the form of forbearance, than coordination. And, Fiona, if you could start that discussion for us.

MS. SCHAEFFER: Sure. Well, we were having a discussion at lunch and Marcus mentioned the magic pudding story. I said to Marcus, will this audience understand the magic pudding story? And looking around the room, I see there are bemused faces. Well, it’s a story we all told our children growing up in Australia where, as a child, I really enjoyed it. The magic pudding just never stopped producing pudding until the entire town was flooded with porridge and pudding everywhere. Well, no agency is a magic pudding. Agencies have limited resources. They can’t just keep on producing. And I think from an agency perspective, as well as from the parties’ perspective, one always ought to ask what are the incremental benefits of this additional investigation we’re doing over -- you know, on top of what five other agencies are doing? What are the incremental benefits of a remedy that is the same or virtually identical to what another agency has obtained as opposed to taking our limited resources and using them for investigations and transactions that these other five agencies couldn’t review? And it’s been interesting to me just to look at how different agencies have been allocating their resources over time. Brazil is an agency that comes to mind. When I come to think about some of the cartel investigations, the merger investigations they focused on maybe ten years ago, my anecdotal perception is that there was a lot more of an international dimension to them than there is today. I think some of the larger Brazilian investigations have involved, in more recent times, transactions in the educational sector and the health care sector, in the domestic financial services sector. And their bang for their buck in those investigations I think is significantly higher than it would be if they were another me-too in a global transaction. Having said that, is it realistic to say if the US is looking at a deal or the EU is looking at a deal or Canada and they’ve got remedies, that everyone else should just back off? No, of course not. But I think at each stage of the investigation, it’s useful for the agencies to ask themselves, what is the incremental value and what are the areas of this transaction that may be specific to our jurisdiction that the other people aren’t covering? What are the holes that we need to fill potentially for our jurisdiction that the others aren’t worrying about as opposed to retreading the same ground? And as counsel to parties to transactions and conduct investigations, we ought to be asking ourselves those same questions about what are the specific impacts of this transaction or our conduct on this jurisdiction.

MS. COPPOLA: Mm-hmm, mm-hmm. That’s very interesting. Thank you, Fiona. Marcus, what did you say to the magic pudding discussion and what are your thoughts on the topic more generally?

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

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

Similarly, in mergers, we will focus on the detriment in Australia. We’ll focus on a remedy that can fix the problems we have identified in Australia, and if it happens that that remedy has already been devised somewhere else and the remedy somewhere else will completely fix the problem in Australia, then what we can do is accept what’s called an enforceable undertaking, which is essentially a statutory promise, which requires the parties to give effect to whatever the commitment that’s being given outside Australia is, give them -- they are required to give that commitment to us in Australia, and that essentially is -- deals with the problem that we’ve got jurisdiction to deal with.

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

MR. BEZZI: We’ve got something that we can enforce.

MS. COPPOLA: Right.

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

MS. COPPOLA: Better focused. Right, right.

Jeanne?

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

The only way we get there, though, is, again, to have really close cooperation. We need to understand the scope of the issues, we need to understand the scope of the remedy, and, frankly, we also need to have trust in the agency that they are going to enforce that remedy at the end of the day, which we have full faith in the US Department of Justice and the US Federal Trade Commission to do that.

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

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

The second one, which is more recent, was a case we cooperated on with the US Department of Justice, UTC/Rockwell last year, which was an aerospace systems review, and in that case just to underscore the importance of the cooperation to get us to the comity, we cooperated closely with the US DOJ and the DG Comp throughout the review.

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

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

The other side of comity, which, you know, I’m not sure the parties appreciated at the time, Commissioner Boswell talked about our simultaneous filing of litigation in the Staples/Office Depot merger a couple of years ago. Part of that was we did not see the need to file an injunction the same day because we knew that there would be an injunction proceeding by the FTC. So the parties did actually benefit because they didn’t have to face an injunction proceeding north of the border as well as south of the border. We benefitted greatly from cooperation in that case.

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

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

Nick, we haven’t heard from you yet on remedies coordination or forbearance. Is there anything you want to add?

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

(Laughter.)

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

MS. COPPOLA: Right.

MR. BANASEVIC: And there was another adjective there as well. But, anyway, for us, I mean, if you look at mergers and conduct, of course, we have an obligatory notification system in mergers, once you reach certain thresholds. I mean, you have to reason every decision whether it’s a clearance of remedies or a prohibition. So there’s no discretion as such in that sense. But, of course, there’s great benefit in the cases that we’re looking at more closely and we’ve got many examples that have been mentioned in terms of coordinating on the substance, on the timing, and, if appropriate, the remedies and the potential impact and how that might read across. Where we have the discretion in terms of choosing which cases we do and which cases we don’t,

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

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

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

Again, it’s not that one can or need guarantee precisely the same outcome, given the differences possibly in even conduct. I mean, some of our markets are national for some of the products even if the companies are operating globally. But I think there is a great benefit in this up-front shaping, sharing thoughts to, to the extent possible, minimize the risk of divergences.

MS. COPPOLA: We have a question from the audience about the ongoing investigations of the tech platforms. The EC, the Japan Fair Trade Commission, are already investigating these firms. What’s important to effectively investigate, including cooperation? Another question, what you can expect from the FTC, but as I’m not a speaker, but a moderator, I think I will punt that to what can you expect from the investigating agencies. And, Nick, according to this week’s Economist, you guys are the determinators. So I’m going to let you answer that question.

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

MS. COPPOLA: There’s these like big guns and, yeah, sledgehammers.

MR. BANASEVIC: I’m not allowed to say anything about ongoing cases, so –

MS. COPPOLA: Right.

MR. BANASEVIC: So what was the –

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

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

MS. COPPOLA: Right.

MR. BANASEVIC: It’s really been of tremendous use. And it’s my opening statement, it’s not an add-on. It can really -- for these big cases where they’re very important, sensitive, and you want to get it right, there’s just a great benefit in sharing experiences, knowledge, with colleagues who have the same -- who want to get it right as well and get the best result. So it’s a very good thing that we shouldn’t have just as just a bolt-on.

MS. SCHAEFFER: Can I just add on to that? Maybe the Cooperation 2.0 for digital platform investigations is not necessarily between antitrust agencies, but between antitrust agencies, consumer protection, and privacy agencies. Because -- and I think the term “forbearance” might come in there as well, in that not everything involving a digital platform is necessarily an antitrust issue.

And we certainly have a lot of intermelding of privacy and consumer protection concerns, as we see with the Australian ACCC report. And how do we jointly investigate those issues or maybe have antitrust not be the primary investigation and enforcement mechanism there?

MS. COPPOLA: We are very close to the end of the session. So I guess, Marcus and Jeanne, starting with you, and if there’s time, we’ll move on to Fiona and Nick. What are your last words of advice for the FTC in the area of enforcement cooperation?

MS. PRATT: I’m not sure I have advice. I think, as you’ve heard, I have found or we have found that gateway provision in our legislation to be particularly useful and, you know, it might be interesting to consider that in your context and whether it’s appropriate.

And I would just want to lastly say thank you very much for having us here. I know the FTC can continue to rely on the Canadian Competition Bureau’s commitment to continuing to build upon the solid cooperation foundation that we have and in particularly dynamic fast-moving markets that we have today. I think the business case for cooperation is only getting stronger and will only get better from here.

MR. BEZZI: So I won’t advise the FTC, but the advice that I’ll give to the ACCC is that we need 21st Cooperation and mutual assistance frameworks.

MS. COPPOLA: Thanks.

Nick, Fiona, anything to add?

MR. BANASEVIC; I’ve said it all, I don’t want to repeat. I think it’s don’t underestimate it, use it, and benefit from the interactions and the knowledge you can have with colleagues.

MS. COPPOLA: Well, thank you all very much for your insights. These have been tremendous. Coming into the panel, I wasn’t sure I would learn anything since I spend most of my day engaged in enforcement cooperation. But I did. So bravo. Thanks so much for participating. I think we’ll move on to the next panel now.

(Applause.)

(Brief break.)

INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES: ARTIFICIAL INTELLIGENCE CASE STUDY

MS. WOODS BELL: Hello, everyone. Welcome back from break. I’m Deon Woods Bell. I’m a lawyer in the Office of International Affairs at the Federal Trade Commission. I’m so excited to be here today.

It is my extreme pleasure to introduce Julie Brill. Julie is Corporate Vice President and Deputy General Counsel for Global Privacy and Regulatory Affairs at Microsoft. Of course, everybody in the building knows her as a former Commissioner and friend of the Federal Trade Commission. She’s widely recognized for her work on internet privacy and data security issues related to advertising and financial fraud.

She’s received so many awards we could not list them all in her bio, nor could I enumerate them here today. One of my favorite is the Top 50 Influencers on Big Data in 2015. And one of my favorite memories is working together with her in Brussels on these same issues. Thank you, and please welcome Julie.

(Applause.)

MS. BRILL: Thank you, Deon. I remember that event, too, and it was great to work with you there. And it’s really an honor to be here today to contribute to today’s important discussions on the FTC’s international role in a world transformed by digital technology.

I am particularly excited to begin this session today that focuses on artificial intelligence. We have a truly distinguished panel, some of whom are -- here they come -- of experts from around the world, who will explore the implications of artificial intelligence at a time when innovative technology calls for innovative thinking about policy and regulation.

Today’s discussion comes at a critical moment. During the past few years, how people work, play, and learn about the world has been transformed. Industries have been reinvented. New ways to treat diseases emerge almost every day. Driving all this change are groundbreaking technologies like cloud computing that enable us to collect and analyze data scale that has never before been possible. But what we have experienced so far is just the beginning.

Rapid progress in the field of artificial intelligence has delivered us to the threshold of a new era of computing that will transform every field of human endeavor. Already, almost without us noticing, AI has become an essential part of our day- to-day lives. It powers the apps that help us get from place to place, predict what we might want to buy, and protects our systems from malware and viruses.

This is just a hint of what’s possible. Artificial intelligence has the potential to improve productivity, drive economic growth, and help us address some of the most pressing challenges in accessibility, health care, sustainability, poverty, and much more. Yet, history teaches us that change of this magnitude has always come with deep doubts and uncertainty.

I believe that if we are to realize the promise of artificial intelligence, we must acknowledge these doubts and work to build trust, trust that technology companies are working not just to maximize profits, but to improve people’s lives; trust that we use the personal data we collect safely, responsibly, and respectfully. But as we are learning the hard way, in the technology industry, trust is fragile.

In the wake of the Cambridge Analytica scandal and the spectacle of tech industry experts being hauled before Congress to answer for their business practices, people wonder if technology and technology companies can be trusted. The truth is that technology is neither inherently good nor bad. Cloud computing and artificial intelligence are just tools that people can use to be more productive and effective, basically the equivalent of the first Industrial Revolution’s steam engine. But it is also true that because technology has never been more powerful, the potential impact, both positive and negative, has never been greater.

So where does trust come from? It begins when companies like Microsoft, that are at the forefront of the digital revolution, acknowledge that in this time of sweeping change, we must consider the impact of our work on individuals, businesses, and societies. Today, we must ask ourselves not just what computers can do, but what they should do. This means there may be times when we have to be willing to decide that there are things that they should not do as well.

To guide us as we weigh these decisions at Microsoft, we have adopted six ethical principles for our work on artificial intelligence. It starts with transparency and accountability. We know that trust requires clear information about how AI systems work, coupled with accountability for the people and companies who develop them. We believe strongly in the principles of fairness which means AI must treat everyone with dignity and respect and without bias.

Our fourth principle encompasses reliability and safety, particularly when AI makes decisions that affect people. We also are strongly committed to the principles of privacy and security, for people’s personal information. And we believe that AI solutions should be built using inclusive design practices that affect the full range of experiences of all who might use them.

Now, while these principles are at the center of every decision we made about artificial intelligence research and development, we also know that the issues at stake are simply too large and too important to be left solely to the private sector. Trust also requires a new foundation of laws.

Here in the United States, right now, one area of the law demands our attention above all others. That area is privacy. Because so much of who we are is expressed digitally and so much of how we interact with each other and the world is captured and stored in digital form, how people think about privacy has changed. For more than a century, our understanding of this most fundamental human right has been shaped by the definition set forth by the great American legal thinker and fathers of the FTC, Louis Brandeis, who defined privacy as the right to be let alone. That right will always be important. But, by itself, it is no longer sufficient.

Now, modern privacy law must embrace two essential realities of life in the digital age. The first is that people expect to use digital tools and technologies to engage freely and safely with each other and with the world.

The second is that people expect to be empowered to control how their personal information is used. Whether we protect these two things is one of the critical challenges of our time. What we need is a new generation of privacy policies that embrace engagement and control without sacrificing interoperability or stifling innovation.

This is why we were the first company to extend the rights that are at the heart of the European general protection regulation, and we extended those to our customers around the world, including the right to know what data is collected, to correct that data, and to delete it or take it somewhere else. And over the last year, we’ve seen

the rise of a global movement to adopt frameworks that enhance consumer control mechanisms modeled on those required by Europe’s GDPR.

With participants here from India, Kenya and Brazil, this panel of distinguished guests is a perfect illustration of this important trend. Brazil’s general data protection law, which goes into effect a year from now, includes provisions that extend new privacy rights to individuals and mandates new requirements for notification, transparency, and governance for organizations. All of these requirements that will be new in Brazil are tightly aligned with GDPR.

In India and Kenya, new privacy laws modeled on GDPR are also currently moving through the legislative process.

Here in the United States, the California Consumer Privacy Act includes provisions that give people more control over their data. And Washington State is considering legislation based on consumer rights protected by GDPR as well.

As part of Microsoft’s commitment to privacy, we offer a dashboard where people can manage their privacy settings. Since May of last year, more than 10 million people around the world have used this tool, with the number growing every day. I think it is telling that while millions of people around the world are using our tool, our data demonstrates that US citizens are the most active in controlling their data. All of this should serve as a wakeup call for US companies and the US Government.

At Microsoft, we believe it is time for United States to adopt a new legal framework for access and use of data that reflects our new understanding of the right to privacy. To achieve this, I believe a strong US framework -- frankly, a strong privacy framework anywhere in the world -- should incorporate four core elements, transparency through robust standards that include and appropriate privacy statements within user experiences, individual empowerment that grants people meaningful control of their data and privacy preferences, corporate responsibility that is built on rigorous assessments that weigh the benefits of processing data against the risk to individuals whose data may be processed, and strong enforcement and rule-making. And, here, that means in the United States that should be all embedded at the US Federal Trade Commission.

While updated privacy laws are essential to building trust, new uses for artificial intelligence are emerging that will require special consideration for their own specific regulations. Facial recognition is a prime example. This technology has shown that it can provide new and positive benefits when used to identify missing children or diagnose diseases. But there is a real risk that -- there is a real risk which includes the danger that it will reinforce social bias and be used as a surveillance tool that encroaches individual freedom.

This is why Microsoft has called on the US Government to regulate facial recognition with a focus on preventing bias, preserving privacy, and prohibiting government surveillance in public places without a court order. It is also one of the reasons we have testified in support of the Washington State privacy bill, which includes provisions that address many of these important concerns about facial recognition technology.

We need laws that place appropriate guardrails to ensure that companies don’t take unfair advantage of individuals or violate people’s fundamental rights. That is the essence of trust. We believe that guardrails can be designed in ways that facilitate global interoperability and promote innovation so we can all work together to continue to harness the potential of the digital revolution to improve people’s lives and drive economic growth.

This will require a commitment from all of us to engage in ongoing discussions and consultations that span governments and sectors. This means it’s essential for the US Government and its agencies, including the FTC, to engage in a broad range of discussions with other governments on digital issues like we are doing with the honored guests here today.

Just as important are gatherings like this that will bring people together from around the world to explore policy approaches to new emerging technologies like artificial intelligence. More than 100 years ago, when Brandeis defined the right to be let alone in his famous Law Review article, The Right to Privacy, he described, with great eloquence, the ongoing process by which rights evolve as humanity progresses and how the law adopts and adapts in response.

“Political, social, and economic changes entail the recognition of new rights,” Brandeis wrote, “and the law in its eternal youth grows to meet demands of society.” Brandeis was moved to write this article because of the impact of photography, mechanical printing presses, and other disruptive new technologies of his time.

Today, we stand at the beginning of a new era of disruption and change, a time of technology- driven transformation that will require the recognition of new rights and the development of new laws to meet the demands of our societies. It’s a task that will ask us to convene in hearings like this one and in forums, meetings and conferences around the world to grapple openly and honestly with a host of issues that will touch on virtually every aspect of our lives and our businesses.

We, at Microsoft, look forward to being a part of these conversations and to working in close partnership with all of you to make sure that technology moves forward within a framework of respect for human dignity and with the goal of serving the greater good. Thank you.

(Applause.)

INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES: ARTIFICIAL INTELLIGENCE CASE STUDY (PANEL)

MS. WOODS BELL: Thank you. Thank you very much, Julie, for those remarks. You outlined very well the tremendous potential of AI and that’s one of the reasons why we’re here today, to discuss them even further.

Well, I’m still Deon Woods Bell. And my co- moderator here is Ellen Connelly, an Attorney Adviser in the Office of Policy and Planning. And, together, we want to welcome you to our panel on international engagement and emerging technologies focusing on artificial intelligence.

You’re in for a treat. As Julie described, we have quite a panel assembled for you here today. This session is a follow-on to the hearings in November, which focus on the same topic. And following the November meetings, colleagues here at the FTC -- and a lot of influence from Ellen here -- said we should go deeper, we should focus on international issues. So today, we’re thrilled to have this impressive group of international officials, practitioners, and academics here and on the line from Harvard.

During this panel, we’ll touch upon a variety of issues and we’ll go deeper and let you see what these colleagues have to offer. We won’t go into great detail on their bios, but we couldn’t resist showing off a little bit for you and letting you know who they are.

On the line from Harvard is Chinmayi Arun. She’s a fellow at the Harvard Berkman Klein Center for Internet & Society, and she’s the Assistant Professor of Law at the National Law University in Delhi. Her chair is there and her picture will soon be on the line as she can hear us right now.

Next, we have, again, he’s still James Dipple-Johnstone. You saw him earlier. He’s a Deputy Commissioner from the UK’s ICO, and prior to the ICO, he was in the Solicitor’s Regulatory Authority where he had been Director of Investigation and Supervision, and he’s not from the ministry of no.

(Laughter.)

MS. WOODS BELL: Next, Francis Kariuki, Director General of the Competition Authority of Kenya. Mr. Kariuki is the founding member and the current Chairman of the African Competition Forum. He’s also an expert in FinTech.

Next over to Marcela. She’s a partner at VMCA Advogados in Brazil focusing on data protection and antitrust. She’s served as Advisor and Chief of Staff for the President of Brazil’s famous CADE.

Over to Isabelle. She’s President and Member of the Board Autorité de la Concurrence, as she was previously the President of the Sixth Chamber of the Conseil d'État, the French Supreme Administrative Court, and other governmental capacities.

And last but not least, we have Omer Tene. Omer is a Vice President and Chief Knowledge Officer at the International Association of Privacy Professionals. He wears so many hats, we couldn’t list them either. He’s an Affiliate Scholar at Stanford and Senior Fellow at the Future of Privacy Forum.

So, before we get started, we want you to be open to looking to questions. We have our colleagues here. We’re going to have short introductory comments from each colleague, and then after this, we’ll have a moderated panel discussion, and we hope that you enjoy.

MS. CONNELLY: Great. So I will start us off by giving each of our panelists a chance to make a brief introductory statement to describe for us the key competition, consumer protection and privacy issues that they see emerging around the artificial intelligence field. We will start with Chinmayi.

MS. ARUN: Thank you for having me. It’s such an honor to be a part of this panel, and I’m happy to see that the FTC is listening to voices from around the world.

If I were to give you the three or four big highlights of how I would think about AI and the right to privacy in data sets in India, it would be -- the first would be in terms of global companies, usually American companies, operating in India versus Indian companies operating both in India, as well as elsewhere in places like Kenya.

The second would be in terms of data because, as you know, it’s a very big country and it provides large and rich data sets that can be complicated in ways that I’m going to describe to you shortly.

The third is that perhaps some of you have heard that there has been a rich and, again, contentious conversation about the right to privacy in India in the context of state surveillance, but also in the context of state protection. So we’ve had a major case on the right to privacy, and we’ve also got a data protection bill, which is very interesting, so I’m going to describe the highlights of that for you.

And the final -- because we’re discussing this in such an international context is this sort of almost a clash of jurisdictions that arises from the Indians, for example, floating proposals of data localization in certain contexts, but also the ways in which India is coping with norms that are emerging from the US and from Europe.

So the first is very simple, which is that as you know the major technology platforms, like Facebook and WhatsApp and Google, are used extensively in India and they have huge user bases in India, but there are also many Indian citizens that access them and have their data on them. Although I will focus a little bit more on the information platforms, it’s good to know that Airbnb, Uber, and other technology platform companies are also offering services in India.

So our legislation, our new privacy act, our proposed amendment to our information technology act are all coping now with the very real idea that there are many Indian citizens whose lives are affected by these technologies that are designed elsewhere based on rules from elsewhere. At the same time, they’re also trying to keep Indian companies competitive because there are Indian companies offering similar services in India.

Our NITI Aayog, which is sort of our version of the planning commission, has described India as the AI garage for 40 percent of the world, and they’ve got a strategy paper on AI. As you know, the big data set question, it’s complicated because, again, India is looking at it as a way towards machine learning, but there are also concerns of data protection and privacy that arise in that context.

And the big tension really is that, on one hand, the policymakers want to leverage this and have this data and sort of learn from it and, on the other, of course, there’s the question of the privacy rights of Indian citizens and especially of marginalized citizens, people who are not able to assert their rights in the consumer forum.

And the final -- so none of this is law yet, but both in the proposed privacy legislation and in the proposed IT amendment act, the question has arisen of whether foreign companies with a sizable user base in India should be asked to localize data in India. So both these proposed legislations have suggested that these companies might be made to host their data sets in India, and I think that that also is cause for concern if they’re thinking about it from a privacy and data protection point of view.

I’m going to stop here. I just wanted to flag all of this in case anyone has questions later. Thank you so much.

MS. CONNELLY: Thank you very much for those really interesting comments.

We’ll move down the line and next up is James.

MR. DIPPLE-JOHNSTONE: Thank you very much and thank you. It’s an honor to be here on this panel with you today.

So I’ve got four issues. And I think the first, which has already been very ably covered, which is that about public trust and the risk of losing public trust in the rollout of AI systems and the role of regulators needing to work together both within country, but also internationally, which is my second theme.

This is an emerging area, one where I don’t think we still have a clear picture of what AI’s impact on our societies will be. And with that in mind, it’s important that regulators keep themselves up to date, keep relevant and work together with others. And that’s very much the approach we’ve taken in the UK. The ICO has a remit in some of the technology, but actually, we work very closely with, for example, colleagues at the Competition and Market Authority, the Financial Conduct Authority, the Center for Data Ethics and Innovation and the Alan Turing Institute to look at the common issues that face us all and how we can improve our regulation.

An important third issue is to look at not only whether the data’s held -- and when we talk about big data sets, we sometimes think of the big tech companies, but in the UK context, the state has large and valuable data sets, too. The UK National Health Service and the UK Education Service have very comprehensive data sets with millions of data points, which would be of value to a number of organizations around the world.

And we are seeing increasing use of AI in the public sector as a model of efficiency and to help us all strive to meet our budget considerations. AI is being looked at for use to decide whether UK citizens are likely to commit crimes, which crimes should be investigated, who’s likely to reoffend, who’s likely to pay their rent on time. And that is beginning to introduce issues of fairness, accountability, and transparency.

And so that’s why, as a regulator, we are really keen to keep abreast of developments. So we are putting a lot of effort into doing that. We are recruiting post-doctoral researchers to help us look at how to regulate AI. We’ve taken new powers to examine AI’s use and look at AI systems in practice and in operation and we’ve reconfigured the office to set up an entire part of the office that will just focus on innovation and technology.

I said it this morning; I’ll keep saying it. We’re not the ministry of no, but we think the GDPR provisions around data protection impact assessments and our work around, for example, regulatory sand boxes and innovation hubs with other regulators. We’re trying to encourage early dialogue to tease through some of these issues together, because I’m not sure any one of us has the perfect answer for all the scenarios.

MS. CONNELLY: Thank you.

Francis?

MR. KARIUKI: Thank you, Ellen and Deon. It’s a pleasure for me to be here and to share my thoughts in regard to AI.

And my view is as a competition and consumer protection regulator, what am I worried about? And I have about four issues, and these are transparency and information asymmetries. What I would like to say is that AI has both created positive and external -- externalities. And in terms of competition and consumer protection, there’s an argument which has been found that they bring more efficiency in terms of prices and greater transparency compared to the traditional retail sales channels, and this is an inquiry which has been conducted in Europe and it has shown that. And, also, they provide additional benefits on these platforms. For example, AI [indiscernible], such platforms could improve choice and value for consumers.

However, the other challenge of -- an encountered challenge in regard to we don’t appreciate the criteria behind the decisions of AI, they are only known to the designer of these systems, and, therefore, the merchant or the consumer may not be aware of how the system has been created and it’s allocating the prices. So there’s the risk of intentional design of the systems in favor of certain participants in the market.

And this could be quite catastrophic in the continent I come from where there’s a lot of market concentration, and, therefore, the companies which are in Africa then can expand their space by being biased against the consumers in Africa.

The other areas that’s also barriers or pathways to entry are, in Kenya, I’ve seen some positive externalities especially AI has enabled new innovations, where in Kenya we have seen recent expansion of financial services for people who are not included in the financial services. And, therefore, companies have been enabled to expand financial services through lending positions for previously people who were not captured in the financial services and also in the insurance sector.

The challenge I see also from the AI is the line between open and proprietary data. AI often creates what is called, in fair data, an individual that is not perhaps -- not factual but opinion based, and, therefore, we may not get an optimal position for the product which is being offered or the prices which are being offered in the market. And, therefore, the challenge going forward is how do we determine data which is a product and which data is an input, and this choice of where the line is will have significant competitive implications as we move.

Besides information asymmetry, I’ve seen AI can also be used in consumer protection issues, discrimination based on other social issues like the region where people come from or even race, as I had mentioned earlier, and these are some of the things where we need, as regulators, both competition and consumer, to look before we fly, because right now is that we are flying blindly and we might be flying into a storm.

MS. CONNELLY: Thank you.

Marcela?

MS. MATTIUZZO: So first of all, thank you, Deon and Ellen, for the invitation for the FTC, to you both for inviting me personally, but also Brazil to be a part of this discussion.

A lot of the points that have been raised here focus on procedural challenges of AI. What I would like to also mention is perhaps the difficulty in both attaining international convergence in these topics, not necessarily laws that are exactly the same, but that point in the same direction, and also convergence within the many fields of law that are connected to AI.

So here, at the FTC, we’re naturally discussing antitrust, consumer protection, and privacy. And even when we’re speaking only of these three areas of law, we can already see that sometimes the objectives of these policies are not always totally convergent.

So, what I would like to -- just to give an example, I guess, that is comparing privacy and antitrust that to me is very clear. What technology has enabled today is for many companies to unilaterally access information and AI has also allowed that information, this data, to be combined and used efficiently for many purposes. So now we can know who bought something, how that person bought it, and so forth, and create, for example, consumer profiles.

Perhaps from an antitrust point of view, one of the solutions to a potential problem of unilateral abuse of this information would be to share the databases with other companies. So we would have many companies that have the access to the same set of data and, therefore, of course, we can have problems of collusion. But leaving that aside, we would have a level playing field.

If, however, we look from the consumer or data protection side of the discussion, we may come to a very different conclusion. And we may come to realize that, perhaps, consumers don’t want their data shared across different platforms and shared across many companies. So, naturally, both objectives pursued by either antitrust or privacy and consumer protection agencies, in the case of Brazil specifically as I hope to make clear throughout my interventions, we are at very different development stages. When it comes to antitrust and consumer protection, we are much more developed and, as you may be aware and former Commissioner Julie Brill already mentioned, in regards to data protection legislation, our specific legislation was approved just last August, August 2018, and has not yet come into force.

So building policy that brings all of these areas of law together in a coherent fashion to address AI challenges seems to me to be a particularly important goal and a particularly important topic for us to focus on.

MS. CONNELLY: Thank you, Marcela. Isabelle?

MS. DE SILVA: Thanks a lot to the FTC for the invitation. I’m really glad to be here.

I would like to say that, for me, the main point is that we think data, artificial intelligence, algorithm, are really key to the competitive process and that is why we must look at it closely. Of course, those processes affect also the way the state is being run. They also affect and they change society, but for us, the main issue is how do they affect the competitive process and the way companies do business?

So what we see is that we really need to invest a lot more than before in understanding what is going on in the market, in the companies, and also to use all our different tools, legal tools, to gain a better understanding and also to give better vision to the market, and I will try to illustrate this with some examples.

So first of all, we use sector inquiries. That is a tool that is common among agencies. But how do we use it? We really take a lot of time to understand a specific market that we deem to be interesting or a process. So that’s what we did with online advertising last year, and, of course, we had very interesting dialogue and followup with Australia, who has finished a very interesting report on online advertising.

And in this way, we get a lot of information from companies. They are sometimes reluctant to give information, but we have the legal framework that enable us to get a lot of information.

And also we give information back to the market. I think this is really something interesting because some sectors are moving so fast that even the companies engaging in the sector don’t always have the big picture, and that is something that has been deemed very useful in the field of what we did about programmatic advertising and the way it’s being run because it’s a very complex and new ecosystem.

Another type of tool we are using very much is the joint studies with other agencies. That’s what we did with the CMA about closed ecosystem in 2014, what we did with the German agency in 2016 about big data, and what we are doing right now about algorithm still with the German agency.

So what is the interest of this? It’s really to show the impact we see that algorithms have on the competitive process and maybe I will tell about a little bit more about this later. This is really something where we draw about, of course, what the experts have written about algorithm, but also in a very practical manner how do companies use algorithm and how does it change the way they do business in the market?

And, finally, another tool that we use is the conference or hearings like you have today at the FTC, but really focusing on what is new, for example, in the field of algorithm. Last year, we had lots of meetings with scientists, sociology experts about what is new about algorithm and also about companies. For example, we had meetings with Google and Facebook to know how they use algorithm in a very precise and detailed matter to help us to understand how it’s being used.

#### Upside AND downside risks of AI are existential---effective governance is key

Themistoklis Tzimas 21, Faculty of Law at the Aristotle University of Thessaloniki, “Chapter 2: The Expectations and Risks from AI”, in Legal and Ethical Challenges of Artificial Intelligence from an International Law Perspective, Springer, 2021, pp. 9–32 Open WorldCat, https://doi.org/10.1007/978-3-030-78585-7

Therefore, it is only natural to be at least skeptical towards a future with entities possessing equal or superior intelligence and levels of autonomy; the prospect even of existential risk looms as possible.7

AI that will have reached or surpassed our level of intelligence make us wonder why would highly autonomous and intelligent AI want to give up control back to its original creators?8 Why remain contained in pre-deﬁned goals set for it by us, humans?

Even AI in its current form and narrow intelligence poses risks because of its embedded-ness in an ever-growing number of crucial aspects of our lives. The role of AI in military, ﬁnancial,9 health, educational, environmental, governance networks-among others—are areas where risk generated by AI—even limited— autonomy can be diffused through non-linear networks, with signiﬁcant impact— even systemic.10

The answer therefore to the question whether AI brings risk with it is yes; as Eliezer Yudkowski comments the greatest of them all is that people conclude too early that they understand it11 or that they assume that they can achieve it without necessarily having acquired complete and thorough understanding of what intelli- gence means.12

Our projection of our—lack of complete—understanding of the concept of intelligence on AI is owed to our lack of complete comprehension of human intelligence too, which is partially covered by the prevalent and until now self- obvious, anthropomorphism because of which we tend to identify higher intelligence with the human mind.

Yudkowski again however suggests that AI “refers to a vastly greater space of possibilities than does the term “Homo sapiens.” When we talk about “AIs” we are really talking about minds-in-general, or optimization processes in general. Imagine a map of mind design space. In one corner, a tiny little circle contains all humans; within a larger tiny circle containing all biological life; and all the rest of the huge map is the space of minds-in-general. The entire map ﬂoats in a still vaster space, the space of optimization processes.”13

Regardless of what our well-established ideas are, there are many, different intelligences and even more signiﬁcantly, there are potentially, different intelli- gences equally or even more evolved than human.

From such a perspective, the unprecedented—ness of potential AI developments and the mystery surrounding them emerges as not only the outcome of pop culture but of a radical transformation of our—until recently—self—obvious identiﬁcation of humanity with highly evolved and dominant intelligence.14

The lack of understanding of intelligence and therefore of AI may be frightening but does not lead necessarily to regulation—at least to a proper one. We could even be led into making potentially catastrophic choices, on the basis of false assumptions.

On top of our lack of understanding, we should add a sentiment of anxiety as well as of expectations, which intensiﬁes as an atmosphere of emergency and of expected groundbreaking developments grows. The most graphic description of this feeling is the potential of a moment of singularity, as mentioned above according to the description by Vinge and Kurzweil.

As the mathematician I. J. Good–Alan Turing’s colleague in the team of the latter during World War II—has put it: “Let an ultraintelligent machine be deﬁned as a machine that can far surpass all the intellectual activities of any man however clever. Since the design of machines is one of these intellectual activities, an ultraintelligent machine could design even better machines; there would then unquestionably be an “intelligence explosion,” and the intelligence of man would be left far behind. Thus the ﬁrst ultraintelligent machine is the last invention that man need ever make, provided that the machine is docile enough to tell us how to keep it under control.”15 This is in a nutshell the moment of singularity.

The estimates currently foresee the emergence of ultra or super intelligence—as it is currently labelled—or in other words of singularity, somewhere between 20 and 50 years from today, further raising the sentiment of emergency.16 We cannot even foretell with precision how singularity would look like but we know that because of its expected groundbreaking impact, both states and private entities compete towards gaining the upper hand in the prospect of the singularity.17

Despite the fact that such predictions have been proven rather optimistic in the past18 and therefore up to some extent inaccurate, there are reasons to assume that their materialization will take place and that the urgency of regulation will be proven realistic.

After all, part of the disappointments from AI should be blamed on the fact that certain activities and standards, which were considered as epitomes of human intelligence have been surpassed by AI, only to indicate that they were not eventu- ally satisfactory thresholds for the surpassing of human intelligence.19 Partially because of AI progress we realize that human intelligence and its thresholds are much more complicated than assumed in the past.

The vastness’s of deﬁnitions of intelligence, as well as its etymological roots are enlightening of the difﬁculties: “to gather, to collect, to assemble or to choose, and to form an impression, thus leading one to ﬁnally understand, perceive, or know”.20

As with other relevant concepts, the truth is that until recently our main way to approach intelligence for far too long was “we know it, when we see it”. AI is an additional reason for looking deeper into intelligence and the more we examine it, the most complicated it seems.

The combination of lack of complete understanding of intelligence, the unpredictability of AI, its rapid evolution and the prospect of singularity explain both the fascination and the fear from AI. Once the latter emerges, we have no real knowledge about what will happen next but only speculations, which until recently belonged to the area of science ﬁction.

We are for example pretty conﬁdent that the speed of AI intelligence growth will accelerate, once self—improvement will have been achieved. The expected or possible chain of events will begin from AI capacity to re-write its own algorithms and exponentially self—improve, surpassing human intelligence, which lacks the capacity of such rapid self—improvement and setting its own goals.21

We can somehow guess the speed of AGI and ASI evolution and possibly some of its initial steps but we cannot guess the directions that such AI will choose to follow and the characteristics that it will demonstrate. Practically, we credibly guess the prospects of AI beyond a certain level of development.

Two existential issues could emerge: ﬁrst, an imbalance of intelligence at our expense—with us, humans becoming the inferior species—in favor of non-biological entities and secondly a lack of even fundamental conceptual communication between the two most intelligent “species”. Both of them heighten the fear of irreversible changes, once we lose the possession of the superior intelligence.22

However, we need to consider the expectations as well. The positive side focuses on the so-called friendly AI, meaning AI which will beneﬁt and not harm humans, thanks to its advanced intelligence.23

AI bears the promise of signiﬁcantly enhancing human life on various aspects, beginning from the already existing, narrow applications. The enhanced automation24 in the industry and the shift to autonomy,25 the take—over by AI of tasks even at the service sector which can be considered as “tedious”—i.e. in the banking sector—climate and weather forecasting, disaster response,26 the potentially better cooperation among different actors in complicated matters such as in matters of information, geopolitics and international relations, logistics, resources ex.27

The realization of the positive expectations depends up to some extent upon the complementarity or not, of AI with human intelligence. However, what friendly AI will bring in our societies constitutes a matter of debate, given our lack of unanimous approach on what should be considered as beneﬁcial and therefore friendly to humans—as is analyzed in the next chapter.

Friendly AI for example bears the prospect of freeing us from hard labor or even further from unwanted labor; of generating further economic growth; of dealing in unbiased, speedy, effective and cheaper ways with sectors such as policing, justice, health, environmental crisis, natural disasters, education, governance, defense and several more of them which necessitate decision-making, with the involvement of sophisticated intelligence.

The synergies between human intelligence and AI “promise” the enhancement of humans in most of their aspects. Such synergies may remain external—humans using AI as external to themselves, in terms of analysis, forecasts, decision—making and in general as a type of assistant-28 or may evolve into the merging of the two forms of intelligence either temporarily or permanently.

The second profoundly enters humanity, existentially—speaking, into uncharted waters. Elon Musk argues in favor of “having some sort of merger of biological intelligence and machine intelligence” and his company “Neuralink” aims at implanting chips in human brain. Musk argues that through this way humans will keep artiﬁcial intelligence under control.29 The proposition is that of “mind design”, with humans playing the role that God had according to theologies.30

While the temptation is strong—exceeding human mind’s capacities, far beyond what nature “created”, by acquiring the capacity for example to connect directly to the cyberspace or to break the barriers of biology31—the risks are signiﬁcant too: what if a microchip malfunction? Will such a brain be usurped or become captive to malfunctioning AI?

The merging of the two intelligences is most likely to evolve initially by invoking medical reasons, instead of human enhancement. But the merging of the two will most likely continue, as after all the limits between healing and enhancement are most often blurry. This development will give rise, as is analyzed below, to signif- icant questions and issues, the most of crucial of which is the setting of a threshold for the prevalence of the human aspect of intelligence over the artiﬁcial one.

Human nature is historically improved, enhanced, healed and now, potentially even re-designed in the future.32 Can a “medical science” endorsing such a goal be ethically acceptable and if yes, under what conditions, when, for whom and by what means? The answers are more difﬁcult than it seems. As the World Health Organi- zation—WHO—provides in its constitution, “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or inﬁrmity”.33

Therefore, why discourage science which aims at human-enhancement, even reaching the levels of post-humanism?34 Or if restrictions are to be imposed on human enhancement, on what ethics and laws will they be justiﬁed? How ethically acceptable is it to prohibit or delay technological evolution, which among several other magniﬁcent achievements, promises to treat death as a disease and cure it, by reducing soul to self, self to mind, and mind to brain, which will then be preserved as a “softwarized” program in a hardware other than the human body?35

After all, “According to the strong artiﬁcial intelligence program there is no fundamental difference between computers and brains: a computer is different machinery than a person in terms of speed and memory capacity.”36

While such a scientiﬁc development and the ones leading potentially to it will be undoubtedly, groundbreaking technologically-speaking, is it actually—ethically- speaking—as ambivalent as it may sound or is it already justiﬁed by our well— rooted human-centrism?37

Secular humanism may have very well outdated religious beliefs about afterlife in the area of science but has not diminished the hope for immortality; on the contrary, science, implicitly or explicitly predicts that matter can in various ways surpass death, albeit by means which belong in the realm of scientiﬁc proof, instead of that of metaphysical belief.38

If this is the philosophical case, the quest for immortality becomes ethically acceptable; it can be considered as embedded both in the existential anxiety of humans, as well as in the human-centrism of secular philosophical and political victory over the dei-centric approach to the world and to our existence.

From another perspective of course and for the not that distant philosophical reasons, the quest for immortality becomes ethically ambiguous or even unacceptable.39 By seeking endless life we may miss all these that make life worth living in the framework of ﬁniteness. As the gerontologist Paul Hayﬂick cautioned “Given the possibility that you could replace all your parts, including your brain, then you lose your self-identity, your self-recognition. You lose who you are! You are who you are because of your memory.”40

In other words, once we begin to integrate the two types of intelligence, within ourselves, until when and how we will be sure that it is human intelligence that guides us, instead of the AI? And if we are not guided completely or—even further—at all by human intelligence but on the contrary we are guided by AI which we have embodied and which is trained by our human intelligence, will we be remaining humans or we will have evolved to some type of meta-human or transhumant species, being different persons as well?41

AI promises tor threatens to offer a solution by breaking down our consciousness into small “particles” of information—simplistically speaking—which can then be “software-ized” and therefore “uploaded” into different forms of physical or non-physical existence.

Diane Ackerman states that “The brain is silent, the brain is dark, the brain tastes nothing, the brain hears nothing. All it receives are electrical impulses--not the sumptuous chocolate melting sweetly, not the oboe solo like the ﬂight of a bird, not the pastel pink and lavender sunset over the coral reef--only impulses.”42 Therefore, all that is needed—although it is of course much more complicated than we can imagine—is a way to code and reproduce such impulses.

Even if we consider that without death, we will no more be humans but something else, why should we remain humans once technologies allow us be something “more”, in the sense of an enhanced version of “being”? Why are we to remain bound by biological evolution if we can re-design it and our future form of existence?

Why not try to achieve the major breakthrough, the anticipated or hoped digita- lization of the human mind, which promises immortality of consciousness via the cyberspace or artiﬁcial bodies: the uploading of our consciousness so that it can live on forever, turning death into an optional condition.43

Either through an artiﬁcial body or emulation-a living, conscious avatar—we hope—or fear—that the domain of immortality will be within reach. It is the prospect of a “substrate-independent minds,” in which human and machine consciousness will merge, transcending biological limits of time, space and mem- ory” that fascinates us.44

As Anders Sandberg explained “The point of brain emulation is to recreate the function of the original brain: if ‘run’ it will be able to think and act as the original,” he says. Progress has been slow but steady. “We are now able to take small brain tissue samples and map them in 3D. These are at exquisite resolution, but the blocks are just a few microns across. We can run simulations of the size of a mouse brain on supercomputers—but we do not have the total connectivity yet. As methods improve, I expect to see automatic conversion of scanned tissue into models that can be run. The different parts exist, but so far there is no pipeline from brains to emulations.”45

The emulation is different from a simulation in the sense that the former mimics not only the outward outcome but also the “internal causal dynamics”, so that the emulated system and in this particular case the human mind behaves as the original.46 Obviously, this is a challenging task: we need to understand the human brain with the help of computational neuroscience and combine simpliﬁed parts such as simulated neurons with network structures so that the patterns of the brain are comprehended. We must combine effectively “biological realism (attempting to be faithful to biology), completeness (using all available empirical data about the system), tractability (the possibility of quantitative or qualitative simulation) and understanding (producing a compressed representation of the salient aspects of the system in the mind of the experimenter)”.47

The technological challenges are vast. Technologically speaking, the whole concept is based on some assumptions which must be proven both accurate and feasible.48 We must achieve technology capable of scanning completely the human brain, of creating software on the basis of the acquired information from its scanning and of the interpretation of information and the hardware which will be capable of uploading or downloading such software.49 The steps within these procedures are equally challenging. Their detailed analysis evades the scope of this book.

Some critical questions—they are further analyzed in the next chapters—emerge however: how will we interpret free will in emulation? What will be the impact of the environment and of what environment? How will be missing parts of the human brain re-constructed and emulated? What will be the status of the several emulations which will be created—i.e. failed attempts or emulations of parts of the human brain—in the course of the search for a complete and functioning emulation? Will they be considered as “persons” and therefore as having some right or will they be considered as mere objects in an experimental lab? How are we going to decode the actual subjective sentiments of these emulations? Essentially, are emulations the humans “themselves” who are emulated or a different person? Even further what will human and person mean in the era of emulation?

From a different perspective, the victory over death may be seen as a danger of mass extinction, absorption or de-humanization. In this new, vast universe of emulations will there be place for humans?50

From the above—mentioned discussion, it becomes obvious that at a large extent, the prospect of risk or of expectation is a matter of perspective, for which there is no unanimous agreement in the present. This may be the greatest danger of all, for which Asimov warned us: unleashing technology while we cannot communicate among us, in the face of it.

The existential prospect as well as the risks by AI may self-evidently emerge from technological advances but are determined on the basis of politico—philosophical or in the wider sense, ethical assumptions. This is where the need for legal regulation steps in. Such a need was often underestimated in the past in favor of a solely technologically oriented approach—although exceptions raising issues other than technological can be found too.51 The gradual raising of ethic—political, philosoph- ical and legal issues constitutes a rather recent development, partially because of the realization of the proximity of the risks and of the expectations.

The public debate is often divided between two “contradictory” views: fear of AI or enthusiastic optimism. The opinions of the experts differ respectively.

Kurzweil, who has come with a prediction for a date for the emergence of singularity—until 2045—expects such a development in a positive way: “What’s actually happening is [machines] are powering all of us,” Kurzweil said during the SXSW interview. “They’re making us smarter. They may not yet be inside our bodies, but, by the 2030s, we will connect our neocortex, the part of our brain where we do our thinking, to the cloud.”52

In a well-known article—issued on the occasion of a ﬁlm—Stephen Hawking, Max Tegmark, Stuart Russell, and Frank Wilczek shared a moderate position: “The potential beneﬁts are huge; everything that civilization has to offer is a product of human intelligence; we cannot predict what we might achieve when this intelligence is magniﬁed by the tools AI may provide, but the eradication of war, disease, and poverty would be high on anyone’s list. Success in creating AI would be the biggest event in human history. . . Unfortunately, it might also be the last, unless we learn how to avoid the risks.”53

### 1NC

#### The United States federal government should create a Digital Platform Agency responsible for industry-specific regulation of platform conduct, requiring light handed procompetitive regulation against monopolizing platform conduct and adopt a progressive data-sharing mandate that meets minimum cryptographic privacy standards.

#### DPA regulation effectively spurs tech competition without setting an antitrust precedent

Tom Wheeler 20, Visiting Fellow in Governance Studies at the Center for Technology Innovation, Phil Verveer, Senior Fellow at the Shorenstein Center on Media, Politics and Public Policy at the Harvard Kennedy School, and Gene Kimmelman, Senior Fellow at the Shorenstein Center on Media, Politics and Public Policy at the Harvard Kennedy School, “The Need for Regulation of Big Tech Beyond Antitrust”, Techtank – Brookings Institution Blog, 9/23/2020, https://www.brookings.edu/blog/techtank/2020/09/23/the-need-for-regulation-of-big-tech-beyond-antitrust/

Enforcement of the antitrust statutes is an important tool for the protection of competitive markets. Yet, it is a blunt instrument unable to reach many nuanced competition and consumer protection issues created by the digital economy. It is inherently uncertain in outcome, reliably lengthy in process, and an after-the-fact response rather than a broad-based set of rules.

Without a doubt, Big Tech has delivered wonderous new capabilities. However, the “move fast and break things” mantra of Silicon Valley has meant that digital companies move fast and make their own rules. Antitrust statutes reflect a time when markets were relatively stable because technology was relatively stable. Today, the rapid pace of digital technology means companies can move rapidly to advantage themselves by exploiting consumers and eliminating potential competition.

Regulation, done with agility, can be an important refinement to the blunt force of the antitrust laws while being able to protect competition and consumers alike. It is not enough, however, to re-task industrial era federal agencies to oversee the digital giants. These agencies are full of dedicated professionals, but they operate on precedents and procedures built for another era when technology and innovation moved at a slower pace. In place of such industrial era muscle memory, we need a purpose-built federal agency with digital DNA.

Congress has traditionally created new expert agencies to oversee new technology platforms. Whether the Interstate Commerce Commission (railroads), Federal Communications Commission (broadcasting), Federal Aviation Administration (air transport), Consumer Financial Protection Bureau (finance), or any other of the alphabet agencies, the precedent is clear: new technologies require specialized oversight. In our report, “New Digital Realities; New Oversight Solutions” we conclude such regulation in the digital era warrants creation of a Digital Platform Agency to establish public interest expectations that promote fair market practices while being agile enough to deal with the rapid pace of digital technology.

Such an agency should be governed by a new congressionally established digital policy built on three pillars:

* Risk management rather than micromanagement: rigid industrial era utility-style regulation is incompatible with today’s rapid pace of technological change. Regulation should be based on risk-targeted remedies focused on market outcomes.
* Restoration of common law principles: for hundreds of years common law has required those providing services to anticipate and mitigate harmful effects (a “duty of care”), as well as providing access to essential services (a “duty to deal”). Oversight of Big Tech need do nothing more than reinstate such expectations.
* Agile regulation: in lieu of top-down dictates, the new agency should be the forum to involve the industry in developing enforceable behavioral standards similar to fire and building codes. Such codes introduce innovation-promoting agility to the oversight process while protecting consumers and competition.

The existing agencies of government are based on statutes and structures that reflect the relatively stable markets and relatively stable technology of the late industrial era. These policies and procedures, however, have been ambushed by the digital future.

The solution to the public interest challenges posed by Big Tech is to embrace its differences and enable subject matter experts to substitute the public interest for corporate interests. While antitrust enforcement is important, the companies can no longer be permitted to make their own rules. It is time for purpose-built federal oversight of the dominant force in our lives and our economy.

## Platforms ADV

### 1NC---Platforms ADV

#### American tech dominance is high. Only antitrust threatens it.

Abbott ’21 [Alden Abbott, Paul Redmond Michel, Adam Mossoff, Kristen Jakobsen Osenga, and Brian O’Shaughnessy; March 10; the Federal Trade Commission’s General Counsel (2018-2021), adjunct professor at George Mason University, J.D. from Harvard Law School, M.A. in economics from Georgetown University; Retired Chief Judge and United States Circuit Judge of the United States Court of Appeals for the Federal Circuit; Law Professor at George Mason University; Law Professor at the University of Richmond; chair of Dinsmore’s IP Transactions and Licensing Group; the Regulatory Transparency Project, “Aligning Intellectual Property, Antitrust, and National Security Policy,” https://regproject.org/wp-content/uploads/Paper-Aligning-Intellectual-Property-Antitrust-and-National-Security-Policy.pdf]

The U.S. government has recognized that “5G is a critical strategic technology [such that] nations that master advanced communications technologies and ubiquitous connectivity will have a long-term economic and military advantage.”8 The U.S. has had a substantial technological edge over our military and intelligence rivals in foundational R&D for 5G and other next-generation technologies. U.S. companies have long been leaders in the development of previous generations of core mobile standards (2G, 3G, 4G, and LTE). This technological leadership has made it possible for U.S. companies to ensure the security and integrity of the hardware and software products that make up the backbone of the U.S. telecommunication systems. This leadership must continue for the U.S. government to more effectively anticipate potential security risks and take the necessary steps to protect national security.9

Despite this history of clear technological leadership, there are causes for concern. First, a very small number of U.S. companies have made the investments in the overwhelming majority of the R&D necessary to develop 5G.10 Historically, U.S. companies have heavily invested in R&D, which has propelled the U.S. into leadership positions in critical standard development organizations working on foundational next-generation technologies like 5G.11 U.S. companies like Qualcomm play a significant and important role in this process through innovation, patenting, and standard setting, but they are not alone in the global community of high-tech companies.12 Backed by their nations’ leadership, Chinese and Korean companies have also invested heavily in developing the core technologies for 5G.13

The willingness of U.S. companies to invest in R&D is threatened, however. The development of 5G is a bit like a race, with the companies who develop the best technology coming out ahead. While U.S. companies are savvy and talented competitors in this race, aggressive and unwarranted use of antitrust law by U.S. regulators, as well as by foreign antitrust authorities, threatens to put obstacles in these companies’ paths and hinder their ability to lead.

#### Regulating tech destroys innovation key to stop existential threats and outcompete china.

Larry Downes 18, J.D. from the University of Chicago Law School, frequent contributor to The Washington Post, Harvard Business Review, Forbes and CNET, Project Director at the Georgetown Center for Business and Public Policy's Evolution of Regulation and Innovation project, “How More Regulation for U.S. Tech Could Backfire,” Harvard Business Review, 02-09-2018, <https://hbr.org/2018/02/how-more-regulation-for-u-s-tech-could-backfire>

If 2017 was the year that tech became a lightning rod for dissatisfaction over everything from the last U.S. presidential election to the possibility of a smartphone-driven dystopia, 2018 already looks to be that much worse.

Innovation and its discontents are nothing new, of course, going back at least to the 18th century, when Luddites physically attacked industrial looms. Hostility to the internet appeared the moment the Web became a commercial technology, threatening from the outset to upend traditional businesses and maybe even our deeply embedded beliefs about family, society, and government. George Mason University’s Adam Thierer, reviewing a resurgence of books about the “existential threat” of disruptive innovation, has detailed what he calls a “techno-panic template” in how we react to disruptive innovations that don’t fit into familiar categories.

But with the proliferation of new products and their reach ever-deeper into our work, home, and personal lives, the relentless tech revolt of the last year shouldn’t really have come as any surprise, especially to those of us in Silicon Valley.

Still, the only solution critics can propose for our growing tech malaise is government intervention — usually expressed vaguely as “regulating tech” or “breaking up” the biggest and most successful Internet companies. Break-ups, which require a legal finding that the structure of a company is enabling anti-competitive behavior, seem now to have become a synonym for somehow crippling a successful enterprise.

Of course, nobody thinks technology companies should be left unregulated. Tech companies, like any other enterprise, are already subject to a complex tangle of laws, varying based on industry and local authority. They all pay taxes, report their finances, disclose significant shareholders, and comply with the full range of employment, health and safety, advertising, intellectual property, consumer protection and anti-competition laws, to name just a few.

There are also specialized laws for tech, including limits on how Internet companies can engage with children. In the U.S., commercial drones must be registered with the Federal Aviation Administration. Genetic testing and other health-related devices must pass muster with the Food and Drug Administration. Increasingly, ride-sharing and casual rental services must meet some of the same standards and inspections as long-time transportation and hospitality incumbents.

There are growing calls, likewise, to regulate social media and video platforms as if they were traditional print or broadcast news sources, even though doing so would almost certainly run afoul of the very free speech protections proponents are hoping to preserve.

But perhaps what tech critics really want are more innovative rules. Traditional regulations, after all, were designed in response to earlier technologies and the market failures they generated. They don’t cover largely speculative and mostly future-looking concerns.

What if, for example, artificial intelligence puts an entire generation out of work? What if genetic manipulations accidentally unravel the fabric of DNA, reversing evolution in one fell swoop? What if social media companies learn so much about us that they undermine—intentionally or otherwise—democratic institutions, creating a tyranny of “unregulated” big data controlled by a few unelected young CEOs?

The problem with such speculation is that it is just that. In deliberative government, legislators and regulatory agencies must weigh the often-substantial costs of proposed limits against their likely benefit, balanced against the harm of simply leaving in place the current legal status quo.

But there’s no scientific method for estimating the risk of prematurely shutting down experiments that could yield important discoveries. There’s no framework for pre-emptively regulating nascent industries and potential new technologies. By definition, they’ve caused no measurable harm.

In particular, breaking up the most successful Internet and cloud-based companies only looks like a solution. It isn’t. Antitrust is meant to punish dominant companies that use their leverage to raise costs for consumers. Yet the services provided by technology companies are often widely available at little or no cost. Many of the products and services of Amazon, Apple, Google, Facebook and Microsoft — the internet giants referred to by the New York Times as “the frightful five” — are free for consumers.

More to the point, break-ups almost always backfire. Think of the former AT&T, which was regulated as a monopoly utility until 1982, when the government changed its mind and split the company into component long-distance and regional phone companies. The sum of the parts actually increased in value — except for the long-distance company, which faded in the face of unregulated new competitors.

Then, over the next 20 years, the regional companies put themselves back together, and, with economies of scale, reemerged as a mobile internet network and Pay TV provider, competing with cable companies and fast-growing internet-based video services including YouTube, Amazon and Netflix. What started as a regulatory punishment for AT&T led to an even bigger network of companies.

On the other hand, the constant threat of a forced divestiture can be disastrous for consumers and enterprise alike. IBM prevailed against multiple efforts to break it up along product lines, but was so shaken by the decades-long experience that the company became dangerously timid about future innovations, missing the shifts first to client-server and then to Internet-based computing architectures, nearly bankrupting the business.

Microsoft, similarly, was so distracted by its multi-year fight to avoid break-up both by U.S. and European regulators that it lost essential momentum. It mostly missed out on the mobile revolution, and hesitated in responding to open-source alternatives to operating systems, desktop applications, and other software apps that seriously eroded the company’s once-formidable competitive advantage. (The company is now growing a cloud services business, but is still far behind Google and Amazon.)

These examples hint at an alternative to random and unproven new forms of regulation for emerging technologies: simply waiting for the next generation of innovations and the entrepreneurs who wield them to disrupt the supposed monopolists right out of their disagreeable behaviors, sometimes fatally.

#### Startups are doing fine---the pandemic created fertile ground for innovation.

Greg Rosalsky 21, Reporter at NPR, M.A. in Economics and Public Policy from the Woodrow Wilson School at Princeton University, “What America's Startup Boom Could Mean For The Economy,” NPR, 06-29-2021, https://www.npr.org/sections/money/2021/06/29/1010229557/what-americas-startup-boom-could-mean-for-the-economy

Back in November, the Planet Money newsletter reported that — despite a deadly pandemic and an ugly recession — America was seeing a boom in the creation of new startups. We spoke with University of Maryland economist John Haltiwanger, one of the leading scholars of business formation. Now Haltiwanger has a new study out, and the trend is clear: "The surge continues," Haltiwanger says. "We're now convinced this wasn't just a blip."

Like so many other areas of the economy, applications for new businesses pulled back in the first half of 2020 but then snapped forward again like a slingshot. Not only was 2020 the best year on record for new business creation since the Census Bureau began tracking it in 2004, but applications for new businesses have continued to soar, through at least last month. In May, there were a half a million applications for new businesses; the second highest month on record, below only last July. In total, there have been more than six million filings for new businesses since the pandemic began. The boom can be seen in both businesses composed of only one self-employed person and businesses that the Census expects will employ multiple people.

Over the last year and half, we have been reshuffling how and where we work and shop; and that shift has created all sorts of opportunities for entrepreneurs. With the pandemic, it's like someone ripped out an irrigation pipe for brick-and-mortar commerce and plugged it into virtual commerce. It's brought a drought to face-to-face businesses, and a bounty to businesses you interact with on a digital screen. The retail sector alone, driven by e-commerce, accounts for about a third of all the new startup growth. In addition, trucking, warehousing, and delivery services are all seeing surges — which makes sense, as we've seen a massive shift of spending on in-person services to tangible goods that are bought online.

We've also seen the rise of remote work and a reshuffling of the population, from city centers to suburbs, and from traditional job centers to "Zoom Towns." Where people go, they bring their dollars. It may help explain why the food and accommodation sector is the greatest area of growth. We've also seen huge growth in the types of businesses that can provide remote services.

There are at least two potential theories for what's going on. First, while the boom is undeniably good news, there is a slightly negative take: we've seen a surge in new businesses mainly because the pandemic forced two painful restructurings to the economy. It began by ravaging the face-to-face economy and creating an awkward marketplace where we could only do stuff six feet apart. This suffocated many existing businesses while providing oxygen for others, such as online retailers, video conferencing apps, drive-thrus, delivery services, mask and sanitizer companies, and the like. Yet, many of these new opportunities for pandemic-friendly businesses may prove to be only temporary. Many of them could die as we head back to normal.

Now that most of us are vaccinated, we're releasing the pressure cooker of our pent-up demand for going out. It's leading to the second major restructuring: new businesses — restaurants, bars, salons and so on — are growing out of the ashes of the businesses scorched by the pandemic. This is great news! It's better than no new businesses. But it's possible that we're now just heading back to normal, as opposed to something new and better. Think of it like the economy doing a pendulum swing from a normal economy to a pandemic economy and back to a normal economy again.

It's hard to completely rule out this Negative Nancy take. We don't have many details about what exactly the new businesses created during the pandemic are doing, or how big they're gonna get. More importantly, we still don't have great data on how many and what kinds of businesses died over the last year, and whether these new businesses are merely just filling the massive hole created at the beginning of the pandemic. The data suggests the biggest surges occurred at the beginning and tail ends of the pandemic, which is consistent with the idea that this was a pendulum swing.

But Haltiwanger offers a second, more optimistic theory, which says this is about way more than just a pendulum swing: it's a rocket ship to a better economy. As painful as the pandemic has been, he believes it has forced the business world to drop outdated ways of doing things and embrace technology in a new way. "I don't think any of us had a clue that we could do so much business activity remotely," Haltiwanger says. "That sparks all kinds of new ideas."

#### Fintech startups are booming.

Griffith ’21 [Erin; March 29; reporter, good last name, citing Suryadevara, Stripe’s chief financial officer, and public data; the New York Times, “The Start-Up Enemies of Wall Street Are Booming,” https://www.nytimes.com/2021/03/29/technology/fintech-startups-wall-street.html]

Sila is one of thousands of financial technology start-ups riding an investor frenzy driven by a growing realization that Big Finance is ripe for a tech makeover. When the pandemic forced businesses to speed up their usage of digital tools, including e-commerce and online banking, the demand for what is known as fintech exploded.

Now start-ups with names like Blend, Brex and Dave that provide decidedly unglamorous banking, lending and payment processing offerings are hot tickets. That was punctuated this month when Stripe, a payments company, raised $600 million in a financing that valued it at $95 billion, the highest ever for a private start-up in the United States.

Financial technology companies are also making a splash on the stock market. On Tuesday, Robinhood, a stock trading app popular with young adults, filed for an initial public offering. And Coinbase, a cryptocurrency start-up, is scheduled to go public in the next few weeks in what could be a $100 billion listing.

Even tiny financial start-ups that have not formally introduced their products — such as Zeller, which will offer banking services to businesses; and Sivo, which is building lending software — have raised millions of dollars and been valued at nine-digit sums.

In total, venture capital investors poured $44.4 billion into financial technology start-ups last year, up from $1.1 billion in 2009, according to PitchBook, which tracks private financings.

Many investors are now making bold predictions that these start-ups will upend big banks, established credit card providers — and in some cases, the entire financial system.

“The banks are extremely vulnerable” because they have not kept up with what customers expect, said Mark Goldberg, an investor at the venture capital firm Index Ventures. He predicted $1 trillion of market value could transfer from old guard financial institutions to tech companies over the next two decades.

“It’s what Amazon did to offline retail,” he said. “It’s just playing out 10 years later in fintech right now.”

The financial technology start-ups that are riding the boom run the gamut. They provide services including checking accounts, mortgages, insurance, investing, payment processing and cryptocurrencies.

Many are capitalizing on people’s long-simmering distrust of the big banks, especially after the 2008 financial crisis. Often, the start-ups offer slick and easy-to-use apps, no physical branches and low or no fees. And they are building on people’s growing familiarity over the past decade with tech tools and digital payments, a shift that has accelerated in the pandemic.

Just as cheap cloud computing and smartphones once enabled a wave of new app start-ups, the financial technology sector has developed its own set of building blocks, allowing new companies to spring up faster.

One of the building-block companies is Stripe. Founded in 2010, Stripe started out by offering to process payments for small businesses and start-ups. By 2018, it was worth $20 billion and had begun investing in other start-ups.

Stripe now processes hundreds of billions of dollars in payments a year, has expanded to larger customers including Salesforce and Booking.com, and has made more than 30 investments in other fintech start-ups.

“We are in a hyper-growth industry and within that, the company itself is experiencing hyper-growth,” Dhivya Suryadevara, Stripe’s chief financial officer, said in an interview.

Domm Holland, chief executive of Fast, an e-commerce checkout software start-up, said Stripe sped up his company’s progress. Customers who use Stripe to accept online payments can then use Fast’s software for their checkout process.

“If Stripe didn’t exist today, we would first have to build Stripe,” Mr. Holland said. “That’s a lot of work. They’ve already done that.”

Last year, as Fast’s business grew in the pandemic, investors began messaging Mr. Holland daily asking to invest in the company. “I have people LinkedIn messaging and emailing, just offering, ‘Take $5 million at any valuation you like,’” he said. “It is a bizarre world to live in.”

He ended up raising $102 million for Fast in January. Stripe was one of the main investors in the financing.

Other companies that play similar “building block” roles in the financial technology boom include Affirm, which offers lending and went public this year; Shopify, which enables e-commerce transactions; and Plaid, which helps apps connect with bank accounts.

“The infrastructure has gone to a whole other level,” said CJ MacDonald, founder of Step, a debit card provider aimed at teenagers. Introduced in September, Step quickly reached one million customers, partly from endorsements from social media influencers like Charli D’Amelio.

In December, Step raised $50 million in funding. The company was not looking for more money, Mr. MacDonald said. But investors started calling as soon as the app joined the top-downloaded finance app list shortly after it was released. The money came together in a matter of weeks, he said.

Investors are even clamoring to buy into broken deals. Plaid, which had agreed to sell itself to Visa for $5.6 billion last year, saw the deal unravel in January after facing antitrust scrutiny. Now the fast-growing company is in talks with investors to raise funding at a valuation near $15 billion, said two people with knowledge of the company who spoke on the condition they not be identified because the discussions are confidential. The Information earlier reported Plaid’s funding talks.

#### Status quo solves sanctions evasion by cryptocurrency

Robert A. Schwinger 21, partner in the commercial litigation group at Norton Rose Fulbright US, 3/9/21, “Cryptocurrency Offers No Escape From International Sanctions,” New York Law Journal, https://www.law.com/newyorklawjournal/2021/03/08/cryptocurrency-offers-no-escape-from-international-sanctions/

Among the conclusions offered in "Cryptocurrency Enforcement Framework" issued by the Department of Justice this past fall (see generally R. Schwinger, "Blockchain Law: DOJ's 'Cryptocurrency Enforcement Framework'," NYLJ (Jan. 15, 2021)) was the ominous warning that "cryptocurrency presents a troubling new opportunity for individuals and rogue states to avoid international sanctions and to undermine traditional financial markets, thereby harming the interests of the United States and its allies." A spate of recent government enforcement action shows that the United States is not hesitating to tackle cryptocurrency activity being used to try to circumvent the prohibitions of U.S. economic sanctions.

The United States maintains a powerful system of economic sanctions as part of the tools it uses in international relations, such as under the International Emergency Economic Powers Act, 50 U.S.C. §§1701 et seq. (IEEPA). These sanctions target not just particular bad actors but also certain entire countries or regimes. Well-known examples of such sanctioned states include North Korea, Iran, Cuba, Venezuela, Crimea, Sudan and Syria. These sanctions are designed to cut off these countries from much of the modern financial system, as a means of U.S. leverage in international relations.

For persons in or involved with such sanctioned countries, the prospect of being able to make and receive payments through cryptocurrency outside the conventional financial system with its stringent regulations and oversight is a powerful lure, especially given the ability cryptocurrency offers to operate anonymously or pseudonymously. But recent U.S. enforcement activity illustrates how the government is taking strong action against persons involved with such misuses of cryptocurrency in order to meet this threat and deter others.

Talk, Services or Conspiracy?

In United States v. Griffith, 2020 WL 275903 (S.D.N.Y. Jan. 27, 2021), the Court upheld an indictment charging a U.S. citizen with conspiring to violate IEEPA sanctions against North Korea by giving a talk in Pyongyang on blockchain technology and cryptocurrency. The defendant Griffith was an employee of the Ethereum Foundation, which supports the Ethereum blockchain. His indictment centered on a presentation he made at a cryptocurrency conference in North Korea concerning possible applications of blockchain technology.

It was charged that prior to this conference, Griffith had been interested in establishing an Ethereum environment in North Korea, at one point texting a colleague that "we'd love to make an Ethereum trip to [North Korea] and setup an Ethereum node … . It'll help them circumvent the current sanctions on them." He also sent texts to a colleague speculating that while he was not sure why North Korea was interested in cryptocurrencies, it was "probably avoiding sanctions." Despite the State Department's denial of a request Griffith made for permission to travel to North Korea to speak at the cryptocurrency conference about "the applications of blockchain technology to business and anti-corruption," Griffith nevertheless was able to secure a visa from North Korea's mission to the UN in New York and spoke at the conference.

The court held that Griffith's presentation constituted the prohibited export of a service to North Korea, a country subject to comprehensive U.S. sanctions. See Exec. Order 13722, 81 Fed. Reg. 14943 (March 15, 2016); 31 C.F.R. §510.206(a). In so holding, the court rejected several defenses Griffith had raised.

Griffith argued that his presentation could not constitute services because he was not paid, but the court rejected the contention that the receipt of a fee is a necessary element of a "service." It pointed to United States v. Banki, 685 F.3d 99 (2d Cir. 2012), which rejected any fee requirement, relying on the dictionary definition of "service" as well as the policy consideration that if service required a fee to be prohibited, parties would be at liberty to provide uncompensated assistance to persons subject to sanctions without any consequences.

Griffith also raised the issue that U.S. sanctions on North Korea, like other U.S. sanctions programs, exempt "informational materials" from the prohibition on the export of services, and argued that hisconduct fell within the exemption. The regulation from the Treasury Department's Office of Foreign Asset Control (OFAC) on which Griffith relied, however, limited this exemption to materials "fully created and in existence at the date of the transactions." 31 C.F.R. §510.213(c)(2). The court thus rejected Griffith's attempt to challenge his indictment on this ground. It stated that "the key distinction rests between informational materials that are widely circulated in a standardized format and those that are bespoke" (quoting United States v. Amirnazmi, 645 F.3d 564, 587 (3d Cir. 2011)). While Griffith argued that his presentation was nothing more than "highlevel publicly available information" without substantive alteration, and consisted of only "general articles in the public domain" and "very general information … available on the Internet," the government claimed to have evidence that Griffith drew diagrams on a whiteboard while speaking and concluded his time with a brief question-and-answer session. The court concluded that whether Griffith's presentation was fully created and in existence at the date of the presentation was a factual dispute that a jury would have to resolve.

The court also held that ultimately these issues did not affect the validity of the indictment because Griffith was charged with conspiracy to violate IEEPA, not a substantive IEEPA violation. The government charged that Griffith and his co-conspirators agreed to advise North Korea on how "to evade and avoid sanctions by using blockchain and cryptocurrency technologies" and that "Griffith's speaking engagement at the April 2019 conference was a major step in a long-term plan to persuade and assist [North Korea] in using Ethereum to avoid sanctions and launder money." The indictment alleged that the presentation was simply one action in furtherance of a conspiracy that extended from August 2018 through November 2019 (seven months after the speaking engagement). The act in furtherance of the conspiracy did not itself need to be illegal.

Lastly, the court rejected Griffith's contention that the indictment as applied to him violated his First Amendment right to free speech. It concluded that even under a strict scrutiny approach the IEEPA regulatory scheme as applied to Griffith did not violate the First Amendment because it served a compelling foreign policy interest of the United States—maintaining national security—while imposing the least restrictive burden on speech. It determined that the regulatory scheme was narrowly tailored to meet this compelling interest because it was aimed at a designated country, exempted information or informational materials from its coverage, implemented a licensing scheme that permits U.S. persons to apply for authorization to provide services, and required the government to prove willful misconduct beyond a reasonable doubt.

The court stressed that Griffith's challenge to his indictment "has nothing to do with advocacy" but rather with knowingly and willfully participating in a conspiracy to provide services to North Korea. In addition, it noted, "[s]ervices by their nature are intangible and are often rendered through the words of the service-provider, whether lawyer, accountant, financial advisor or technology advisor." Thus, as an "alternative holding," the court concluded that because speech concerning cryptocurrency transactions or blockchain technology is "an essential but subordinate component" of the service in question, "it lowers the level of appropriate judicial scrutiny." The challenge to the indictment thus withstood the defendant's attack on First Amendment grounds as well, notwithstanding that the crime charged centered around giving a talk at a conference.

Cryptocurrency in The North Korean Military Intelligence Toolkit

On Feb. 17, 2021, the Justice Department unsealed a two-count indictment that had been returned on Dec. 8, 2020 against three North Korean officials. These officials, alleged to be part of a North Korean military intelligence agency called the Reconnaissance General Bureau, were charged with various illicit cyber, cryptocurrency and blockchain activities, including as part of an attempt to evade U.S. sanctions. United States v. Jon, Chang HyokKim Il and Park Jin Hyok, No 2:20-cr-00614-DMG (C.D. Cal.). In the first count, the indictment charged the defendants with conspiracy under 18 U.S.C. §371 to violate various provisions of the Computer Fraud and Abuse Act, 18 U.S.C. §1030, by orchestrating various cyber intrusions and attacks, heists and ransomware attacks, and by spreading malware, against victims that included entertainment companies, financial institutions, online casinos, and cryptocurrency companies. The indictment's second count charged the defendants with conspiracy in violation of 18 U.S.C. §1349 to commit bank and wire fraud through various schemes, one of which involved using a cryptocurrency initial coin offering (ICO) and blockchain tokenization of assets for purposes that included evading U.S. sanctions.

Specifically, the indictment's second count alleged that defendant Kim Il and other conspirators developed a plan to create a digital token called the "Marine Chain Token," which would allow investors to "purchase fractional ownership interests in marine shipping vessels, such as cargo ships, supported by a blockchain." Defendant Kim Il would contact individuals in Singapore, where he once lived, regarding potential involvement in creating Marine Chain. He and the other conspirators were also alleged at times to have used false and fraudulent names when contacting individuals they hoped would be involved in creating Marine Chain, not disclosing that they were North Korean citizens or that they were communicating using false and fraudulent names.

The indictment further charged that as part of the defendants' plan, they sought to raise funds for the Marine Chain platform through an ICO. In doing so, they allegedly communicated with potential investors using false and fraudulent names in order to convince them to invest in the Marine Chain platform, again not disclosing they were North Korean citizens or that they were communicating using false and fraudulent names. The indictment also charged that they would not disclose to investors that "a purpose of the Marine Chain Token was to evade United States sanctions on North Korea." According to the allegations, their plan was to "tokenize individual vessels on the Marine Chain platform, allowing investors to purchase ownership interests in marine shipping vessels," and to receive approval from Hong Kong's Securities and Futures Commission to trade the Marine Chain Token as a security.

According to a New York Times report, a Justice Department official acknowledged that there was little chance that any of the three defendants, who live in North Korea, would be arrested. Nevertheless, the official explained that the indictment was intended to show the public the seriousness of the North Korean threat and the Justice Department's ability to identify persons involved in such activities and to warn them and the countries that support them.

More Than Just North Korea

Concern about cryptocurrency being used as a means to evade IEEPA sanctions is not limited to North Korea. Three years ago, President Trump issued Executive Order 13827 (March 19, 2018) directed against Venezuela, in response to Venezuela's efforts to bypass the effect of U.S. economic sanctions by developing its own cryptocurrency called the "Petro."

This Executive Order states that:

In light of recent actions taken by the Maduro regime to attempt to circumvent U.S. sanctions by issuing a digital currency in a process that Venezuela's democratically elected National Assembly has denounced as unlawful … [a]ll transactions related to, provision of financing for, and other dealings in, by a United States person or within the United States, any digital currency, digital coin, or digital token, that was issued by, for, or on behalf of the Government of Venezuela on or after January 9, 2018, are prohibited … .

The order further prohibits "[a]ny transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in th[e] order" and "[a]ny conspiracy formed to violate any of the prohibitions set forth in this order."

The order specifically provides that its references to the "Government of Venezuela" are intended to encompass "any political subdivision, agency, or instrumentality" of that governments, "including the Central Bank of Venezuela and Petroleos de Venezuela, S.A. (PdVSA)" as well as any other person or entity "owned or controlled by, or acting for or on behalf of, the Government of Venezuela."

Due Diligence Risks for Domestic Companies

On Feb. 18, 2021, OFAC issued an Enforcement Release in which it announced that an Atlanta-based company called BitPay, Inc., which offered a payment processing solution to enable merchants to accept digital currency as payment for goods and services, had agreed to pay $507,375 to settle potential civil liability for what OFAC charged were "2,102 apparent violations of multiple sanctions programs." The OFAC release charged that BitPay

allowed persons who appear to have been located in the Crimea region of Ukraine, Cuba, North Korea, Iran, Sudan, and Syria to transact with merchants in the United States and elsewhere using digital currency on [its] platform even though [it] had location information, including Internet Protocol (IP) addresses and other location data, about those persons prior to effecting the transactions.

OFAC explained in its release that "[w]hile BitPay screened its direct customers—the merchants" against OFAC sanctions lists, it allegedly "failed to screen location data that it obtained about its merchants' buyers," which reportedly included the buyers' names, addresses, email addresses, phone numbers and IP addresses. As a result, even though BitPay had implemented certain sanctions compliance controls and made clear in employee training that it prohibited merchant sign-ups from sanctioned jurisdictions and trade with sanctioned individuals and entities, OFAC sought and was able to obtain civil penalties against BitPay.

OFAC stressed:

This action highlights that companies involved in providing digital currency services … should understand the sanctions risks associated with providing digital currency services and should take steps necessary to mitigate those risks. Companies that … process transactions using digital currency are responsible for ensuring that they do not engage in unauthorized transactions prohibited by OFAC sanctions, such as dealings with blocked persons or property, or engaging in prohibited trade or investmentrelated transactions."

Conclusion

Cryptocurrencies and other virtual and digital currencies seek to stake their place in the financial world alongside more conventional financial products and instruments and better known and more historically familiar banks and financial institutions. But in so doing, it should come as little surprise that this new asset class will likewise find itself falling subject to tools like the economic sanctions the United States uses to protect its international interests by wielding power over global financial markets and international transactions. For the United States not to do so would expose it to the risk that its sanctions regime could be rendered toothless by new financial technology. Players in the cryptocurrency space who ignore the restrictions imposed by U.S. international sanctions are being put on notice that they do so at their peril.

#### Bitcoin doesn’t allow Iran to successfully evade sanctions

Michael Sexton 21, Fellow and Director of the Cybersecurity Initiative at the Middle East Institute; and Brett Sudetic, foreign affairs consultant and advisor to Gulf State Analytics, 1/22/21, “Bitcoin: A dirty solution to Iran’s economic troubles?,” https://www.mei.edu/publications/bitcoin-dirty-solution-irans-economic-troubles

Bitcoin, despite its recent popularity, may not be as promising as some Iranians would hope. The cryptocurrency is seldom used or usable in everyday transactions, and its value is notoriously unstable. Volatility of the currency and uncertainty around government regulations have led many Investors and financial analysts - including legendary investor Warren Buffet - to assert that the cryptocurrency possesses no value and is likely to collapse at some point. Others fear that while cryptocurrencies are inherently designed to give people more freedom and privacy in conducting financial transactions, potential government regulations could hamper adoption of the cryptocurrency in the near future.

Iran’s embrace of bitcoin is also likely to attract greater scrutiny from anti-money laundering and counter-terrorism finance investigators. All bitcoin transactions are public, although the identities behind the transactions are hidden behind random (but static) numerical addresses. This means that, while the currency is attractive for terrorists, criminals, and other users who cannot rely on traditional banking, it can also be a treasure trove of intelligence for governments and even open-source researchers. The United States government has previously exposed the bitcoin addresses of sanctioned Iranians to clamp down on illicit transactions.

Bitcoin mining is not a solution to Iran’s economic troubles, but a symptom of them. To arrest the harm that this emerging industry is causing to Iran’s energy infrastructure and environment, Iran and the P5+1 will need to prepare Iran to gainfully participate in the global economy without relying on quixotic and problematic enterprises like cryptocurrency mining.

#### Sanctions Fail

Jennifer Rubin 18, 8-21-2018, "Trump’S Iran Strategy Is Debunked — From The Right," Washington Post, https://www.washingtonpost.com/news/opinions/wp/2018/08/21/trumps-iran-strategy-is-debunked-from-the-right/?utm\_term=.07df75be9390

Frederick W. Kagan of the American Enterprise Institute writes that, unlike the Soviet Union, Iran is not going to collapse or give up its ideology under fear of collapse because of economic pressure from the West: There is every reason to believe that the current supreme leader, Ayatollah Ali Khamenei, will not lose his will. A veteran himself of the horrendously bloody Iran–Iraq War, Khamenei has ordered his security forces to kill his people on numerous occasions, including most dramatically during the protests following the rigged 2009 election. . . . The extent to which the regime’s own policies, including its determination to develop the means of building a nuclear-weapons arsenal, has created the economic isolation that so harms them may also be news to some Iranians, but, again, the general outlines of that reality probably are not. Even if solving the regime’s economic problems required reducing its oppression of its population, and it probably does not, there is no reason to think that such a reduction would generate the kind of systemic shock that blasted the Soviet system in a few years. Moreover, Kagan points out, the survival of Iran’s Revolutionary Guard Corps (IRGC) requires the regime to survive. (“Any new government in Iran that is not an Islamic Republic built on the principles described above could not tolerate the continued existence of an organization so steeped in those principles with the military, intelligence, and economic capabilities the Guards now have.”) In practice this means Iran is very likely to resist change even if it means undergoing a good deal of economic hardship — and clamping down even harder on its own people who may take to the streets as a result of external economic pressure. (“It is almost impossible to imagine the current regime leadership losing the will to kill, nor is there any reason to think that the IRGC itself and the most IRGC-like of the Basij units would detach themselves from the regime and stand aside or join the protesters.”) Worse, it might increase the IRGC’s control of the government. Kagan’s conclusion is sobering: “The U.S. should therefore proceed on the assumption that no amount of external pressure will cause the rapid collapse of the Islamic Republic of Iran, but that such pressure could instigate a large-scale bloody crackdown that initially strengthens the control of the IRGC and other extremists.”

## Conduct ADV

### 1NC---Conduct ADV

#### The plan spills over, decimating business confidence and overall economic recovery

Trace Mitchell 21, Policy Counsel at NetChoice, JD from the George Mason University, Antonin Scalia Law School, Former Research Associate at the Mercatus Center at George Mason University, BA in Political Science and Government from Florida Gulf Coast University, “Weaponizing Antitrust to Attack Big Tech Is a Bad Idea”, Morning Consult, 3/3/2021, https://morningconsult.com/opinions/weaponizing-antitrust-to-attack-big-tech-is-a-bad-idea/

From the House Judiciary report calling for dramatic antitrust reform to federal antitrust regulators and state attorneys general initiating lawsuits against Facebook and Google, government officials are once again calling for more aggressive antitrust enforcement to go after America’s tech businesses.

And while critics from all sides are reaching for any and all tools to go after “Big Tech,” weaponizing antitrust will only end up harming American consumers and the American economy at a time when we’re still trying to keep our heads above water.

Using antitrust to go after American tech won’t stop at Silicon Valley. Every sector of our economy will be at risk of politically motivated antitrust enforcement. And that won’t just hurt consumers searching for information on Google or shopping for products on Amazon — America’s economy could lose its global competitiveness amid a global pandemic.

In fact, the recent cases against Google from the Department of Justice and state attorneys general are a great example of just how this misuse of antitrust could harm Americans across the country and halt innovation in its tracks.

These suits conveniently forget how consumers benefit from Google’s suite of products in attempts to claim that Google unfairly monopolized the search and search advertising markets. Even worse, by claiming consumer harm, the government fails to truly grasp what consumers actually want.

You see, under the consumer welfare standard, antitrust enforcement is built to focus on what consumers want and whether consumers benefit. When the government argues Google is harming Americans because its products are preinstalled and even the default search engine on Apple, the government forgets that American consumers don’t think this is a problem.

The vast majority of search users prefer Google to its competitors. And through preinstallation, we get free-to-use products, quick searches and near-limitless information in an integrated system with the click of a mouse. It isn’t a problem; it’s a time saver. Further, because Google can reinvest in developing more user-friendly tech in a preinstalled ecosystem, we get interoperable apps that make our experience that much more convenient and intuitive. And even if consumers do want a different app, they can fix this problem with no heavy leg work or travel — just the swipe of a finger.

But if the government gets its way, the message could be disastrous for innovation: Even if your business benefits Americans and improves the user experience, the government can still put a target on your back. Not to mention, the government would be more likely to put a target on your back if you’re large and politically disfavored. Consumers across the internet and the American economy would be hurt and left without more accessible and more affordable technology as options.

We should be working to reward, not punish, innovation. Otherwise, the next Google may just decide it isn’t worth the time and effort.

Similarly, the Federal Trade Commission’s recent case against Facebook also puts the wants of policymakers above the actual interests of consumers.

Here, the government claims that Facebook harms consumers by acquiring and then integrating services like Instagram and WhatsApp. So harmful, the Federal Trade Commission says, that Facebook must divest from these services, even if that would harm American consumers, innovation and entrepreneurship for decades to come.

But this is not a case of consumer harm or bad behavior — Facebook’s acquisition of Instagram and WhatsApp helped ensure that consumers’ desires were prioritized. Through millions of investment dollars into research and development, Facebook turned good services into great services that consumers actively keep coming back to.

Through relentless product improvement, WhatsApp became a free-to-use platform and Instagram became one of the most successful photo-sharing social media apps in the world. In both cases, consumers benefited from convenient and state-of-the-art advancements. No longer do we have to pay to use messaging or search through multiple results to shop our influencer feed.

As it stands, the Federal Trade Commission case could splinter one successful tech company into multiple, less efficient organizations, setting a precedent that could affect every American industry. Consumers would not only lose Facebook’s free-to-use services but also potentially the next big clothing brand or the next hit microbrewed beer.

By impeding mergers, the sheer fear of potential antitrust enforcement would shutter the doors on small businesses from all sectors of the economy. So much investment in innovation is built on the possibility of being acquired by a larger player. Entrepreneurs and innovators from manufacturing, automotive and tech alike would be left with an unfortunate takeaway — succeed and benefit consumers, but not too much.

And with an economy still struggling to recover, the absolute last thing we need is to leave consumers without innovative and affordable choices, small businesses without key investment opportunities and our economy without a competitive edge globally.

But by weaponizing antitrust, we’ll get neither thoughtful intervention nor consumer benefits. Instead, the United States will lose ground to foreign competitors and American consumers will ultimately pay the price.

#### Diversifying digital providers results in smaller firms that are more prone to malware.

Dakota Foster & Zachary Arnold 20, Research Assistant for Dr. Colin Kahl at the Stanford Center for International Security and Cooperation, J.D. candidate at Stanford Law School, MS in Global Governance and Diplomacy from the University of Oxford, M.A. in War Studies from King’s College London; Research Fellow at Georgetown's Center for Security and Emerging Technology, J.D. from Yale Law School, “Antitrust and Artificial Intelligence: How Breaking Up Big Tech Could Affect the Pentagon’s Access to AI,” Center for Security and Emerging Technology, May 2020, https://cset.georgetown.edu/wp-content/uploads/CSET-Antitrust-and-Artificial-Intelligence.pdf

Smaller AI firms might invest less in cybersecurity, making them and their products more vulnerable. Cybersecurity is expensive, and trade secret theft occurs primarily through cyberattacks.155Although big companies have a larger attack surface and more points of vulnerability, they also have the ability to invest in cybersecurity. By contrast, small firms often lack the cybersecurity resources to defeat sophisticated, state-sponsored hackers.

The top U.S. tech firms lead in domestic absolute spending on IT, which includes cybersecurity.156 Facebook’s Head of Global Affairs, Nick Clegg, claimed that “the resources that we will spend on security and safety this year alone [2019] will be more than our overall revenues at the time of our initial public offering in 2012. That would be pretty much impossible for a smaller company.”157

Not coincidentally, smaller businesses run a greater risk of cyberattack,158 and they are less likely than large companies to identify the source.159 Because of their size and access to larger companies through the supply chain, smaller firms are lucrative cyberattack targets.160Moreover, if smaller, post-breakup companies increasingly work on defense-relevant products, they will become more salient targets for foreign actors. Cybersecurity breaches generally result from internal mistakes rather than foreign government activity,161 yet “Defense Technology” and “Information and Communication Technology” are two of six industries identified by the National Counterintelligence and Security Center as the most likely targets for foreign intelligence collectors.162

#### Monocultures are safe --- every alternative is hacked more.

Roger A. Grimes 9, holds more than 40 computer certifications and has authored ten books on computer security. He has been fighting malware and malicious hackers since 1987, beginning with disassembling early DOS viruses. He specializes in protecting host computers from hackers and malware, and consults to companies from the Fortune 100 to small businesses. A frequent industry speaker and educator, Roger currently works for KnowBe4 as the Data-Driven Defense Evangelist and is the author of Cryptography Apocalypse. Don't fall for the monoculture myth, CSO Online, 4-24-2009, https://www.csoonline.com/article/2632142/don-t-fall-for-the-monoculture-myth.html

Here we go again: another expert recommending that people stop using a popular piece of software because it has too many vulnerabilities. In this case, I'm talking about F-Secure's recommendation to abandon Adobe's Acrobat Reader in favor of other PDF rendering programs, like Fox-It or any of the free alternatives available.

You'll often read similar recommendations to dump Microsoft's Internet Explorer (I work full-time for Microsoft) and use any other browser instead. To completely protect yourself, they'll advise moving off of Microsoft Windows all together.

The idea is that protection can be gained by moving to a more secure product or that it's just inherently safer to use a less popular product because it is less likely to be attacked. Now, the former argument I can buy. If one product has weaker security than another product, who can blame you for switching? Of course, that argument is more complex than it first appears.

What is a more secure product? Do you measure that with known bug counts, severity of bugs, time to patch, or how often it is publicly exploited? And is the product you are moving to actually more secure or just attacked less often because it is not as popular? This leads to the other argument: When it comes to software, there's safety in fewer numbers of users. The idea is that when everyone is using the same application or operating system (OS), a computer monoculture is created that leads to more exploits.

On the face of it, it's a compelling argument, one that's hard to reason against. If we all use the same software, then attackers can write one piece of code to exploit us all simultaneously. It seems to make sense that moving away from a monoculture (an argument first popularized in a paper by Dan Greer and others in 2003) would reduce overall security risk.

And for sure, there are compelling factual arguments on a case-by-case basis. If you didn't run (unpatched) versions of Microsoft SQL Server in 2003, the SQL Slammer worm couldn't get you. Besides Windows, I also run OpenBSD, Ubuntu, and Mac OS X at home, and the last operating systems are attacked less frequently, with the exception of my Apache-based Web servers, which are attacked six to eight times more often than my IIS servers. However, the truth is that I don't get exploited on any of these systems unless I intentionally allow them to get exploited. (I run eight honeypots to monitor malware and hacker behavior.)

Celebrate diversity?

The key question is whether a more diverse software landscape -- i.e., the opposite of a computer monoculture -- would be safer over the long run.

Although some may accuse me of using this column to defend my full-time employer, the truth is that no one has presented compelling evidence that moving to a computer multiculture would provide more security protection to more users over the long run. Lots of people have speculated, but if the Windows world just up and splintered into a dozen different OSes and applications, no one has proven that it would provide more security value. Conventional wisdom says it might, but could it really?

I think the potential challenges to this way of thinking are many. First, often the alternatives people choose are as insecure as the market leaders they abandon; people may get a temporary decrease in security risk until the software they use becomes more popular.

The monoculture argument about safety in fewer numbers holds water only if the move to the less popular software stays under the radar. If the masses follow, nothing is gained. Ten years ago, Microsoft Office document formats were the only game. But then Adobe's PDF arrived, and now PDFs are as common on the Internet as Office files. And not surprisingly, PDF is receiving more than its fair share of hackers and exploits. Some protection vendors are claiming that PDF exploits account for nearly half of all exploits in the wild today, surpassing Office's issues.

Adobe Acrobat Reader critics usually recommend moving to Fox-It, except that Fox-It has already had exploits. Internet Explorer critics recommend moving to Firefox, Safari, Opera, or Chrome, but all of these alternatives are commonly exploited too. Microsoft Office critics often recommend moving to OpenOffice.org, except that it, too, has already been exploited dozens of times, and some expert code analyzers think it is rife with exploits and insecure code. It's so frustrating it makes you want to move to simple text editors and text-only browsers, except those have already been exploited, too, and in any case, they fall well short of the features most of us need. When the world moves to the new product, you're right back where you started.

Life on the run

This isn't the answer, unless you plan on hopscotching around the software world from one program to the next, trying to keep one step ahead of the malicious hackers. While this works on a personal level, it's not so easy to manage in the enterprise. Plus, forcing the original vendor to become a more secure coder might make better use of overall effort. Who wants to be the person who forces their users to move to another product just to watch the original product become more secure than the new alternative?

Case in point: After the Microsoft SQL Slammer worm happened, there have been fewer than a handful of exploits against SQL Server, none popularly exploited. In the same time frame, there have been dozens to hundreds of exploits against SQL Server's most popular competitors -- same with IIS versus Apache after the Code Red worm debacle. Vendors that get a brutal lesson often fix their mistakes faster than the competition.

# Block

## Conduct ADV

### U---Growth---2NC

#### Biz con is threading the needle---it’s just strong enough to sustain growth, but fragile

Joe Ucuzoglu 1-26, Chief Executive Officer at Deloitte US, “CEOs Eye 2022 with Optimism and a Dash of Uncertainty”, Ritz Herald, 1/26/2022, https://ritzherald.com/ceos-eye-2022-with-optimism-and-a-dash-of-uncertainty/

The first CEO survey of 2022 shows leaders threading the needle between feeling “hopeful” and “uncertain” about the year ahead. CEOs expect business growth to remain strong, but continue to highlight challenges with talent, the continued pandemic, and supply chain disruptions. Holding steady on expectations for growth, surveyed CEOs appear cautiously optimistic that their organizations have adjusted and adapted to a “new normal” marked by the enduring uncertainty of COVID-19.

When asked in the Fall 2021 survey about when pandemic business effects would be over, nearly one-third of CEOs said they didn’t expect the impact of COVID-19 ending anytime in the “foreseeable future,” while 11% said business effects would be over by the end of 2021, 23% said by mid-2022, and 35% said by the end of 2022.

The timing of the Fall 2021 survey coincided with the rise of the Delta variant in September 2021, while the current survey was fielded at the beginning of January 2022 during a time of high disruption by the Omicron variant. Even so, CEO expectations are remarkably unchanged from four months ago. Similar to predictions they made back in September, 8% of CEOs claim that the business effects of the pandemic are already over for their organization, and just under a third say they will not be over in the “foreseeable future.” About 20% say by mid-2022, and 40% say by the end of 2022.

Expectations for growth are also relatively unchanged from the Fall 2021 survey, with almost two-thirds of CEOs expecting their organization’s growth to be “very strong” or “strong” over the next 12 months. The remaining third expects “modest” growth, and a fractional 2% expect “weak” growth.

However, CEOs have updated their outlook on financial and market instability. In the current survey, 36% of CEOs pointed to this issue as a top external concern, compared to 13% in Fall 2021. That figure rises to 62% for CEOs in the Financial Services industry, where it’s the top-ranked issue.

“Notwithstanding the challenging societal circumstances at this moment presented by the Omicron surge, CEOs remain optimistic about the business environment and see strong growth opportunities over the next year. A new normal appears to be setting in whereby business leaders simply expect new challenges to arise continuously and are confident they can manage through them to achieve positive business results while making a real difference in society.” – Joe Ucuzoglu, Chief Executive Officer, Deloitte US.

### U---AT: Antitrust Now---2NC

#### Nothing concrete has been implemented---the question is what will actually get through

Alden Abbott 1-26, Senior Research Fellow at the Mercatus Center at George Mason University, and Andrew Mercado, Adjunct Professor and Research Assistant at George Mason University's Antonin Scalia Law School, Master's Degree in Economics from George Mason University, “Developments in Competition Policy During the First Year of the Biden Administration”, Mercatus Center Policy Briefs, 1/26/2022, https://www.mercatus.org/publications/antitrust-and-competition/developments-competition-policy-during-first-year-biden

Conclusion

Competition policy developments in the first year of the Biden administration have a common theme. Very few concrete, actionable steps have been taken, but the groundwork has been laid for far greater government intervention to curtail disfavored types of business conduct. By bringing interventionist individuals into top positions at the antitrust agencies and releasing an executive order focused primarily on directing federal agencies to intervene to a greater extent in the economy, the new administration has made it clear that more aggressive antitrust enforcement actions—and novel competition rulemaking proposals—are in the offing. What’s more, growing fervor in the halls of Congress has led to bipartisan support for bills that would expand the power of antitrust agencies to limit or block mergers and other transactions by dominant firms. These developments all point to what may be the largest antitrust policy shift in nearly half a century, one that could significantly reshape the fabric of the economy and the welfare of consumers. Year two of the Biden administration will provide greater insights regarding the extent to which such a dramatic policy transformation will actually come to pass.

#### Antitrust will stall in courts---businesses are watching for a breakthrough that signals a sea change in law

John Ingrassia 22, Senior Counsel at Proskauer Rose LLP, JD from Hofstra University School of Law, BA from Pace University, “How to Navigate the Coming Antitrust Policy Tests”, JD Supra, 1/5/2022, https://www.jdsupra.com/legalnews/how-to-navigate-the-coming-antitrust-7543303/

2021 will be remembered in antitrust law. Not since the 1970s has there been so much chatter over the fundamental purposes of antitrust policy, or such potential for actual sea change.

Half a century ago, Robert Bork and the Chicago School argued that antitrust law had lost its way and should focus on consumer welfare. Bork's view was that antitrust enforcement was getting in the way of legitimate competition, and the U.S. Supreme Court was quick to embrace the consumer welfare standard.

Now, Federal Trade Commission Chair Lina Khan and the new Brandeisians argue that antitrust law has again lost its way and must shed the constraints of the consumer welfare standard.

Khan's view is that consolidation has gone unchecked in the American economy, resulting in structural harms to competition that the consumer welfare standard is unable to address.

She believes the agency has historically defined markets too narrowly to effectively police broader economic impacts of sustained consolidation, and favored gerrymandered remedies over outright challenges.

Khan has imposed sweeping changes aimed at chilling merger activity and shaping the future of merger enforcement. Against dissents from Republican Commissioners Christine Wilson and Noah Phillips, and charge of going rogue from the U.S. Chamber of Commerce, the FTC stripped away long-standing exemptions and interpretations that streamlined merger review.

The action came in response to an unprecedented merger wave — 3,845 acquisitions filed with the agencies in the first 11 months of 2021, substantially more than most full years.

The changes are having an impact, making investigations more intrusive, lengthy and less predictable. Still, policy precedes practice, and while the FTC has been heavy on policy, it has yet to test those policies in the courts.

The tests may come in the next year. Meanwhile, we can also expect the FTC and the U.S. Department of Justice under Assistant Attorney General Jonathan Kanter's leadership, to not only continue the trajectory of policy changes but also begin the task of entrenching them in agency practice.

Here, we review the year in FTC policy moves, what they mean and how to navigate the newly laid minefields.

Warning Letters After the Close of HSR Waiting Periods

In an unprecedented move, the FTC recently began issuing letters to parties in transactions

the agency may intend to investigate after expiration of the Hart-Scott-Rodino Act waiting period. According to the agency in an Aug. 3, 2021, blog, this is the result of "a tidal wave of merger filings that is straining the agency's capacity to rigorously investigate deals ahead of the statutory deadlines."

Wilson, however, said on Twitter on Aug. 12, 2021, that she was "gravely concerned that the carefully crafted HSR framework is suffering a death by a thousand cuts," following her Aug. 9 statement that said "For the HSR Act to retain meaning, it cannot be that the FTC will keep merger investigations open indefinitely, as a matter of routine, every time there is a surge in filings."

The FTC's jurisdiction to review transactions is independent of the HSR reporting requirements, with the power to investigate any transaction before or after closing, whether subject to reporting or not, and whether the HSR waiting period has expired or not.

There are examples of the agencies reviewing nonreportable transactions, and even investigating reportable transactions after expiration of the HSR waiting period, though they are rare.

The warning letters do not assert new authority not already existing under law, but notifying parties that an investigation may remain open post-HSR clearance implicates finality and certainty of investigations, but not every transaction gets a warning letter. Those with no issues go through unscathed. Those with clear issues are investigated.

The deals that might pose some issues, but not enough to draw an investigation, might trigger the newly minted warning letter. To show the letters have teeth, the FTC will sooner or later have to challenge a deal post-HSR waiting period, putting it to the test before courts, where it is likely to face hurdles to the extent the deal did not warrant a full investigation in the first instance.

Still, the practice is ushering a change in how provisions are drafted in deal documents. A buyer asserting that it is not required to close over the — arguably — still-pending investigation may face an uphill battle depending on how the closing conditions are drafted, for they typically point to the expiration of applicable waiting periods and not the absence of potential ongoing investigations or issuance of warning letters.

So careful buyers seek closing requirements that no investigations are threatened and that no warning letters have been issued. Recent examples include the 3D Systems Corp.'s agreement to acquire Oqton Inc. and Universal Corp.'s agreement to buy Shank's Extracts Inc.

The parties' agreements provided that if a warning letter is issued, the investigation would be treated as closed 30 days after receipt of such letter. Buyers may want to consider similar provisions until more emerges on how the FTC will proceed with warning letter transactions.

More Intensive Merger Investigations

The FTC announced plans on Aug. 3, 2021, to make the second request process both "more streamlined and more rigorous." The changes include the following:

Merger investigations will address additional potentially impacted competition, such as labor markets, cross-market effects, and the impact on incentives of investment firms.

Modifications to second requests will be more limited.

The agency will require parties to provide more information relating to their use of e- discovery in responding to the investigation.

Additional information will be required with respect to privilege claims.

The FTC said these changes are in recognition that "an unduly narrow approach to merger review may have created blind spots and enabled unlawful consolidation."

Possibly in response to such steeped up investigative techniques and resistance to find common ground with merger parties, Sportsman's Warehouse Holdings Inc. and Great Outdoors Group LLC abandoned their proposed merger at the end of 2021, citing indications that the FTC would be unlikely to approve the outdoor sporting goods transaction.

The changes, though, do little to streamline the second request process. They make it more complex, burdensome and time-consuming.

Perhaps most notable is the use of the process to delve into labor markets. Republicans Wilson and Phillips argued that FTC leadership may have themselves to blame for the merger review crunch, saying in a Nov. 8, 2021 statement:

If the agency is lowering thresholds of concern and broadening theories of harm, this certainly would explain why the FTC is unable to conduct merger reviews in a timely manner while our sister agency remains capable of addressing the same increased filing volumes within statutory timeframes.

More Onerous Consent Decree Provisions

Where merger parties settle a challenge rather than litigate, the consent decree process sets out the parties' obligations. Historically, such consent decrees, among other things, required parties to notify the agency prior to certain future acquisitions.

The FTC rescinded this long-standing policy, noting that it:

Returns now to its prior practice of routinely requiring merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged.

The agency will also require divestiture buyers to agree to prior approval for any future sale of the assets they acquire. Khan explained the move was to avoid "drain[ing] the already strapped resources of the Commission" on "repeat offenders."

The FTC included the new provision in its Oct. 25, 2021, consent decree settling a proposed transaction by DaVita Inc., a dialysis service provider. DaVita is now required to receive prior approval from the FTC of 10 years before any new acquisitions, a dialysis clinic business in Utah being in question.

This is a significant change and will chill not only settlements with the FTC, but also M&A transactions at the outset where such provisions are commercially untenable. Wilson and Phillips noted in dissent that "a prior approval requirement imposes significant obligations on merging parties and innocent divestiture buyers."

The FTC clearly aims to chill M&A activity, and merger agreements that provide more optionality to abandon deals will become more common, though parties intent on pushing their deal through may see a consent decree with 10-year approval provisions as less palatable than litigating, and force the FTC to cave or go to court.

Withdrawal of the Vertical Merger Guidelines

In another party-line vote, the FTC withdrew the vertical merger guidelines, which were issued just last year. Democratic commissioners criticized the guidelines as based on "unsound economic theories that are unsupported by the law or market realities," and reflecting a "flawed discussion of the purported procompetitive benefits (i.e., efficiencies) of vertical mergers."

Vertical transactions are between firms at different levels in the supply chain. Historically, antitrust enforcement of exceptional vertical mergers were rare and difficult given the previously presumed efficiencies. Vertical mergers can eliminate double marginalization, in which firms at each level mark up prices above marginal cost. Elimination of one markup results in lower prices and can be pro-competitive.

Khan, however, argues the guidelines' "reliance on [elimination of double marginalization] is theoretically and factually misplaced." Going forward, "the FTC will analyze mergers in accordance with its statutory mandate, which does not presume efficiencies for any category of mergers."

This too drew a strong rebuke from the Republican commissioners, who said "The FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them."

The commission's challenges to chipmaker Nvidia Corp.'s $40 billion acquisition of U.K. chip design provider Arm Ltd. alleged the transaction would combine one of the largest chip producers with a firm that has essential design technology — critical inputs.

In a Dec. 2, 2021, statement, the FTC said the acquisition "would distort Arm's incentives in chip markets and allow the combined firm to unfairly undermine Nvidia's rivals."

The FTC's lawsuit should "send a strong signal that we will act aggressively to protect our critical infrastructure markets from illegal vertical mergers that have far-reaching and damaging effects on future innovations," FTC Bureau of Competition Director Holly Vedova said in the statement.

Given that vertical mergers will be closely scrutinized as a matter of course, parties need to consider concerns the FTC may identify and prepare strong counters — other than elimination of double marginalization.

For example, parties could argue that the transaction expands access to products and expands consumer choice. Parties willing to go the distance with a vertical merger should also remain mindful that the guidelines have never been cited or relied on by a court, and it is the established jurisprudence on vertical transactions that will carry the day.

Rescinding the Consumer Welfare Standard

In July 2021, the FTC rescinded its policy interpreting its statutory mandate to root out "unfair methods of competition" as coterminous with promoting consumer welfare under the Sherman and Clayton Acts.

In a July 19, 2021, statement, the FTC called the rescinded policy was "bind[ing] the FTC to liability standards created by generalist judges in private treble-damages actions under the Sherman Act."

Still, the consumer welfare standard has been entrenched in antitrust jurisprudence for decades, and the FTC cannot change that. The immediate impact is thus more likely to be seen in administrative actions in the FTC's own court.

In a dissenting statement, Republican commissioners countered that FTC leadership does not propose a replacement standard and "that efforts to distance Section 5 from the consumer welfare standard are a recipe for bad policy and adverse court decisions," adding that, "unlike those in academia, the FTC will have to defend its interpretation of Section 5 in court, where it should expect a hostile reception if it cannot offer clear limiting principles."

Labor Market Scrutiny

Government investigations and private litigation relating to no-poach and wage-fixing agreements are ballooning, and criminal indictments are now a reality.

Encouraged by President Joe Biden's executive order on competition, the FTC and the DOJ have doubled down on investigating labor markets. Merger investigations now routinely include requests for employee compensation data, inquiries regarding noncompete and nonsolicit agreements, and are more likely to delve into both the merger's effects on labor, and the parties' prior labor practices.

The DOJ's challenge to Penguin Random House LLC's proposed acquisition of Simon & Schuster Inc. focuses on harm to the labor market — for authors.

In his first public comments, the DOJ's Kanter said:

We will fight for American workers including in connection with illegal mergers that substantially lessen competition for laborers. Going forward, you can expect efforts like these not only to continue but to increase.

Khan echoed the sentiment, saying:

Competition and conduct can hurt us not just as consumers who buy products from a shrinking number of large firms, but also as workers who are especially vulnerable and subject to the whims of a boss we can't equally or practically escape.

Antitrust compliance policies now must extend to addressing practices with respect to employee recruiting and compensation. Antitrust compliance training must extend beyond the sales team, and include HR. Businesses are reviewing and revising their compliance policies, and beginning new antitrust training programs to ensure that they are not subjected to claims of depressed wages and barriers to worker mobility.

Looking Ahead to the Year to Come

The year 2021 has been like no other for antitrust enforcement. While the FTC's various policy pronouncements are clearly intended to chill merger activity, it does not appear to have had the intended outcome.

HSR filings continue at off-the-charts levels. Amid this strong showing of M&A activity, the advice is to keep moving transactions forward, stay ahead of the new tacks the agencies might take, and account for newly injected risk and uncertainty.

Looking ahead, expect another energetic year. So far, the FTC's policy changes have not seemed to slow the pace of merger activity, but the frenzy cannot last forever. Nonetheless, merging parties are now going into the merger review process with eyes open, knowing it is likely to be more intense and uncertain. Parties to vertical transactions will no longer ride easy on double marginalization theories, and parties will be handing over their HR and payroll files.

At the same time, the heavy resistance to these changes will continue, if not strengthen, and will play out not just in courts and the halls of Congress, but will also spill into the political mainstream.

### Econ---Internals---Biz Con---2NC

#### Studies prove biz con’s key AND depends on perceptions of political stability

Gabriel Caldas Montes 21, PhD Candidate in the Department of Economics at Fluminense Federal University and Fabiana da Silva Dr. Leite Nogueira, PhD in Economics from Universidade Federal Fluminense, Professor of Economics at the Universidade de Vassouras, “Effects of Economic Policy Uncertainty and Political Uncertainty on Business Confidence and Investment”, Journal of Economic Studies, April 2021, Emerald Insights

1. Introduction

The literature on business confidence is vast. If on the one hand some studies indicate that business confidence acts as a leading indicator of macroeconomic activity and influences the economic environment, on the other hand, some studies investigate the determinants of business confidence (Khan and Upadhayaya, 2020).

Although many advances have been made, the literature on the determinants of business confidence continues to evolve. Some studies analyze not only the effects of macroeconomic variables, but also the effects of other variables able to create (or reduce) uncertainties, such as corruption (Montes and Almeida, 2017) and monetary policy credibility (Montes, 2013; de Mendonça and Almeida, 2019). These studies reveal that low credibility and high levels of corruption reduce confidence due to the uncertainties that emerge.

Uncertain economic scenarios created by economic policy uncertainty undermine confidence, and affect the decision making of entrepreneurs, who, for example, postpone investment and employment decisions in order to gain more information (Bloom et al., 2018). Regarding the definition of economic policy uncertainty, Al-Thaqeb and Algharabali (2019) points out that “*Policy uncertainty is the economic risk associated with undefined future government policies and regulatory frameworks*” (Al-Thaqeb and Algharabali, 2019, p. 2). Baker et al. (2016) and Al-Thaqeb and Algharabali (2019) suggest that economic policy uncertainty delay economic recoveries during periods of recession as businesses and households postpone their decisions about investment and consumption expenditures due to market uncertainty. Nevertheless, regarding the effects of economic policy uncertainty on research and development (R&D) expenditures and innovation outputs, Tajaddini and Gholipour (2020) find positive relationships for a set of 19 developed and developing countries, thus, contradicting those that claim a negative association between economic policy uncertainty and R&D expenditure.

Since the work of Bloom (2009), and due to existing controversies in the literature, studies investigate the effects of uncertainty shocks on different economic variables (e.g., Baker et al., 2016; Bachmann et al., 2013; Colombo, 2013; Nodari, 2014; Donadelli, 2015; Gulen and Ion, 2015; Moore, 2017; Istiak and Serletis, 2018; Bahmani-Oskooee and Nayeri, 2018; Bahmani- Oskooee et al., 2018; Mumtaz and Surico, 2018; Gholipour, 2019; Greenland et al., 2019; Istiak and Alam, 2019, 2020; Tajaddini and Gholipour, 2020). In general, the findings suggest that macroeconomic variables such as GDP, investment and employment are adversely affected by increased economic policy uncertainty.

The political environment is also a source of uncertainty that affects the economy. Studies provide evidence that the instability of the political environment has negative effects on the economic environment (e.g., Barro, 1991; Alesina and Perotti, 1996; Svensson, 1998; Carmignani, 2003; Aisen and Veiga, 2006, 2013; Durnev, 2010; Zouhaier and Kefi, 2012; Julio and Yook, 2012; Uddin et al., 2017; Azzimonti, 2018; Jens, 2017). These studies show that political instability has negative effects on inflation, GDP and unemployment.

Political uncertainty reflects instabilities on the political scene (i.e., involving politicians). The instabilities arising from the political scenario are associated to uncertainties regarding possible changes in the “rules of the game” and in the functioning of institutions. Hence, the uncertainty related to the political system is a key feature affecting the business environment, which entrepreneurs must consider when deciding, for instance, to start or expand their businesses. The effects of political uncertainty are stronger when firms and politicians have close connections and political favors might be at play.

One can suggest economic policy uncertainty reduces entrepreneurs’ optimism about the future of the economy and their business. Similarly, an uncertain political environment can deteriorate business confidence, producing negative effects on the economic environment. Hence, some important questions arise. Does political uncertainty affect business confidence? Is business confidence affected by economic policy uncertainty? Are political uncertainty and economic policy uncertainty transmitted to investment decisions through business confidence? These questions are particularly important for developing countries since these countries often present higher levels of political uncertainty and economic policy uncertainty.

### 2NC---Cyber Turn

#### Splitting platforms makes digital vulnerability worse --- gatekeepers are key.

Tyler Cowen 19, professor of economics at George Mason University, “Breaking Up Facebook Would Be a Big Mistake”, Slate Magazine, 6-13-19, https://slate.com/technology/2019/06/facebook-big-tech-antitrust-breakup-mistake.html

Imagine, for instance, that instead of the current Facebook we had seven smaller companies all performing comparable social networking services, perhaps with some form of interconnectability or data portability. The negative sides of social media, which are indeed real, probably would be worse and harder to control.

It is unlikely that such a setting would result in greater consumer privacy and protection. Instead, we would have more weakly capitalized entities, with less talent on staff and weaker A.I. technologies to take down objectionable material. Probably some of those companies would be more tolerant of irresponsible user behavior as a competitive lure. Fake accounts would proliferate, and social networking sites such as 4chan—often a cesspool of racism and rhetoric that goes beyond the merely offensive—would comprise a larger and more central part of the market.

As for privacy, these smaller Facebook replacements would be more susceptible to hacks, foreign surveillance and infiltration, and external manipulation—the real dangers to our privacy and well-being

### 2NC---Monocultures Good

#### Hackers will target shared vulnerabilities between platforms which zeroes any beneficial effect of diversification and the cloud compounds this.

Roger A. Grimes 9, holds more than 40 computer certifications and has authored ten books on computer security. He has been fighting malware and malicious hackers since 1987, beginning with disassembling early DOS viruses. He specializes in protecting host computers from hackers and malware, and consults to companies from the Fortune 100 to small businesses. A frequent industry speaker and educator, Roger currently works for KnowBe4 as the Data-Driven Defense Evangelist and is the author of Cryptography Apocalypse. Don't fall for the monoculture myth, CSO Online, 4-24-2009, https://www.csoonline.com/article/2632142/don-t-fall-for-the-monoculture-myth.html

Note: Outside of the current security discussion, I highly recommend trying alternative products to see what feature sets and benefits they offer, and to be able to accurately point out the strengths and weaknesses when comparing against the products your company is using. Sometimes you can find a gem where you least expect it.

I believe the monoculture argument is losing more steam every day. The second rebuttal point is that the most popular applications are cross-platform already and exploits that work against one version usually work against the others -- not always, but more often than not. For example, a Safari browser exploit can be a problem no matter which OS you use. The same rule generally applies to Adobe Acrobat, iTunes, and Flash exploits. Not all work on all platforms, but they will attack most platforms with varying degrees of success.

Third, the file formats are becoming the new popular attack vector. If everyone up and moved to different applications, it probably wouldn't change a thing. Let's say the world ended up using 100 different word processors evenly distributed in use. People still need to communicate, and whatever document or protocol format becomes the de facto data exchange standard would become the de facto attack point. For example, most of the exploits against SQL databases don't pinpoint a particular platform or version of SQL, but rely upon SQL injection attacks. What make of SQL database you are using is far less important than the security of the code it is running.

Fourth, as computing moves into the cloud and as apps, documents, and protocols become more browser based, the differences between the various vendor products will lessen, and again, hackers will focus their attacks on the common links. Will the future attacks be against OSes, applications, data formats, and protocols, or will they leverage the inherent vulnerabilities in the cloud fabric itself?

#### Sophisticated malware that targets multicultures already exists and further development is feasible --- forcing hackers to develop and use it prevents detection and creates much worse vulnerabilities.

Roger A. Grimes 9, holds more than 40 computer certifications and has authored ten books on computer security. He has been fighting malware and malicious hackers since 1987, beginning with disassembling early DOS viruses. He specializes in protecting host computers from hackers and malware, and consults to companies from the Fortune 100 to small businesses. A frequent industry speaker and educator, Roger currently works for KnowBe4 as the Data-Driven Defense Evangelist and is the author of Cryptography Apocalypse. Don't fall for the monoculture myth, CSO Online, 4-24-2009, https://www.csoonline.com/article/2632142/don-t-fall-for-the-monoculture-myth.html

I'm sure many readers are still discounting all my previous arguments. Suppose the world does move toward a more diverse computing environment. Is it really that hard for an attacker to attack 20 apps or OSes than one? Yes, of course, but maybe it's not the high hurdle most people think it is.

My fifth rebuttal point is that today's attackers are professional criminals. Make a point defense and they will get around it. Coding for 20 OSes or applications doesn't take that much more effort in real life than coding for one exploit. Look at all of the malware programs today that already use multiple attack vectors. Ten years ago, most malware programs attacked one exploit. Today, it's common for a single malware program to make use of 5, 10, or even 20 or more attack vectors. Conficker, anyone?

If we all ended up with 20 different apps and 20 different OSes, the attackers would simply begin exploiting more of them at once. All of the most popular apps and OSes are exploited pretty regularly. Attackers would learn to separate their entry exploit vectors and post-exploitation code into two separate but coordinated routines. The Metasploit project has been making this easy for more than half a decade. Are we to assume that rich, professional malware attackers will just give up and go home?

The idea of multiple attack vectors married with multiple post-exploit mechanisms in a malware program isn't even a new idea. Plenty of worms are already doing this, but it isn't mainstream because the attackers don't need the additional code and sophistication -- yet. If they use it sooner than they need it, it results in wasted computing cycles, slower malicious code, and easier detection. They'll also broadcast their new offensive techniques to the enemy (i.e., the anti-malware industry and the global community of good).

### 2NC---AT: Gatekeeping/Self-Preferencing

#### Platform monopolies don’t hurt competitiveness and alternatives are abused more.

Tyler Cowen 19, professor of economics at George Mason University, “Breaking Up Facebook Would Be a Big Mistake”, Slate Magazine, 6-13-19, https://slate.com/technology/2019/06/facebook-big-tech-antitrust-breakup-mistake.html

It is commonly alleged that Facebook has a monopoly on social networking, yet unlike traditional villainous monopolists, Facebook has not raised prices—the service is free—or restricted output. And people do not use Facebook because the company has emptied their lives of alternatives. We can still connect with one another by text, email, telephone calls (yes, they still work), Pinterest, Twitter, LinkedIn, writing a blog and creating an online community (my own favorite), Twitch, Fortnite and other online games and platforms, Snapchat, messaging services (including for instance Apple’s iMessage, and also Facebook’s own WhatsApp, maximized for privacy), and last but not least, knocking on your neighbor’s door.

On the other hand, this is an age of suspicion of power, and the big tech companies are indeed large, highly profitable, and world-spanning. They have overturned how we communicate, and there is a resulting sense, not always backed by hard analysis, that the status quo simply cannot be left alone. But American antitrust law doesn’t penalize bigness or social influence per se. There may well be features of the major tech companies you don’t like, such as their privacy implications or how they have shifted the balance of power in politics, but that is not a sound legal basis for dismantling them. If you wish to address consumer privacy issues on online platforms or foreign interference in elections, push for legislation that does so, but don’t prescribe a remedy for one illness to one that is completely unrelated.

Advocates of splitting up the big tech companies have a utopian vision of what will replace them. Whether you like it or not, we now live in a world where every possible idea (and video) will be put out there in some fashion or another. Don’t confuse your discomfort with reality with your assessment of big tech companies as individual agents. We’re probably better off having major, well-capitalized companies as guardians and gatekeepers of online channels, however imperfect their records, as the relevant alternatives would probably be less able to fend off abuse of their platforms and thus we would all fare worse.

Imagine, for instance, that instead of the current Facebook we had seven smaller companies all performing comparable social networking services, perhaps with some form of interconnectability or data portability. The negative sides of social media, which are indeed real, probably would be worse and harder to control.

It is unlikely that such a setting would result in greater consumer privacy and protection. Instead, we would have more weakly capitalized entities, with less talent on staff and weaker A.I. technologies to take down objectionable material. Probably some of those companies would be more tolerant of irresponsible user behavior as a competitive lure. Fake accounts would proliferate, and social networking sites such as 4chan—often a cesspool of racism and rhetoric that goes beyond the merely offensive—would comprise a larger and more central part of the market.

As for privacy, these smaller Facebook replacements would be more susceptible to hacks, foreign surveillance and infiltration, and external manipulation—the real dangers to our privacy and well-being.

A more modest plan to split up Facebook might just hive off WhatsApp and Instagram, the company’s two most successful acquisitions, leaving “Facebook the page/service” more or less intact. But that won’t work, either. For one thing, it wouldn’t address most of the actual current criticisms of Facebook, which typically revolve around the Facebook page. If we had maintained an independent Instagram, current social media dilemmas wouldn’t be any less acute. Facebook has actually upgraded those services and kept them uncluttered, with the revenue-earning burden placed mainly on the Facebook page itself.

An independent WhatsApp, once placed under the pressure to bring in more revenue and make profits as a solo enterprise, would acquire more of the features Facebook critics find objectionable. Put another way: Facebook resists the temptation to make WhatsApp more like its own ad-driven core product because the company realizes that if it did, it would drive many users away and onto other “pure” texting services. And that curb on Zuckerberg and Co.’s power to monetize WhatsApp is another indication that Facebook’s supposed monopoly power isn’t all that monopolistic.

### 2NC---AT: Small Business Key

#### Platforms Good for small business – centralized networks make advertising and delivery easier and alternatives are too expensive.

Tyler Cowen 19, professor of economics at George Mason University, “Breaking Up Facebook Would Be a Big Mistake”, Slate Magazine, 6-13-19, https://slate.com/technology/2019/06/facebook-big-tech-antitrust-breakup-mistake.html

Finally, the next time you are tempted to levy a charge of monopoly against Google or Facebook, keep in mind that both companies are significant anti-monopoly engines in their own right. They allow small and midsize businesses to engage in targeted advertising, and therefore to offer niche products that compete against the goods and services of larger companies. Before Facebook and Google, smaller companies had much more limited advertising prospects as they often found it too expensive to advertise on television or radio.

So instead of being price-gouging advertising providers, Google and Facebook allow far smaller companies to spread their message in smart, economical ways, allowing them to compete with larger firms. This is a common trend in the world of accessible, networked tech platforms, of behemoths empowering smaller companies. Think of how much easier Amazon’s Marketplace makes it for small businesses to sell to distant customers, and how much Amazon’s cloud computing services make it easier for individual entrepreneurs to start these small businesses without having to hire in-house tech support.

## Platforms ADV

### Iran---Fintech Not Key---2NC

#### Fintech isn’t key --- their ev admits sanctions evasion is a structural problem with crypto and Treasury crackdowns solve.

**Erdbrink 19** --- Dutch journalist who is the Northern Europe bureau chief for The New York Times

Thomas, 1-29-2019, "How Bitcoin Could Help Iran Undermine U.S. Sanctions,” New York Times, https://www.nytimes.com/2019/01/29/world/middleeast/bitcoin-iran-sanctions.html

Iran’s economy has been hobbled by banking sanctions that effectively stop foreign companies from doing business in the country. But transactions in Bitcoin, difficult to trace, could allow Iranians to make international payments while bypassing the American restrictions on banks.

In the past, the threat of United States sanctions has been enough to squelch most business with Iran, but the anonymous payments made in Bitcoin could change that. While Washington could still monitor and intimidate major companies, countless small and midsize companies could exploit Bitcoin and other cryptocurrencies to conduct business under American radar.

The United States Treasury, well aware of the threat, is attempting to bring Bitcoin and the others into line. In recent weeks, in response to an internet fraud case originating from Iran, the Treasury imposed sanctions on two Iranians and the Bitcoin addresses, or ‘‘wallets,’’ they had used for trading in the currency.

The Treasury also has warned digital marketplaces that buy and sell Bitcoin and companies that sell computers used to process Bitcoin transactions that they should not provide services to Iranians. Several well-known trading sites are now blocking buyers and sellers from Iran. Some have confiscated money belonging to clients based in Iran.

“Treasury will aggressively pursue Iran and other rogue regimes attempting to exploit digital currencies,” the department said in a statement.

But by their nature, cryptocurrencies are uncontrolled by any person or entity. At best, efforts to regulate or monitor trade in them are episodic, whack-a-mole affairs. With Bitcoin and other cryptocurrencies, there is simply no way to duplicate the banking sanctions that have proved so damaging to the Iranian economy.

Bitcoin transactions are recorded on a digital ledger or database known as the blockchain, maintained communally by many independent computers. The system is designed explicitly to avoid central banks and large financial institutions. Like emails delivered without going through a central postal service, the computer network maintaining Bitcoin records enables the movement of money without going through any central authority.

The Iranian government has been slow to recognize the potential sanctions-evading possibilities of Bitcoin. But it is now considering the establishment of exchanges to facilitate trading, one official, Abdolhassan Firouzabadi, said recently. Despite the failure of Venezuela’s state-backed cryptocurrency, the Petro, Iran’s central bank said recently that it was seriously considering creation of something similar, possibly called the Crypto-Rial, named after the national currency, the rial.

Still, Iran’s venture into Bitcoin pales in comparison to what has been happening the former Soviet republic of Georgia, where thousands of people have jumped into the cryptocurrency business.

At the computerized processing operation in the Iranian desert, no one seemed particularly concerned with the geopolitical implications of Bitcoin.

The operation consisted of 2,800 computers from China, fitted into eight containers, which when linked are called a farm. It makes intense mathematical calculations, known as mining, needed to confirm Bitcoin transactions. Miners collect fees in Bitcoin for their services.

Ignoring the rain, the European visitor used the calculator on his mobile phone to determine how much money could be made from this particular farm, multiplying computer power and deducting electricity and operational costs.

He estimated about five Bitcoins a month, which at roughly $4,000 per Bitcoin at current price levels, would be about $20,000.

“Not too bad,” he said.

The currency fluctuates like any other, though it has proved particularly volatile, sinking to slightly less than $4,000 a unit from nearly $20,000 about a year ago.

“We’ll have two engineers on site to keep everything running, that’s it,” said Behzad, the chief executive of IranAsic, the company running the site. He, like the European investor, did not want to provide his family name, out of fear of penalties from the United States.

The Chinese computers, called Antminer V9s, were regarded as outdated by the European visitor. Still, he said, “I guess this is the last place on earth where they are still profitable.”

That helps explain why Iran seems to be taking its first baby steps toward becoming a global center for mining Bitcoins. Because of generous government subsidies, electricity — the energy for the computers needed to process cryptocurrency transactions — costs little in Iran. It goes for about six-tenths of a cent per kilowatt-hour, compared with an average of 12 cents in the United States and 35 cents in Germany.

In recent months, dozens of foreign investors from Europe, Russia and Asia have considered moving their mining operations to Iran and other low-cost countries like Georgia. “We have to be flexible in this industry and go where prices are the lowest in order to survive,” said the European investor.

### Fintech High---2NC

#### Large firms and big banks are driving FinTech innovation now that sustains economic coercion---paragraph after their card

Peter E. Harrell 19, Adjunct Senior Fellow at the Center for a New American Security, advises companies on sanctions compliance matters, previously Deputy Assistant Secretary for Counter Threat Finance and Sanctions at the U.S. State Department; and Elizabeth Rosenberg, Senior Fellow and Director of the Energy, Economics, and Security Program at the Center for a New American Security, previously Senior Advisor at the U.S. Department of the Treasury on illicit finance issues, 2019, “Economic Dominance, Financial Technology, and the Future of U.S. Economic Coercion,” <http://files.cnas.org.s3.amazonaws.com/documents/CNAS-Report-Economic_Dominance-final.pdf>

Developments in financial technology also have the potential to affect the availability and strength of coercive economic measures over the longer term. The movement to develop blockchain-based, decentralized payments platforms and new digital currencies or tokenized assets that feature anonymity can undermine the strength of coercive economic measures. However, financial technology developments, such as the development of artificial intelligence/machine learning (AI/ML) compliance technologies, also present potential means to better detect and stop evaders and avoiders of U.S. economic coercion throughout global chains of financial interconnectivity.

Financial technologies are not themselves the drivers of potential future changes to the sources of coercive economic leverage. However, they may enable foreign governments to develop better tools to insulate transactions from U.S. jurisdiction. And, regardless of the actions of foreign governments as they spread commercially, they may help evaders duck U.S. coercive economic power in limited but meaningful ways. Conversely, new AI/ML or other technologies may help U.S. policymakers implementing economic coercion to better do their job.

Financial technology can be a facilitator of rapid transformation in the financial services sector. Importantly, financial technology developments will not happen just in the United States; a number of other countries, from China to Singapore to Switzerland, are promoting themselves as financial technology leaders. There is no guarantee that financial technology innovators and investors will be centered in the United States in the future—which represents a vulnerability to U.S. economic prominence.

Maintaining U.S. Leverage

The extent to which the United States will maintain coercive economic leverage in a world where financial technology disrupts aspects of the traditional financial architecture will depend to a significant degree on the extent to which U.S. firms, and large global firms, continue to play a dominant role in the development of the technology. To put it bluntly, a blockchain-based clearing mechanism that enables trade between foreign countries without financial transactions touching the dollar would likely undermine U.S. leverage if the technology were developed and operated by a foreign company that had no need to adhere to U.S. law. The United States would maintain at least some leverage if the technology were developed or operated by a U.S. company obliged to adhere to U.S. sanctions, technology-export restrictions, and other relevant laws, or a foreign company with significant U.S. exposure.

**\*\*\*GEORGETOWN ENDS\*\*\***

There are some signs that large U.S. and global firms will play a larger role in financial technology developments over the next several years as such technology moves even more mainstream. This is good news for U.S. economic prominence and the strength of U.S. coercive economic measures. The biggest conventional banks, exchanges, and investment houses, as well as central banks, have all begun making major commitments to this new class of technology. The Depository Trust & Clearing Corporation, a U.S. company that operates one of the main entities for clearing and settlement of securities transactions, is testing a new platform for credit derivatives based on distributed ledger technology.94 Large financial institutions are also getting involved with digital currencies. Goldman Sachs decided in May 2018 to open a trading desk for Bitcoin and has already been clearing Bitcoin futures on the Chicago Mercantile Exchange for clients.95 But other trends may bode less well for the future of U.S. coercive economic leverage. Central banks in Sweden, Canada, and China are all studying the possibility of issuing central-bank-backed digital currency, and Uruguay’s central bank started a pilot program for digital currency. The People’s Bank of China is particularly interested in developing its digital currency with “controllable anonymity.”96

The approach that U.S. regulators take toward fostering financial technology developments will be an important determinative to the issue of U.S. dominance of financial technology. In interviews, many financial technology company executives and investors cited a lack of clarity and understanding from U.S. regulators as a substantial barrier to innovation and adoption of financial technology. A particular sticking point in interviews was the unwillingness of the Securities and Exchange Commission (SEC) to provide greater clarity and more rapid decisions on whether it considers new digital currencies to be securities. However, U.S. regulators are trying to lay out new approaches to incentivize development of financial technology, with the Treasury Department releasing a report in July 2018 spelling out a variety of ways the United States could improve its regulatory environment for financial technology.97

Amex Good

### Innovation---UQ---2NC

#### Digital economy strong now---studies.

Baye ’20 [Michael Baye, James Cooper, Kenneth Elzinga, Deborah Garza, Thomas Hazlett, Benjamin Klein, Tad Lipsky, Scott Masten, Maureen Ohlhausen, James Rill, Vernon Smith, Robert Willig, Joshua Wright, and John Yun, with some professors omitted for convenience; May 20; Former Director of the FTC’s Bureau of Economics, Bert Elwert Professor of Business at Indiana University; Former Acting and Deputy Director of the FTC’s Office of Policy Planning; Economics Professor at the University of Virginia; Chair of the Antitrust Modernization Commission, Former Acting and Deputy Assistant Attorney General of the DOJ’s Antitrust Division; Former Chief Economist of the FCC, Economics Professor at Clemson University; Economics Professor at UCLA; Former Acting Director of the FTC’s Bureau of Competition, Former Deputy Assistant Attorney General of the DOJ’s Antitrust Division; Business Economics and Public Policy at the University of Michigan; Former Acting Chairman & Commissioner of the FTC; Former Assistant Attorney General of DOJ’s Antitrust Division; Nobel Laureate in Economics and Professor at Chapman University; Former Deputy Assistant Attorney General for Economics at the DOJ’s Antitrust Division, Economics and Public Affairs Professor at Princeton University; Former Commissioner of the FTC, Law Professor at George Mason University; Former Acting Deputy Assistant Director of the FTC’s Bureau of Economics, Law Professor at George Mason University; “Joint Submission Of Antitrust Economists, Legal Scholars, And Practitioners To The House Judiciary Committee On The State Of Antitrust Law And Implications For Protecting Competition In Digital Markets,” <https://laweconcenter.org/wp-content/uploads/2020/05/house_joint_antitrust_letter_20200514.pdf>]

I. The Digital Economy is Healthy, Competitive, and Benefits Consumers

We do not recount here the extensive literature calling into question claims that market power and concentration have been systematically increasing, resulting in serious consequences for consumers, workers, innovation, economic inequality, and more. 9 At best, we have an incomplete and imperfect understanding of recent market trends; there is undoubtedly more research to do. But the weight of the literature today—much of which is no more than a couple of years old and some of which is still in working paper form—does not support the conclusion that the economy has been trending inexorably toward increased market power and greater consumer harm, especially for the purpose of justifying dramatic legislative changes to the antitrust framework. It is certainly not the case that “any conclusion to the contrary reflects either an incomplete or incorrect understanding of economics and the economic literature from the last several decades.”10

The most recent studies suggest that the observed changes in national-level concentration are brought about by the expansion of more productive large firms into local markets leading to, in these economists’ own words, “more, rather than less, competitive markets.”11 Further, despite occasional claims to the contrary, the literature has not uncovered systematic competition problems in digital markets. The best interpretation of existing evidence is that the deployment of new technology by traditional industries has increased economies of scale and scope and enhanced local competition.12 None of the economic evidence supports claims about generally enhanced market power in markets inhabited by the companies that develop such technological tools.

Prominent economists across the political spectrum have offered similar analyses, all of which serve to call into question the certitude of the assertions underlying the calls for radical antitrust reform.13

The digital economy is rife with competition and innovation, and consumers are benefitting in meaningful and remarkable ways from dynamic rivalry among companies big and small. That does not mean the digital economy is, or should be, immune from antitrust scrutiny. But recent scholarship strongly suggests that competition in that sector of the economy has thrived under the existing antitrust laws, which can and should be applied when those laws are violated.

### Innovation---Link Turn---AT: Kill Zones

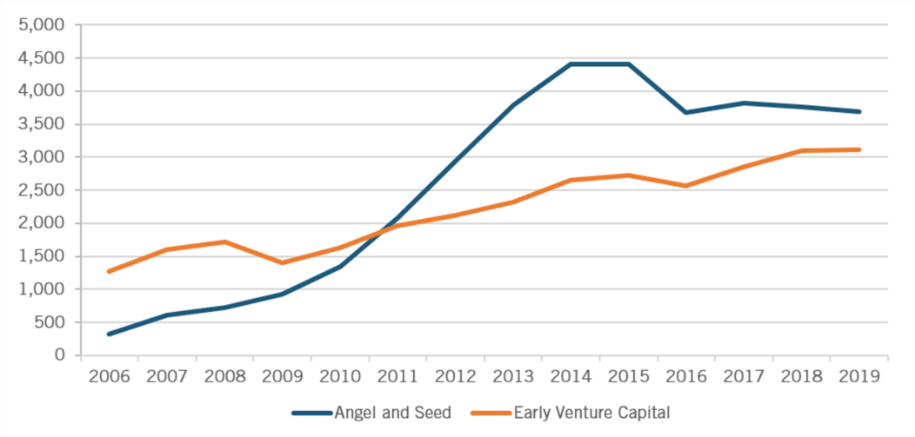
#### Kill zones are wrong---the possibility of a merger motivates innovation---increasing amounts of deals prove.

Robert D. Atkinson 21, President of the Information Technology & Innovation Foundation, founding member of the Polaris Council who advices the U.S. Government Accountability Office’s Science, Technology Assessment, and Analytics team, Ph.D. in City and Regional Planning from the University of North Carolina, Chapel Hill, “How Progressives Have Spun Dubious Theories and Faulty Research Into a Harmful New Antitrust Doctrine,” Information Technology & Innovation Foundation, 03-10-2021, https://itif.org/publications/2021/03/10/how-progressives-have-spun-dubious-theories-and-faulty-research-harmful-new

Large U.S. technology platforms invest almost as much in R&D as the entire U.K. economy does (business and government).29 But knowing that innovation is important, neo-Brandeisians have argued that big technology companies actually limit innovation, either by acquiring start-ups in order to terminate the development of innovations that threaten their continued dominance (“killer acquisitions”) or by creating areas of the market in which they exert dominance to the extent others won’t invest in them (“kill zones”). Either way, large tech companies supposedly limit prospective challengers from being able to take root and grow, thereby limiting not only competition but overall U.S. innovation.

In fact, acquisitions may be beneficial, at least to innovation, if they allow the larger firms to benefit from economies of scale or network effects, and enable the smaller firms to reach many more customers much more quickly with a higher quality product. Moreover, the prospect of being purchased by a larger company often motivates founders and venture capitalists to invest. Making it more difficult for them to sell therefore might make it harder for promising firms to find funding.

And rather than looking at so-called kill zones as an innovation deterrent, it is more accurate to view them as an innovation enabler that guides entrepreneurial resources (talent and capital) to areas that have the best chance of success. Why invest in companies seeking to duplicate mature products offered by large firms that benefit from economies of scale or network effects? It is better for society if new companies concentrate instead on other markets they can break into. Indeed, that seems to be occurring, as venture capital investment, especially in early-stage deals, has grown significantly over the last decade, indicating that there is no shortage of innovation opportunities.

Moreover, if they are creating kill zones, why did the number of angel and seed deals rise almost sixfold between 2006 and 2019, peaking in 2015? The number of early deals rose by 2.4 times. It is hard to see any sign of investor activity slowing down. (See figure 5.)  


### Competitiveness---Turn---2NC

#### The aff destroys competitiveness---it takes away innovation incentives for small and big firms alike.

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The campaign to “rein in Big Tech” in America continues to gain momentum. The recent Facebook whistleblower testimony in Congress on the platform’s alleged harm to children and democracy—though not an antitrust issue—was followed by the introduction of a Senate “antitrust reform” bill. That legislation would heavily regulate Big Tech business transactions by blocking companies like Amazon and Google from advertising their products on their own platforms, among other restrictions. Far from promoting competition, the net result would be an intrusive weakening of U.S. international competitiveness.

Notwithstanding other controversies about these platforms, many Big Tech critics argue that the large players in the field are limiting competition and stifling innovation, and those critics increasingly point to Europe and China as justification for a similar U.S. crackdown. But this assessment couldn’t be further from the truth. Both Beijing and Brussels are shooting themselves in the foot, and Washington could lose the U.S.-China tech competition if it does the same.

Big Tech’s opponents often claim that because of megafirms’ market power, smaller companies are reluctant to invest in challenging their dominance and that successful startups are often bought out by resourceful incumbents. But venture capital wouldn’t have supported many of the startups if there weren’t a chance of being acquired. As prominent tech industry analyst Ben Thompson points out, “investors have the freedom to be more speculative in their investments, and pay more attention to technological breakthroughs and less to monetization, because there is always the possibility of exiting [investments] via acquisition.” This positive effect of potential acquisitions was also acknowledged by a European Commission report in 2019.

What’s more, startup acquisitions by large platforms benefit consumers by speeding up the diffusion of new technologies. The potential of being acquired by such platforms also inspires small entrepreneurs who specialize in invention but not in large-scale production to establish startups dedicated to new technologies.

Big Tech platforms have plenty of incentives to innovate on their own, too. According to the 2020 EU industrial R&D investment scoreboard, six of the top ten investors in Research and Development (R&D) are U.S. companies, and the top four of those six are tech giants: Alphabet, Microsoft, Apple, and Facebook. They all have significantly ramped up their R&D investment from five years ago while making acquisitions.

China’s spectacular catch-up with the West on technology has much to do with its lenient antitrust enforcement, and Beijing knows that. For years, Chinese regulators’ approach to the tech sector has been known by the slogan “tolerance and caution”—on their part. In 2017, Chinese Premier Li Keqiang stressed that, in order to create favorable conditions for innovation, China’s regulatory regime needed to be accommodating and prudent as long as companies did not cross the Communist Party’s red lines. For over two decades, hundreds of Chinese companies, including Alibaba and Didi, were able to exploit a regulatory loophole to raise the needed capital in U.S. stock exchanges because of Beijing’s acquiescence.

Beijing started to talk up antitrust regulations only before the recent tech crackdown. In February, China’s antitrust regulator published a guideline on the platform economy that changed its accommodating approach to “targeted and scientific enforcement.” But the reversal was primarily motivated by Beijing’s national security strategy rather than any epiphany that reining in on Big Tech would spur innovation—it wouldn’t. Beijing’s recent moves showed a determination to pull its economy away from America, and clamping down on its tech giants that are so intertwined with Western interests is necessary for enforcing the new red line. But that approach may well slow the rate of Chinese platform innovation.

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Unlike China, the European Union has consistently employed a regulatory antitrust approach toward “dominant” high-tech firms. In recent years, this has repeatedly featured high antirust fines levied against leading American winners, including Google, Amazon, Facebook, and Qualcomm. This approach has not strengthened the hand of European platforms, as none of the twenty largest digital platforms have European origins. Despite clear harm to innovation, the EU antitrust enforcers appear to be doubling down with a “precautionary approach” that regulates novel business conduct by big digital platforms.

The lesson for U.S. policymakers is unequivocal: The American ingenuity that spawned the internet economy and created amazing new products and industries has not happened by accident. The internet economy and its latest manifestation, Big Tech platforms, have thrived in an environment of “permissionless innovation” that has avoided heavy-handed regulatory intervention. Abandoning this recipe for success in favor of statist Chinese or European controls over big companies would be a sure way to undermine American innovation and high tech-driven economic growth.

## Cap K

### Framework---2NC

#### Logic---ideological bias should make you suspect of both advantages and solvency---ignoring it dooms the aff.

Jacqueline Best 21, Professor in the School of Political Studies at the University of Ottawa, Ph.D. in Political Science from Johns Hopkins University, “Varieties of ignorance in neoliberal policy: or the possibilities and perils of wishful economic thinking,” Review of International Political Economy, 03-27-2021, https://doi.org/10.1080/09692290.2021.1888144

This article argues that political economy scholars need to bring the concept of ignorance into the core of our analyses, moving beyond existing analyses focused on uncertainty and expertise. The evidence here makes it clear that policy ignorance is not just caused by external forces such as crises, shocks and uncertainty, but is also endemic to economic thinking and policy practice. Ideational sources of ignorance produce blind spots in economic theories that end up being embedded in policies, while policymakers actively mobilize ignorance throughout the policy process to achieve their ends.

Scholars interested in the politics of expertise, myself included, have written extensively about its depoliticizing effects – about how useful it can be to treat a problem as a matter of expert judgement, and thus exclude it from meaningful political debate. What this research makes clear is that ignorance is also depoliticizing. If policymakers can ignore the potentially painful consequences of their policies, they can discount those costs and move ahead with a policy that might otherwise seem unwise or wrong. The wishful thinking built into many of the economic ideas championed by right-wing economists, politicians and policymakers in the early 1980s allowed them to make political minefields seem like safe bets. Very few politicians were going to support policies that would produce extremely high interest rates and force millions of people out of work. Rational expectations theory, supply side economics and monetarism all seemed to promise a way of minimizing these costs. When the internal forecasts suggested that these assumptions didn’t add up, a little fudging turned out to be a useful way of papering over the gaps and inconsistencies. Denial, finally, allowed those same policymakers to avoid responsibility for the unfortunate consequences of their wishful thinking.

Lest this all seem too Machiavellian, it’s important to remember that much of this ignorance got both Reagan and Thatcher governments into some serious political trouble – and could well have cost them their next elections, if they hadn’t got lucky in different ways. Moreover, policymakers did not always seek to conceal or deny their ignorance when they were confronted by it: some actors admitted and sought to make sense of what they did not know through a process of reflexive puzzling.

This article has set out to map some of the space between learning and lying in policy making. In the process, I have explored the various degrees of reflexivity that policymakers have about their own ignorance and the different extents to which they seek to conceal what they do or do not know as they respond to policy challenges. In choosing to fudge, policymakers are at least somewhat aware of the fact that there are gaps in their knowledge, while actively seeking to conceal that ignorance. In denying that there is anything wrong, in contrast, policymakers can either be unreflexive (if they are true believers in a given economic theory), or cynical and aware of the falseness of their denial.

In neither of these cases, however, do we see a willingness to take the moment of confusion produced by the shock as an opportunity to reflect on the more fundamental question of the possible ideational (and even epistemic) sources of ignorance. It is only policymakers willing to engage in reflexive puzzling who take the risk of admitting both external and ideational sources of ignorance, while trying to find a way to act in spite of those limits to their knowledge.

This discussion of hypothetical policymakers begs an important question that cannot be adequately answered in this article: why some policymakers seem more open to admitting the limits of their knowledge than others. While the two cases examined here are too few to generalize from, it is still suggestive that many politicians, economists and partisan bureaucratic appointments were the most likely to be wedded to wishful thinking and to be resistant to reassessing their blind spots. However, that was not universally true, as we can see in Stockman’s about-face from being a true believer to a far more skeptical policy actor, as well as in the various degrees of denial and pragmatism among the economists participating on the President’s Economic Policy Advisory Board. This is nonetheless an important question to explore in future research, not only for empirical reasons but also for normative ones – as fostering a culture of reflexivity about both what policymakers know and what they do not is clearly more important today than ever.

I began this article by referencing a number of recent examples of dangerous economic ignorance – as evidenced in recent botched responses to the COVID-19 pandemic, protracted austerity policies, Brexit claims, and efforts to downplay the likely costs of climate change. The strategies of wishful thinking, fudging evidence and outright denial that I have discussed here bear a great deal of resemblance to some of the post-truth politics that we are witnessing now. Rather than engaging in a kind of nostalgia for a time when experts were experts and politicians heeded their advice, if we are to tackle the dangers of this kind of post-truth politics, we need to understand their powerful and longstanding appeal. Of course, some of what we are seeing today can only be described as lying, plain and simple. Yet, the context for that mendacity is a broader culture of selective ignorance in economic theory and practice that has a long and important history.

#### Competition---safeguarding it replicates neoliberal logic---our first priority should be to deconstruct the 1AC’s narrative to expose its underpinnings.

Caroline Alphin 21, Professor of English at Radford University, Ph.D. in Social, Political, Ethical, and Cultural Thought from Virginia Tech, “Disciplinary Neoliberalism and the Simulation of Freedom,” Spectra, Vol. 8, No. 1, 2021, http://doi.org/10.21061/spectra.v8i1.161

These visual plays of appearing free make it seem like individuals are actually free from constraints, from the nodes of knowledge/power that shape ideologies, discipline, and simulations. But these visual plays of appearing free hide the reality of neoliberalism, which is that “[a]lthough the [neoliberal subject]6 deems itself free, in reality it is a slave. In so far as it willingly exploits itself without a master, it is an absolute slave.”7 Freedom under neoliberalism is no more than a play of appearances. An appearance of being free is the result of the day to day disciplining of the self as an individual. A turn to disciplinary power highlights the fact that under neoliberalism control, constraint, compulsion, prohibitions, limits, and governance, etc., do not necessarily need a state enforcer. Individuals are free to control, constrain, compel, prohibit, limit and govern themselves. Individuals want to control, constrain, compel, and govern the self. In many ways, the state is internalized by the docile subject of disciplinary power. As individuals turn inward and become their own exploiters, as they become a particular thinking subject that is always reflecting on and governing the self, they display their freedom. A particular kind of free individual comes into being because it is required by liberalism and neoliberalism. That is, liberalism is a reality building project that understands the state, institutions, discipline, and sovereignty as ordered around and for the individual: an individual that is rational, autonomous, free, and competitive. Neoliberalism is a reality building project that understands the state, institutions, and sovereignty as ordered around competition and that requires and produces an individual that is more than anything else free to compete. Disciplinary neoliberalism is “highly efficient” at “exploiting freedom. Everything that belongs to practices and expressive forms of liberty – emotion, play and communication comes to be exploited.”8 But this does not mean that the modus operandi of neoliberalism is exploiting people against their will. Rather, as I argued above, individuals willingly do the work of exploitation as they exploit themselves, and it is out of this self-exploitation that the play of appearing free, of simulating freedom, emerges. Thus, it is through a turn to the quotidian modes of self-exploitation that we can see how neoliberalism exceeds the state. If studies of neoliberalism want to consider what is beyond this hegemonic reality building project, then they must consider the work that individuals do to make neoliberalism possible. Policy change and reform will not tackle the problem of the docile subject.

The simulation of freedom brings me to the work that Debrix does with the visual in ReEnvisioning Peacekeeping. Neoliberalism is okay with contradiction. It is good at absorbing potentially radical forces and at the same time there are visual and virtual processes that continually produce a “dominant vision.”9 This critical engagement with post-modern critiques has opened several important avenues, including legitimizing critical theoretical engagements with visual processes as productive forces. Rather than working towards diagnosing or reflecting the present, works like Re-Envisioning Peacekeeping do more than describe the postmodern condition and lament the loss of a self rooted in instrumental rationality and/or an idealized modern past, which is what happens in the anti-postmodern anxieties of Žižek, Virilio, Jameson, and Lyotard. Instead, if we think of visual processes, including films, as a productive force of neoliberalism, liberalism, or any dominant system, that it furthers reality, or that visual processes are reality or do reality, then the historical, social, political, and economic contingencies of dominant discourses, hegemonic ideologies, and global governmentalities can become more apparent. In other words, rather than think about art as though it functions as a mirror image of the real, as a representation (the real here is often the postmodern condition of late-capitalism), the work this text contributes to looks at the co-productive relationship between narratives/discourses/ideologies, whether visual or written, and hegemonic reality projects. Works like Re-Envisioning Peacekeeping open the door for treating philosophical and political texts as though they are narrative fiction in order to make disciplinary and hierarchical distinctions more difficult to hold onto. In other words, it opens the door for antagonizing “the construction of virtual worlds.”10

To conclude, I will consider an example of the co-productive relationship between discourse, in this case visual discourse, and neoliberalism. I think it is in looking at this co-productive relationship that the disruptive possibilities of Debrix’s deployment of visual simulation and destabilization become apparent. A parallel can be drawn between destabilization and cognitive estrangement since both can be about the ways we think about the visual, including images and film. Similar to cognitive estrangement, Debrix’s deployment of simulation offers a way to destabilize the reality building processes of neoliberalism by bringing attention to one way it constructs its reality.11 Debrix thinks about peacekeeping in a way that moves against the grain, that is to say, that makes UN peacekeeping more than a futile endeavor or a failure to recognize the realities of a postrealist landscape. If we accept that power is not much more than a play of appearances, peacekeeping as a visual simulation becomes more than a futile endeavor. Peacekeeping becomes a reality; it, as a visual simulation, actively produces a reality where peacekeeping is real. Debrix’s Re-Envisioning Peacekeeping highlights the need for Critical IR studies to consider the narratives, discourses, or ideologies that shape the power forces at play in international relations. If we accept freedom as no more than a play of appearances, if we think about films and neoliberalism as visually co-productive forces behind a certain notion of freedom and behind a reality where freedom is necessary, then we can disrupt the virtual and visual processes that make neoliberalism possible. As an illustration, we can think about a film like Blade Runner. As a film, Blade Runner incites the individual to live without a community. The world of Blade Runner is organized around competition, and freedom is understood as the freedom to compete. In other words, Blade Runner tells us that freedom is to be free of constraint. It simulates a kind of freedom that is highly exploitable under neoliberalism; a freedom that is about self-governance. In the end, freedom without constraint is part of the way disciplinary neoliberalism becomes real and material.12

#### World-building---plan focus declares a war of enclosure on non-capitalist subject formation.

Ian G. R. Shaw & Marv Waterstone 21, Associate Professor of Global Security Challenges at the University of Leeds, Ph.D. in Geography from the University of Arizona; Professor Emeritus of Geography at the University of Arizona, Ph.D. from the University of Arizona, “A Planet of Surplus Life: Building Worlds Beyond Capitalism,” Antipode, Vol. 53, No. 6, November 2021, https://doi.org/10.1111/anti.12741

Capitalism is an immense machine for churning out surplus life. Its long war of enclosure has captured, controlled, and pauperised human life, and laid waste to nonhuman life. Many of us are actual paupers—but most of us are virtual paupers (Marx 1973), always becoming-surplus to capital. Capitalism, in turn, is unable to correct its violences. For Harvey (2018:208–209), “Surplus capital and an ever increasing mass of surplus and disposable labour sit side by side without there being any way to put them together to produce the use values so desperately needed … What can be madder than that?” We have argued that this madness must be imagined as a battle for geographic justice. Our contribution lodges the problematic of surplus life—together with a series of exit strategies—within the common flesh of the world. The political task we have set is to create, sustain, and connect alter-worlds, supplanting centuries of capitalist worldlessness and alienation. We have consistently made the case for world as an existential analytic for uniting the commons as a “resource” with the more-than-human relations that enliven and support it. Freedom, in turn, emerges from having a place in the world, thereby uniting territory and existential autonomy. As Gorz (1989:166) writes, “Freedom consists … in reconquering spaces of autonomy”. Our political imagination is radically truncated if we see the anaemic welfare state or waged life as the sole shelters from the coming storm.

The importance placed on alter-worlds shifts our attention from hierarchical agents of power into the sinews of the world itself—into lived sites and practices of being-with. This being-with extends to planetary life, thereby “abandoning a homocentric conception of planetary well-being and learning to live in common with the biotic and abiotic forces that create conditions felicitous to life” (Healy 2015:345). Yet the conjuncture many of us are at—surplus populations confronting a fissiparous, decaying, and violent capitalism—remains dangerous. As Frase (2016:102) warns, “A world where the ruling class no longer depends on the exploitation of working class labour is a world where … Its ultimate endpoint is literally the extermination of the poor”. There is nothing inevitable that an outcast humanity will organise against the machine responsible for its expulsion. This is where politics becomes the art of geographic justice. We must start dreaming, building, and connecting new worlds. “If no geographic locations exist for that tomorrow, we start gathering twigs, stones, strips of clothing, meat, bones, and clay. We begin constructing an island, or better yet, a rowboat, that we plant in the middle of tomorrow” (Subcomandante Galeano, in EZLN 2016:167). We must make the end of capitalism easier to imagine than the end of the world.

### Link---AT: Case Outweighs---2NC

#### the idea that markets are a NECESSITY is an inherently flawed logical -- competition law ontologizes markets, using legal authority to reinforce capitalism’s underlying logic---antitrust’s self-referential nature can never confront the failures posed by capitalism itself.

Z Umut Türem 16, Associate Professor in the Atatürk Institute for Modern Turkish History at Bogaziçi University, Ph.D. from the Institute for Law and Society at New York University, “‘The market’ unbound: neoliberalism, competition laws and post territoriality,” Journal of International Relations and Development, Vol. 19, 2016, https://doi.org/10.1057/jird.2016.5

How, conceptually speaking, does competition law produce the frame or grid upon which relationships are understood and organised? This question is intimately related to a further set of questions: What is the frame in which competition law will be applied? What is the jurisdictional boundary, the context in which one may determine that a company has violated laws regulating competition? This frame, according to competition law itself, is the ‘(relevant) market’ in terms of both geography and the product at hand. In other words, each time a competition authority reviews whether anticompetitive conduct has taken place, it must first determine what the relevant market is, both product-wise and geographically. This sounds simple perhaps, but I argue that it reveals the underlying logic of the system that we call neoliberalism. While the actually existing competition law is typically bound to operate within traditional regimes of law and nation-state territoriality, the ideal of competition law prioritises the market over territoriality.5

Substantively speaking, the initial question for passing judgment over competition violation or merger cases concerns substitutability and cross-elasticity of products. As Fox et al. (2004: 196) argue: ‘Reasonably interchangeable products […] should be included in a first cut market hypothesis, at least to determine the outer limits of a market. Cross elasticity at current price […] will [similarly be helpful in] reveal[ing] dynamics of market competition given defendant’s price’. The European Union Commission’s Market Definition Notice defines the relevant product market definition as follows:

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use. A relevant product market may in some cases be composed of a number of individual products and/or services which present largely identical physical or technical characteristics and are interchangeable. (Quoted in Nguyen 2012: 14)

For instance, imagine that corporation A in the food industry produces chocolate, candy bars, biscuits and cupcakes, and is known to be a strong contender in each category, though not a specialist in any of them. Imagine a second corporation B that produces similar items, but focuses on biscuits and candy bars, maintaining a high market share in these two product lines. Now consider a complaint by B that A is using its overall market strength and dominant position to push B out of the market. What is ‘the market’ in this situation, and how can one quantify a dominant position? The complainant, corporation B, would argue that the market encompasses all of these products (and perhaps more) and may be loosely called the sweet snack market. B would claim that A’s strength in this sweet snack market overall has given it the power to push B out. Corporation A may reduce the price of chocolate and cupcakes, which B suggests will cause an implicit consumer shift from biscuits and candy bars to chocolate and cupcakes. The shift would lead to a loss of profit for B.

Corporation A may respond that it is a mistake to classify all of these products as a single market. After all, cupcakes and chocolate are more luxurious items consumed only by high(er)-end consumers. Thus, A may claim that absent a drastic price decrease, it would be next to impossible to move consumers from candy bars and biscuits to the relatively more expensive chocolate and cupcakes. If A demonstrates that their price decrease was not drastic, then it can claim that the decision to bring down prices was unrelated to pushing B out of any market.

This certainly is an oversimplified example; many more complicated ones exist. However, even in this case, many questions arise: How does A justify the claim that chocolate and cupcakes are not substitutes for biscuits and candy bars? If B suggests that A’s desire to push B out of the market is targeted to specific towns or regions, and if B shows that consumers in those areas are relatively more affluent and thus have atypical consumer preferences, then can B argue that even a small decrease in the price of chocolate and cupcakes can lure consumers away from candy bars and biscuits?

The question of locale brings us to the second consideration for determining the relevant market: the geographical dimension. The concern is for the geographical boundaries within which a given market is embedded. The European Union Commission’s Notice defines the relevant geographical market as follows:

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because, in particular, conditions of competition are appreciably different in those areas. Factors relevant to the assessment of the relevant geographic market include the nature and characteristics of the products or services concerned, the existence of entry barriers or consumer preferences, appreciable differences of the undertakings’ market shares between neighboring areas or substantial price differences. (Quoted in Nguyen 2012: 35)

To elaborate, let me provide a specific example from a much-studied industry in the field of competition law and economics. Let us assume that a state-owned cement plant in the imaginary Republic of Cementia is to be privatised, and the state is conducting a tender for the sale of the plant. Two private companies, A and B, submit bids to buy the plant. A’s overall market share in the cement business in the territory of Cementia is lower than B’s. It makes a significantly higher bid than B, expecting to win the auction. The decision goes before the Competition Authority of Cementia, which opines that the absorption of the plant by A would violate competition law in that it would create a dominant position in the market. The Authority recommends instead that B’s lower offer be honoured. If A’s share of the cement business in Cementia is so much less than B’s, why block the sale of the plant to A, whose offer would have filled the public coffers?

The answer is that although A’s market share within the overall borders of Cementia is lower, in the given region where the cement plant is located, firm A already has an operating plant. If A were to own another plant in the same region, then it would easily dominate the market there. How is geography relevant in this context? Cement is costly to transport, so it is neither efficient nor profitable for firms to transport it distances upwards of 100 miles. If firm A owns two plants within a 100-mile radius and competitors have no more than one plant each, the firm could effectively manipulate cement prices by playing with the supply in that region. How many or few other plants A controls in the broader framework of national borders or other sub-national regions would not matter. Since no company could cost-effectively transport cement to the region from other, even neighbouring regions, firm A’s power and profits in this particular region would be unchecked. To prevent this, the competition authority would resolve to sell the plant to a different firm in order to generate competition in a market that is defined by geography and transportation possibilities.

Just as with the previous example of the candy market, the determination of the boundaries of the market evokes a broad set of questions, most notably how to demarcate the exact boundaries or borders of a given geographic market. Even in these hypothetical examples, it becomes clear that there is a need for tools and techniques to determine the relevant market. In other words, the need to define relevant markets requires the mobilisation of technical, expert tests.

Space limitations prevent me from going into much detail about these tests, but let me give two brief examples. The Elzinga Hogarty test is an economic test devised to measure the boundaries of a geographic market. The test looks at two factors: first, the ratio of entry of a product into a region compared to the overall sales of that product in that region, and second, the ratio of the exits of a product from a region compared to the overall production of that product in the region. If both values are high, then a region may be considered an autonomous market in that the price can be determined independently of other regions (Elzinga and Hogarty 1973, 1978). For product markets, there is the ‘Small but Significant Non-transitory Increase in Price’ (SSNIP) test, which is also called the hypothetical monopolists test. ‘The SSNIP test can be understood as a way to identify short term demand substitutability by positing a small but significant price rise’ (Nguyen 2012: 17). It measures substitutability by asking if ‘a hypothetical monopolist [would] find it profitable to increase the price for a product or a group of products significantly (5–10%) above the competitive level in a non-transitory way’ (Nguyen 2012: 17).

A significant portion of a competition agency’s work concerns determining the boundaries of markets via such tests. As demonstrated briefly above, this job is complex and contested. In fact, the actually existing markets can be said to be ‘produced’ through socio-technical instruments such as the tests above and consumer surveys (such as whether or not they would substitute product X for Y).6 More recently, such ‘determining’ or ‘production’ of markets is further carried out by ‘market inquiries’, which enable competition authorities ‘to use a broad prism […] to study obstacles to competition’ in specific markets (Indig and Gal 2013).

This process of constantly finding markets via expert tests, producing them via institutionalised competition authorities and backing this all up with an aspiring science — economics — gives the idea of the market an ontological existence carved into the realm of the natural. The market approximates and eventually fuses with its own representation on the curve of supply and demand, irrespective of social context and various anchors dropped into distinctive societies and social constellations. The production of the market takes place not through the simple decision of whether X and Y areas constitute markets for W and Z products. The issue is the creation of institutional sites by which such decisions can be made: in this case, competition agencies. Once such institutional sites begin to operate, they both produce the concepts they work with and take them as their starting point. A well-known example, noted earlier, ‘would be maps, which not only create a distance between the physicality of the land and its representation but also, through replication, produce the reality of the categories maps “represent”, such as the nation-state’ (Türem 2011: 114).7

We can deduct from the foregoing analysis that infinite markets can exist irrespective of space, shape or form. Moreover, through the work of actors in the field of competition — including bureaucrats within competition authorities, lawyers, economists, etc. — relatively larger and significant markets are made visible in order to ensure their proper functioning. In due course, ‘the market’ tacitly becomes an abstract, analytical grid on the basis of which legal interventions into social and economic relations can be organised. Simultaneously, as Tim Mitchell (2000) argues for modernity and representation more broadly, a gap forms between the market as described on paper and the real, actually existing markets. Such a gap enhances the ontological existence of the concept of market. This reality is mobilised again to conceive, organise and intervene into relations, networks, people and products.

Certainly, the process of producing the market is enabled and maintained by real actors, whose job is to demarcate markets, people who happen to be economists, lawyers and other white-collar professionals working in the field of competition. One has to determine, after all, what results are sufficiently significant in the Elzinga Hogarty test for a geographical region to constitute a market. Or, to refer back to a previous example, at what point can one say that chocolate and cupcakes are substitutable for candy bars and biscuits? In other words, a ‘need’ has arisen for experts to tell us which tests to apply and what the results of those tests mean.

The determination or production of a market is not only made possible by the work of such professionals, but also through the efforts of the academics and policymakers who craft and run these tests. An analogy to the cadastral mapping operations of the 18th and 19th centuries is apt. Just as cadastral surveys produced a new representation of space and such new representations empowered new actors within the state (modern bureaucracy, expert mappers, etc.) over against traditional rulers, the creation and application of economic tests reproduce markets on a different plane, empowering the white-collar professionals who use and organise the knowledge of markets.

As the scientific site in which such tests are designed, economics has become a privileged discipline in this brave new world of markets. Referring to Michel Foucault, Davies (2010: 64) argues that ‘the science of economics sits in adversarial tension with the creation and execution of law; indeed the former often exists for the purpose of exposing the latter’s nonsensical nature’. In this sense, it is no accident that the rise and spread of competition law in the neoliberal period coincides with the ascent of the Chicago School approach to antitrust in the United States. The Chicago School has been single-minded in the advancement of economic theory-driven antitrust law and offers economic analysis and increased efficiency as the sole bases upon which competition law should operate (Eisner 1991). In turn, this understanding facilitated the global spread of competition legislation and practice (Davies 2010). The Chicago School has grown in importance in the United States due to its marketability abroad and the connections it has forged in foreign contexts (Montecinos 1995; Valdes 1995; Dezalay and Garth 2002). The dominance of the Chicago School economic analysis in the field of competition law has been at the expense of the Harvard School paradigm of structure–conduct–performance, which emphasises the structure of the markets over the notion of efficiency driven by economic theory. The latter paradigm considers how markets must, foremost, keep their own processes alive rather than just seek efficiency (Fox et al. 2004: 57). In this context, as a discipline grounded in the territoriality of the nation-state, ‘modern law’ loses out to economics, which bases its legitimacy increasingly on universal, ever more a-territorial assumptions.

### Impact---Overview---2NC

#### It’s try-or-die and turns every impact.

Bordera et al. 21, Activist at Extinction Rebellion Spain and València en Transició; Fernando Valladares, Research Professor of Biogeography and Global Change at the National Museum of Natural Sciences, Winner of the Jaume I Prize for Environmental Protection, Ph.D. in Biological Sciences from the Complutense University of Madrid; Antonio Turiel, Research Scientist in the Institute of Marine Sciences at the Spanish Research Council, Ph.D. in Theoretical Physics from the Autonomous University of Madrid; Ferran Puig Vilar, Journalist specializing in the climate crisis, Telecommunications Engineer; Fernando Prieto, Director of the Observatory for Sustainability, Ph.D. in Ecology from the Autonomous University of Madrid; Tim Hewlett, Member of the Scientist Rebellion collective, Ph.D. in Astrophysics from the University of St. Andrews, “IPCC Warns that Capitalism is Unsustainable,” Progressive International, 11-06-2021, https://progressive.international/wire/2021-11-04-ipcc-warns-that-capitalism-is-unsustainable/en

A leaked draft of the third part of the upcoming IPCC report establishes that we must move away from the current capitalist model to avoid exceeding planetary limits. It also confirms that, as stated in the article published by CTXT on August 7, "Greenhouse gas (GHG) emissions must peak in at most four years". The document also acknowledges that there is little chance of further economic growth.

The signatories of this article, scientists and journalists, have analysed a new part of the Sixth Report, leaked by the scientists' collective Scientist Rebellion and Extinction Rebellion Spain. The leak clearly shows the vast discrepancies between the scientific community’s understanding of what is needed to achieve an effective and just transition, and the reality of how little has been achieved. Fortunately, among the usual more timid positions, demands that would have been unthinkable not so long ago are beginning to emerge.

Before getting into the analysis, a bit of context is needed. In 1990, the IPCC's First Assessment Report still stated that "the observed increase [in temperature] may be largely due to natural variability". This debate was closed in subsequent reports. However, in case there was still any doubt, the analysis of Group I of the Sixth Report - now official - has eliminated any uncertainty. It removes any possibility of retorts from climate denialists, who have long been amply showered with money by those who had the most to lose — the fossil fuel lobbies. The first question to solve a mystery is usually the classic Cui Bono (Who benefits?).

The underlying question now is, how do we ensure that the necessary transition is perceived as a benefit and not as a difficulty? The leaked report confirms that there is no other possibility than giving up indefinite growth. The transition has to take into account the cultural and historical differences in emissions between countries, and the differences between the rural and urban world, so as not to benefit one over the other, and above all the tremendous and growing economic inequalities between the increasingly poor and the increasingly obscenely rich. Either these three dichotomies are addressed, or the transition will have more enemies than supporters and will sabotage itself. The draft reads: "Lessons from experimental economics show that people may not accept measures that are perceived as unfair even if the cost of not accepting them is higher".

Even if we manage to change course, the scientists warn that "Transitions are not usually smooth and gradual. They can be sudden and disruptive". They also point out that "the pace of transition can be hindered by the blockage exerted by existing capital, institutions and social norms", emphasising the importance of inertias. They add, "The centrality of fossil energy in economic development over the past two hundred years raises obvious questions about the possibility of decarbonisation.”

Policies favourable to fossil fuel companies have extracted our common wealth - our air, forests, land... - and put it in the hands of a small minority. Green policies are therefore bound to be redistributive at a time when inequality is soaring. One of the measures proposed to reduce the regressivity of carbon prices is redistributing tax revenues in favour of low and middle income earners. But, as anthropologist Jason Hickel reminds us, “Anything short of a binding cap on fossil fuel extraction, with declining annual targets that will wind down the industry to zero, is just hand-waving.”

This brings us to one of the report's defining paragraphs, "Some scientists stress that climate change is caused by industrial development, and more specifically, by the nature of social and economic development produced by the nature of capitalist society, which they therefore consider ultimately unsustainable". Although many have said it before, we don't think we have ever read anything quite so clarifying in the world's leading climate report, which adds, "Current emissions are incompatible with the Paris Agreement and immediate and deep cuts are absolutely mandatory.

Different emission reduction scenarios

These targets, which imply a drastic decrease in emissions and therefore also in energy production and material use in the short term, are impossible to achieve with the current model. In addition, Group III links reducing emissions to the fulfilment of the 17 Sustainable Development Goals to be achieved by 2030, as agreed upon by the member states of the United Nations in 2015. Despite the existing contradictions within the 17 SDGs, they include inarguable objectives such as the reduction of inequality and the protection of biodiversity, alongside the more controversial one, within the report itself, of promoting sustainable economic growth.

It is customary practice not to hide scientific debate at the IPCC. In 1990, it still revolved around the causes of climate change, but after 30 fruitless years we now see that the discussion is between positions that still believe we can continue to grow and reduce emissions at the necessary rate, and those who see this as another type of denialism. A more subtle form of it, but one which in the end benefits and is defended by the same people who once questioned the origin of global warming.

The IPCC report accepts that "mitigation and development goals cannot be achieved through incremental changes". Stubbornly focusing on growth requires massive development of technologies that can reduce greenhouse gas concentrations in the atmosphere, but these CCS (Carbon Capture and Sequestration) technologies are not materialising as predicted.

Ecosystem carbon sinks are in clear decline and climate feedbacks are being triggered which, as is now widely acknowledged, is pushing the Earth past several points of no return and hence into a warmer and more unstable state. The only known way to avoid climate collapse is to move away from the perpetual growth model.

The report highlights that the "organised hypocrisy" identified in international cooperation, where agreements and claims are not matched by actions, is one of the most important barriers to mitigation.

The IPCC is also calling on us not to forget the unimplemented lessons of covid-19. Lessons that should serve to avoid making the same mistakes with climate change, as the analogies are clear and direct. The costs of prevention and preparatory actions are minimal compared to the costs of the impacts caused. Delaying action will lead to increasing costs that will be very difficult to bear.

If action is not taken soon, challenges will increase exponentially, and with unforeseen consequences.

Given the increasingly obvious contradictions in the concept of sustainable development, speaking about any form of development will only be possible by moving away from GDP as a measure of wealth to a less competition-based economic model. The only sustainable development is horizontal, not vertical, and this means reducing inequality.

It is clear that there needs to be a perception that a large majority of us 'benefit', or there will be no solution. This is why it is crucial the enormity and scale of the problem are explained for the measures to be understood and certain sacrifices to be seen as benefits. The alternative is to change climate stability forever and aggravate conflicts over resources.

Competition helped species evolve, but, as the brilliant microbiologist Lynn Margulis has shown, it is cooperation that is the key to evolutionary leaps. We now face a precipice drawn by the intersection of the ecological and energy crises. We can have good lives with less energy available (and at the same time, we will have lower workloads), but capitalism will not be able to sustain itself with less energy without completing its mutation into a kind of techno-feudalism. Only if we cooperate, if we understand that we share so much, including an atmosphere that doesn't know what borders are, can we react and leap far enough to avoid the fall.

### Perm---2NC

#### Idleness DA---integrating the 1AC’s call to action prevents its use as a point of rupture to escape capitalism’s plane of existence.

Emrah Karakilic 21, Senior Research Fellow in the Nottingham Business School at Nottingham Trent University, Ph.D. in Sociology from Goldsmiths, University of London, “Idleness as a micro ethico-political action,” Organization, Vol. 28, No. 6, 2021, https://doi.org/10.1177%2F1350508420966744

Today, the ‘end of history’ seems to define the ethos of humanity at large. In the age of ‘capitalist realism’, Fisher (2009) refers to Jameson (2003), ‘it is easier to imagine the end of the world than it is to imagine the end of capitalism’ (p. 2). ‘The futurity of future’ is cancelled as we have come to believe that ‘the future will be pretty much like the present only more so’ (Eagleton, 2002: para 2, also Fisher, 2014). We must resist the prevailing capitalist catechism [investissement] and keep the question of ‘what is to be done’ alive – the theorists insist. Yet, if one of the greatest ‘achievements’ of capitalism lies in ‘the capitalisation of subjective power’ (Guattari, 2000: 47), that is, the capture of human sensibility, imagination and desire, is there even any hope?

My answer is affirmative. As noted, firstly, the neoliberal project of transforming every individual into a business is increasingly in crisis. This is a subjective crisis in Guattarian parlance, revealing itself, for Berardi (2015), in the astonishing rise of mental health problems.6 Secondly, with the Covid-19 pandemic, it now seems inevitable that we will experience a deep economic recession (Davies, 2020; Elliott, 2020), which will deepen the subjective crisis when the public starts to foot the bill for bailouts. Therefore, I agree with Davies (2020) that the impact of the pandemic on economies ‘might better be understood as the sort of world-making event that allows for new economic and intellectual beginnings’ (para 12, also Žižek, 2020).

If so, how might we think of a new process of subjectivation whereby a new way of being in the world can be actualised? O’Sullivan (2011, also 2012: 59–87) offers two central theses on the new in relation to subjectivity. Firstly, he writes, ‘the new does not arrive from some other place (transcendence), but is produced from the very matter of the world. . . After all, where else can the new come from?’ (O’Sullivan, 2011: 97). This means that the new involves a recombination of already existing elements in and of the world. Yet, is this sort of recombination enough to produce something new? In the second thesis, he elucidates, ‘what else is needed [is] a certain depth. . . Put simply, the new involves accessing something outside the present plane of existence’ (O’Sullivan, 2011: 97–98). Accordingly, the production of new – subjectivity – involves experimentation with this sort of immanent outside and returning to the present plane of existence more equipped with novel perspectives to combine its elements differently.

In continental philosophy, this outside has a name.7 It is the temporal realm of virtual or pure-past in Bergson (1991), truth in Foucault (1995) (or Foucauldian truth) and incorporeal Universes in Guattari (1995, 2000). This paper cannot do justice to all these concepts. Yet, it might speculate on what traverses them as a common theme. Here, the outside implies a realm where one can experience difference-in-kind. It does not involve identification or imitation of something already existing because it is characterised by unactualised potentiality. It is not to do with knowledge as such, particularly with ‘scientific’ knowledge, as it does not understand ‘evidence’, ‘proof’ or ‘fact’. It is ‘non-dimensioned, non-coordinated, trans-sensible and infinite’ (Guattari, 2000: 75). It is a realm of ‘absolute non-narrative, non-culture, and non-knowledge’ (Lazzarato, 2014: 18). More concretely, it is a realm where one can encounter with hitherto unknown ‘universes of reference’, experiment with new ‘existential refrains and configurations’, which can then act, in the world we are living, as catalytic focal points for ‘the resingularisation of existence’ (Guattari, 1995, 2000).

The outside is not immediately accessible or apparent to the human body-mind configuration in its typical state. To access and communicate with this sort of outside, there must be a break with already existing reality and its accompanying significations, narratives, refrains, values, norms, semiotic chains and enslaving machinic apparatuses. There must be, in a word, a rupture in habit, be it formed consciously or impulsively. This presupposes, first and foremost, a suspension of the general mobilisation decreed by capital. Workers’ strikes, struggles, revolts and riots do not only operate as technologies of such a rupture but they also expose what the heterogeneous elements of the outside might be. They are the moments of, paradoxically, non-movement, suspending all dominant references and coordinates with unforeseeable consequences: ‘I am no longer as I was before. I am . . . carried beyond my familiar existential Territories’ (Guattari, 1995: 93).

In this context, I think of idleness as a micro ethico-political technology of such a rupture, a technology of Foucauldian self-care (see also Munro, 2014; Randall and Munro, 2010), potentially opening up the aforementioned outside. Nietzsche (1996) argues that idleness, against hasty mobilisation, is a ‘noble thing’, ‘really the beginning of all vices’ and ‘located in the closest vicinity to all virtues’ (p. 171). In a similar vein, Kierkegaard (1946) holds that what is evil is not idleness but those who dictate that idleness as evil. ‘Idleness . . . is a truly divine life’ (Kierkegaard, 1946: 23). He adds that ‘every human being who lacks a sense of idleness proves that his [or her] consciousness has not yet been elevated to the level of the humane’ (Kierkegaard, 1946: 24). Does not idleness mean laziness? Nietzsche (1996) mockingly answers, ‘you don’t think . . . I am talking about you, do you, you lazybones?’ (p. 171).8 By idleness, Nietzsche and Kierkegaard, therefore, do not understand acceptance of what happens, a sort of emptiness or monotony. They rather see it as an ethico-political action on one self. In Nietzsche, idleness refers to the practice of otium in the form of self-contemplation or what he (Nietzsche, 1996: 171) calls ‘meditative life’ or ‘prolonged reflection’ (Nietzsche, 1974: 259). In fact, this reflects the connotation of the term in Elizabethan English, that is, wandering in the mind. Kierkegaard (1946) implies something similar when he considers ‘the restless activity’ (vis-à-vis an examined life) a barrier before ‘the world of the spirit’ (p. 24).

In contemporary capitalism, we have increasingly become more like inputs, absorbing all stimuli imposed by two regimes of power (i.e. social subjection and machinic enslavement), and outputs, emitting some sort of response often unreflectively. In order to open a gap between stimulus and response (à la Bergson, 1991), we should resist reckless mobilisation, enjoy ‘a vita contemplative (e.g. taking a walk with ideas and friends) without self-contempt and a bad conscience’ (Nietzsche, 1974: 260), and attempt to cultivate a genuine understanding of our reactive selves. This ‘self-positioning’ (Foucault, 2000) may culminate in ‘a kind of super-productivity arising from a specifically non-productive (in capitalist terms) state’ (O’Sullivan, 2011: 99). Idleness, that is to say, may enable us to recognise and grasp not only our habitual responses and reactions, whose aggregation ultimately constitutes who we are and how we act, but also new existential terrains on another vector, in which the aspects of a different mode of being could be found.

As a way of conclusion, we must note, firstly, that idleness, like any technology of rupture, is only a first step towards producing a new subjectivity. New habits, refrains, practices, organisations, and so forth should follow from any rupture so as to combine the elements of the actual world in a different way. Secondly, the production of a new subjectivity is after all always an experiment. We cannot know beforehand whether the outside is emancipating or supressing, producing joy or sadness. This experiment, however, is the very test of life (Foucault, 2000).

#### World-building DA---the perm precludes it, nuking the movement.

Ian G. R. Shaw & Marv Waterstone 21, Associate Professor of Global Security Challenges at the University of Leeds, Ph.D. in Geography from the University of Arizona; Professor Emeritus of Geography at the University of Arizona, Ph.D. from the University of Arizona, “A Planet of Surplus Life: Building Worlds Beyond Capitalism,” Antipode, Vol. 53, No. 6, November 2021, https://doi.org/10.1111/anti.12741

By worlding our understanding of capitalism, then, we see surplus life as symptomatic of spatial violences rooted in centuries of colonial dispossession, alienation, and enclosure. Pauperisation—the process of becoming-surplus—is a process of becoming surplus to the world. Terms like poverty, under this understanding, imply a world-poverty. Capitalism prevents billions of people from producing, using, and inhabiting common spaces to flourish, and erases alternative cosmologies and imaginaries. Arendt (2013:256) characterised modern life in terms of this world-alienation—one that threw people off the land, enclosed the commons, destroyed existential autonomy, and created a “labouring poor”. World alienation is a profound loss of territorial autonomy, or loss of “a tangible, worldly place of one’s own” (Arendt 2013:70). Accordingly, we want to present our view of alternative worlds—or alter-worlds—to those subsumed by capital. At the beating heart of this project to de-alienate surplus life is the reappropriation of the commons. “Since capital requires the separation of the worker from the means of production and subsistence”, writes Linebaugh (2014:110), “commoning must logically ground the answer to the ills of a class-riven society”. Crucially, the commons are not just a “resource”, but, following De Angelis (2017), must be thought of in terms of a social system, or, as we prefer, a world.

The commons have become a central socio-spatial framework—or organising principle—for how to conceptualise a beyond-capitalist horizon (Hardt and Negri 2009, 2017). For Gibson-Graham (2006:193), this means “creating, enlarging, reclaiming, replenishing, and sharing a commons, acknowledging the interdependence of individuals, groups, nature, things, traditions, and knowledges, and tending the commons as a way of tending the community”. The commons are a vital resource of shared power, collective property ownership, and the co-production of beyond-capitalist spaces, goods, and subjectivities (De Angelis 2017). As Chatterton and Pusey (2020:30) write, these spaces are “a means to struggle against capitalism”. The commons, in other words, are productive spaces that generate new and emergent vocabularies, solidarities, and “social and spatial practices and repertoires of resistance that can be used against capitalism” (Chatterton 2016:407). Reclaiming the commons is vital for regaining non-capitalist forms of wealth and social coexistence. Of course, the commons are not homogeneous systems that are straightforwardly opposed to capital—nor are they automatically a threat. Instead, they are complex terrains of contradictory socio-spatial relations and prefigurative possibilities (see Noterman 2016).

Centuries of pauperisation have destroyed the spatial strategies for territorial autonomy. The battle is thus for the very contours of the world, not just for wages or the workplace. Accordingly, lodging the commons at the heart of geographic justice demonstrates the vital political relay between territorial autonomy and existential autonomy. This alternative geography is vividly illustrated by landbased movements such as the MST in Brazil, the Landless People’s Movement in South Africa, the Black farmers movement in the US, the Via Campesina Movement, or the Zapatistas in the Lacandon jungle. All express wealth in terms of the commons, rather than capital (De Angelis 2017). The indigenous struggle for emancipation “orients the forces of resistance more clearly toward an autonomous terrain” (Hardt and Negri 2009:102). Alter-worlds are animated by this spirit of autonomous commoning. For Subcomandante Galeano of the Zapatistas, “Zapatismo believes that, ‘When the land hurts, everything hurts’” (in EZLN 2016:254). There is much to be gleaned from indigenous cosmologies for beyond-capitalist praxes: dignified associations between humans and nonhumans, as well as innovative forms of value and exchange (Araujo 2017).

The zero point of capitalism was its elimination of incompatible worlds—setting in motion a profound world alienation. Alter-worlds are autonomous, singular, and common spaces of coexistence between humans and the planet. Crucially, these spaces—of use value rather than exchange value—are not distinctly human spaces, but include nonhuman agents, held together by an emergent but fragile web of life (Tsing 2015; Turker and Murphy 2021). We think the term alter-world is key to understanding the ontology and future of the commons in the 21st century. All-toooften, the commons are seen as resources, rather than worlds. But this is to deny the commons their own agency, dignity, singularity, and life. Alter-worlds are common spaces that loop together human bodies, plants, imaginations, desires, animals, and the shape-shifting fabric of the planet. Commoning becomes the praxis of moving these worlds towards an autonomous and peaceful co-existence beyond capital.

#### Passive Revolution DA---justifying competition in the interim results in co-option.

Clive L. Spash 21, Chair of Public Policy and Governance at the Vienna University of Economics and Business, Ph.D. in Economics from the University of Wyoming, “Apologists for growth: passive revolutionaries in a passive revolution,” Globalizations, Vol. 18, No. 7, 2021, https://doi.org/10.1080/14747731.2020.1824864

A range of arguments have long been made about the problems with the growth economy. Since the rise of the environmental movement in the 1960s, the economic growth paradigm has been subject to social and ecological criticism which bore fruit in numerous books in the 1970s (Daly, 1973; Easterlin, 1974; Hirsch, 1977; Meadows et al., 1972; Mishan, 1969; Schumacher, 1973; Scitovsky, 1976). A key theoretician of how the ecological economic system operates was Georgescu-Roegen (1975/2009). His work highlighted the role of energy and materials in the reproduction of industrial economies and how economic theory failed to take into account ecological, source and sink dependencies. He noted the frivolous use of scarce resources in a consumer society, raising ethical issues about who gets what and for what ends. The problems are social (ethical, political), ecological and economic. I will not rehearse the long standing arguments here, but note that they are the theoretical core of ecological economics (Martinez-Alier, 2013; Røpke, 2004; Spash, 1999), which has informed steadystate, degrowth and post-growth ideas. Over the last thirty years the social aspects of this theory have been increasingly recognized as in need of explicit attention with corresponding links to critical institutionalism, political ecology and political economy (see Koch & Buch-Hansen, 2020; Spash, 2020b). The theoretical foundations of this paper are those of the emerging social-ecological economic paradigm that calls for radical transformation (Spash, 2017, 2011, 2020d).

A contrast is then to be drawn between reform and revolution, transition and transformation, lifestyle choice and systems change. Mild reformists regard revelation of the failures of the dominant economic system of capital accumulation (whether by USA ‘private’ or Chinese ‘public’ corporations, or some hybrid of public-private partnership) as suggesting the need for new organizational approaches and adjustments to institutional arrangements that maintain the basic system intact and reinforce it. The neoliberal and financialized form of corporate capitalism, that became dominant from the early 1980s, excluded the idea of alternative types of economies for social provisioning. Questioning capitalism was no longer legitimate, as exemplified by Margret Thatcher’s phrase ‘there is no alternative’ (TINA). However, the 2008 financial crash stimulated the return of popular criticism of capitalism (especially neoliberalism), corporations, the financial system and the super rich 1%. Economic theories were also targeted as requiring pluralist rethinking (Fischer et al., 2018). A range of populist works, ‘best sellers’ and articles made their authors highly cited under the guise of being outside the orthodoxy, radical and alternative. For example, Cambridge University’s Ha-Joon Chang, an author now cited 30,000 times (Google Scholar), first came to popular attention with his book 23 Things They Don’t Tell You About Capitalism (Chang, 2011). The reorganization of capitalism he advocates is a neo-Keynesian society with strong central government to ameliorate the socially divisive excesses of the economic system. Yet, all Keynesian approaches, in all their various forms, have failed to address the biophysical basis of the economy and so chosen to unscientifically ignore reality. Even less recognized is the type of society such pro-growth economists typically advocate, both in terms of the treatment of Nature (reduced to a resource for human ends), role of humans in society (reduced to labourer/ consumer), human motivation (selfish interest, materialism), politics (nationalism, liberalism) and ethics (preference utilitarianism, hedonism).

Yet, Ha-Joon Chang is just one of many claiming capitalism can be reformed and growth maintained for ‘the common good’ (e.g. GCEC, 2014, 2018; Jacobs & Mazzucato, 2016; OECD, 2020; Stern et al., 2006; von der Leyen, 2019). At the World Economic Forum (WEF) in Davos 2020 the talk was of inclusive ‘stakeholder capitalism’, resurrecting an idea from when capitalism was in crisis during the 1930s (Denning, 2020). This is offered as the ‘new’ hope to counter a range of criticisms that capitalism is socially unjust, rewards an elite, dispossess the poor, supports psychopathic corporations and self-serving financiers, as well as causing ecological destruction (Bakan, 2004; Bienkowski, 2013; Leonard, 1988; van Huijstee et al., 2011). Amongst the invited guest speakers at Davos 2019 and 2020 was Greta Thunberg whose emotive calls to address the ‘climate emergency’ have added urgency to the latest reformist ‘solutions’. Her speeches have been direct and included strong anti-corporate elements (Aronoff, 2019), but remain unfocussed in terms of political content and unspecific on necessary action or what to do about the powerful organizations she is criticizing. Thus, her and others’ strong direct language of a climate catastrophe/emergency/crisis can be and has been adopted and redirected by fossil fuel and corporate interests for their own purposes (Spash, 2020c, 2020a).

While only one of many environmental problems, human induced climate change has come to represent the failings of the current economic system. It is ever more present in the mind of humanity as extreme weather events become more frequent, temperature records are consistently broken year on year, ice sheets and glaciers melt, wild fires spread, and the threat of unknown catastrophic events looms larger. The ‘climate emergency’ has pushed transformation to the top of the political agenda, where it contests with other threats to the financial markets and stability of the world economic order, such as the Coronavirus pandemic (Spash, 2020b). The importance allocated to addressing human induced climate change has led to two reactions: denialism and reframing policy within terms that protect and enhance capitalism. The latter is the concern here. Direct attempts to supress problems of fossil fuel industrialism under a capital accumulating growth economy have come from members of the Davos elite in the guise of the Global Commission on the Economy and Climate (GCEC, 2014, 2018) and billionaire Richard Branson’s B-Team and Carbon War Room that attempt to justify his Virgin corporation’s aerospace and airline industrial expansion with carbon offsetting and trading. Financiers, bankers and super-rich entrepreneurs are rebranded as planetary saviours in our time of crisis.

Corporations, pro-growth governments and bureaucrats, have already adopted FridaysForFuture (FFF) and Extinction Rebellion (XR) calls for urgent action to advocate a range of environmental ‘deals’, such as the European Commission (EC) ‘Green Deal’ (European Commission, 2019), the United Nations (UN) Conference on Trade and Development (UNCTAD) ‘Global Green New Deal’ (UNCTAD, 2019), and the UN Environment Programme (UNEP) ‘New Deal for Nature’ (UNEP, 2019). Continuation of the capital accumulating economic structure remains key to these initiatives, and their aim is to organize society to fit. At the UN Framework Convention on Climate Change (UNFCCC) Conference of the Parties (COP) meeting in Madrid, EC President, Ursula von der Leyen (2019) announced the European Green Deal as

Europe’s new growth strategy. It will cut emissions while also creating jobs and improving our quality of life. For that we need investment! Investment in research, in innovation, in green technologies. […] EUR 1 trillion of investment over the next decade. […] This will include extending emission trading to all relevant sectors. CO2 has to have a price.

The role of price-making markets, corporations and capitalism are not in question. Typical of all these ‘deals’ are claims of coordinating and organizing stakeholders, having civil society and government work with, or more accurately for, ‘industry’, with promises of economic growth, jobs and climate stability.

The top-down approach to diverting attention from the need for systems change is something Gramsci (1971, pp. 106–114) referred to as a ‘passive revolution’. This relates to the passive integration of subordinate segments of society while keeping them powerless. The potential revolutionary or oppositional intellectuals and leaders are absorbed into the system (see also Candeias, 2011). If successful those in power remain, the basic structure of the system is unchanged, and radical and revolutionary thinkers are co-opted into powerless positions and/or support roles. What I will argue is that just such a passive revolution is evident in populist books by self proclaimed radical economists. For example, Kate Raworth’s Doughnut Economics, shortlisted for The Financial Times best economics book of 2017, is entirely oriented around economic growth and criticisms of mainstream economics, but fails to take any stand against economic growth, let alone capitalism. Tim Jackson with over 22,000 (Google Scholar) citations produced Prosperity Without Growth, a book that has over 7,000 cites. Yet, as I will show, he also adopts a position that advocates growth as essential for ‘development’.

In covering and explaining these positions I address some of the silences and absences in theorizing about economic growth in terms of its implications for social organization, how growth impacts on poverty and social inequality, what are the institutional foundations of growth ideology, how alternatives to growth are delegitimized, and in so doing specify a range of organizations attempting to prevent transformation away from growth and the capital accumulating economy. Geo-political and macro-economic structures and mechanisms maintaining the economic growth imperative are identified along the way. The paper is distinct from, but complementary to, my other article in this forum issue of Globalizations (Spash, 2020b). There I focus on drawing out lessons from the Coronavirus pandemic about concrete structural aspects of the operation of actual economies, which are then placed in the context of long running systems critiques from ecological economics and fallacious arguments by mainstream economists denying limits to growth. Both papers complement others in this special issue that expose the failures of economics as a discipline (Galbraith, 2020; Keen, 2020) and the related necessity of and potential for alternative approaches that connect economics to social, political and ecological reality (Gills & Morgan, 2020; Koch & Buch-Hansen, 2020).

In order to understand why systems change is necessary, and how it might be achieved, the structural aspects of that system must be understood, including the mechanisms by which it operates and reproduces itself. In Section 2, the organization of society to maintain a productive growth economy is shown to have multiple unsavoury implications some of which are acknowledge while others are rarely mentioned, such as links to eugenicist positons held by several famous economists (e.g. Keynes, Edgeworth and Meade). The claims made for capitalism, being inclusive and providing freedom from coercion, contrast with the advocacy of a smart, competitive meritocracy and an actualized world order built on the militarized and securitized nation State. In Section 3, the claims for economic growth being the means to development are shown to have been part of a foreign policy agenda of the United States of America (USA) that was adopted, maintained and promoted via international organizations such as the UN, World Bank and International Monetary Fund (IMF). Bodies of the UN have supported the continual rebirth of economic growth – as development, progress, sustainable development, Green growth, Green New Deal. In Section 4, I then turn to explicit coverage of how the ecological crisis, and specifically human induced climate change, is employed to support a new era of growth. In both Sections 3 and 4 I make explicit reference to some populist authors whose work has appeared growth critical and anti-capitalist but has in fact been neither.

This paper reveals how various attempts by different individuals and organizations to claim that growth is good, justifiable or even neutral, form part of a passive revolution that fails to address some basic social and ecological realities. Economic works publicized as critical and progressive prove to be otherwise. One set of ostensibly critical approaches to capitalism claim the right form is all that is required to avoid problems but fail to properly consider climate and ecological crises (e.g. Ha-Joon Chang and post-Keynesians). They also ignore the growth economy’s negative psychological and ethical implications (that Keynes explicitly recognized), undesirable productivist aspects, and tendency in times of crisis to foster extreme right wing political groups. Another set of ostensibly growth critical approaches is explicitly environmentally concerned, but still advocate policies promoting growth (e.g. Jackson, Raworth). These regard growth as necessary for ‘development’ but pay no attention to the competitive asymmetry it entails and lack analysis of the structure of capitalism. Their pragmatic commitment to economic growth results in maintaining capitalism by default and contradicts concern for the evidence of material impacts and social inequities of the system, its tendencies to exploit and create crises.

### Link---Tech---China

#### Competition over tech aims to suppress capitalism’s unsustainable ends.

Junfu Zhao 21, Ph.D. Candidate in Economics at the University of Utah, “The Political Economy of the U.S.-China Technology War,” Monthly Review, Vol. 73, No. 3, July—August 2021, https://monthlyreview.org/2021/07/01/the-political-economy-of-the-u-s-china-technology-war

At first glance, it is puzzling that the United States imposed aggressive trade sanctions on China (as well as on its own allies, though to a lesser extent), given the fact that the United States extracts surplus value from the rest of world through the existing international division of labor. At least two factors account for this anomaly.

First, real wages of U.S. workers have stagnated and U.S. internal inequality has risen significantly since the late 1970s.45 This has fueled the antiglobalization sentiments and the support for Trump. As Daron Acemoglu pointed out in Foreign Affairs, “Trump’s popularity surged based on positions diametrically opposed to Republican orthodoxy: restricting trade, increasing spending on infrastructure, helping and interfering with manufacturing firms, and weakening the country’s international role.”46 These demands run counter to the capitalists who are making substantial profits from globalized production.

Second, U.S. capitalists intend to protect their incumbent positions and avoid competition in core-like activities. The United States has alleged that “Beijing’s economic policies have led to massive industrial overcapacity that distorts global prices and allows China to expand global market share at the expense of competitors operating without the unfair advantages that Beijing provides to its firms.”47 China’s industrial upgrading will likely generate competitive pressures and reduce the profit margins that U.S. capitalists have enjoyed so far. Blocking Huawei—the Chinese company that took the lead in global 5G technology—reflects the U.S. capitalists’ deep sense of insecurity.48

Nonetheless, the globalized U.S. capitalists are unwilling to forego China’s market and cheap labor. In 2017, the sales of U.S.-invested firms that operate in China reached $700 billion, making a profit exceeding $50 billion.49 China’s participation in labor-intensive and low value-added segments of global value chains also enables U.S. firms to specialize in lucrative design and marketing activities.50 Hence, the best scenario for the U.S. capitalists is that China would give up industrial upgrading and stick to the current international division of labor.51

To be sure, China’s ruling elites also have substantial interests in preserving the existing international order. China’s long-term export-oriented growth has led to entrenched interests of coastal provincial governments, export manufacturers, and their lobbyists.52 Besides, China’s overdependence on foreign oil and its internal sovereignty issues make China eager to sustain the stability of the current interstate system.53 Given these considerations, it is quite unlikely that U.S.-China strategic competition will result in a full-scale confrontation for the foreseeable future.54

However, the underlying forces of the capitalist world-economy never stop functioning, bringing about a fundamental dilemma unique to the current hegemonic cycle. Historically, populations living in core states have never exceeded 20 percent of the total population of the capitalist world-system. The enlargement of core populations was made possible by the peripheralization of territories that used to be outside of the world-economy.55 Under U.S. hegemony, the world-economy has encompassed the whole globe and there are no more untouched territories and populations that could be further exploited to support substantial expansion of the core. China, a country with a 1.4 billion population (about 18 percent of the world population), is moving up into and through the semi-periphery zone by striving to enclose within its jurisdiction more core-like activities, which will inevitably generate immense competitive pressures on the existing core states and capitalists. If China succeeds in industrial upgrading, the profits of core capitalists, incomes of core states, and privileges of their peoples are likely to be squeezed. The already declining U.S. hegemony will have far less resources with which to manage internal and external affairs that are increasingly complex. If China fails in industrial upgrading, the profitability crisis will burst and economic stagnation will ensue. The historical legacy of China’s national liberation, socialist revolution, and third worldism will help turn China’s working class into an anticapitalist and anti-imperialist revolutionary force that will shake the capitalist world-system. There is no easy solution to this fundamental dilemma unless the paradigm of economic growth is abandoned, a solution that is incompatible with capitalism.

Conclusion

The writing is on the wall for the capitalist world-economy. The recent disorder of international relations, global pandemic, ensuing economic recession, and U.S. internal conflicts along class and racial lines are signals that the world-economy has entered a phase of chaos, precipitated by the incapability of declining U.S. hegemony to deal with increasingly complex issues. The U.S.-China technology war also reveals a fundamental dilemma. On one hand, China’s march in the technology realm threatens the superiority of core states and capitalists in the international division of labor and will further weaken U.S. hegemony; on the other hand, it is imperative for China’s economy to upgrade and grow in order to accommodate the demands of both capital and labor. Time will tell how this will unfold in our unstable world.

### Alt---Solvency---2NC

#### Only the alt’s combination of utopian thinking and bottom-up struggles can change the micro-relations that capitalism uses it sustain itself.

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Although there is no common anarchist position on social transformation, today anarchists are also usually not struggling for a grand or universal final transformation and disdain an “iron-clad program or method on the future,” as Emma Goldman called it.62 As a non-reformist and non-revolutionary theory of practice and tactics, anarchism is rather about incremental change and departs from the notion that there is no such thing as an instantaneous revolution that liberates all humanity at once.63 Bottom-up grass-roots struggles that aim at changing micro-relations in everyday life are seen as the cutting edge for changing macrostructures. In line with the anarchist ethos of prefigurative direct action and propaganda by the deed, social change should take place here and now and not in some distant post-revolutionary future, a stance that anarchists generally ascribe to Marxist politics.64 As Gustav Landauer put it, “anarchism is not a thing of the future, but of the present; not a matter of demands but of the living.”65 Solutions to societal problems are to be found in a dialectical interplay between thought and action, or what the Zapatista movement termed preguntando caminamos—walking we ask questions. Direct action, also associated with the notion of “Do It Yourself” (DIY), referring to direct interventions in a situation in order to change reality into the desired direction, enjoys primacy.

The anarchist aversion against totalizing and dogmatic ideologies is frequently paired with a distaste for abstract academic debates and philosopher kings claiming intellectual superiority from the ivory towers of academia, safely distanced from activist struggles on the ground.66 As Williams observed, “many of today's anarchists are more focused on getting things done and much less concerned with developing a political philosophy […].”67 Certainly there is much to say in favor of focusing on concrete action. To despise theoretical and social scientific knowledge is however profoundly problematic as transformative action can benefit from it. That is, social scientific knowledge has the potential to play an emancipatory role through uncovering and questioning the workings of social structures and prevailing ideas, and raising awareness about new ideas and, hence, possible alternatives. In the words of Roy Bhaskar, emancipation “consists in the move or transition from unneeded, unwanted and oppressive to needed, wanted and empowering sources of determination,” and as such “depends on the transformation of structures.”68 Knowledge and ideas alone are certainly not sufficient for transforming social structures but can feed the process. Knowledge and ideas are however fallible and disputable, and this is where anarchist thought and practice makes an important contribution: in the light of the real experiences and problems that emerge from transformative action, modifications and changes of those ideas might be necessary. At the same time, as will be demonstrated in the next sections, the narrow focus of anarchism on micro-level bottom-up initiatives in the organization of economic life is also limited: it neglects essential features of global capitalism, such as competition and its all-encompassing reach.

Anarchism, Competition, and Post-Neoliberalism

Competition is one of the norms inherited from the bourgeois economy which raises thorny problems when preserved in a collectivist or self-management economy.69

An anarchist economy ideally consists of horizontally and democratically managed forms of production and decentralized, socialized communal ownership structures. Anarchists do not however promote one particular economic arrangement but advocate free experimentation. As anarcho-syndicalist Rudolf Rocker suggested, different organizational forms of production might operate side by side.70 Importantly, such forms of production should not be imposed from top-down hierarchical structures of formal systems of power, such as the state, political parties, or corporations, but rather evolve from bottom-up, autonomous, and decentralized horizontal networks.71 There are several visions for an economic order characterized by horizontal and democratically managed and socialized forms of production. Michael Albert and Robin Hahnel's detailed work on a participatory economy, in short ParEcon, is probably one of the best-known accounts.72 The bulk of this literature is not exclusively anarchist in nature. A range of other leftist intellectuals have envisaged “real utopias,” “post-growth society,” or called for a “humanized economy” without an outright commitment to anarchist philosophies, albeit some of them may roughly be categorized as “small-a anarchists.”73

For an alternative socio-economic order to take shape, multiple goals need to be met simultaneously. There is surely no “one-size-fits-all” solution. As suggested by “steady state” or “post-growth” economy literatures, as well as green anarchists such as Murray Bookchin, a vital step is to break with the growth imperative underlying contemporary capitalist consumer societies and to find ways of downscaling the economies of the privileged North.74 This is not only necessary and long overdue in order to avoid a further destabilization of the ecosystems, but also has far-reaching consequences with respect to a systemic change: as capitalism has a relentless drive for self-expansion and cannot survive without continued accumulation of capital through surplus value production, a post-growth society would be by definition non-capitalist. However, also in no-growth or steady state economies there would be some surplus production (surplus production is necessary for human survival), and where there is surplus production, there are markets, and where there are markets, there is commercial and financial profit, and hence competition. Although surplus production might be much more contained in such economies, this does not automatically imply that there is no or limited competition. After all, competition is not an exclusive feature of capitalism even though it is surely one of its most pronounced mechanisms.

The very question of the desirability of competition opened up a schism between Pierre Joseph Proudhon, one of the first self-proclaimed anarchists from the classical canon, and his contemporary Karl Marx. Proudhon, famous for the slogans “Anarchism is Order” and “Property is Theft”, advocated market socialism based on ownership rights according to occupancy and use, worker-controlled mutual banks and credit associations, the abolition of wage labor and worker-owned non-hierarchical self-managed firms. Proudhon took a clear pro-competition stance, as worker-owned firms would compete in a free market. In The System of Economic Contradictions: Or the Philosophy of Poverty, he proclaimed that competition “is the vital force which animates the collective being: to destroy it, if such a supposition were possible, would be to kill society.”75 Seeing competition as “a necessity of the human soul” and an “irreplaceable stimulus” to counteract the inherent human tendency to idleness and stagnation, he argued that competition was the only way to arrive at fair prices and to empower consumers to avert overcharging; hence, competition had to be “universal and carried to its maximum of intensity.”76 The most deplorable error of socialism, he argued further, was to have regarded competition “as the disorder of society.”77 Whereas Proudhon believed in the possibility of taming the market and socializing competition, Marx, in his response to Proudhon in 1847, which he provocatively titled the Poverty of Philosophy, argued that competition without its lethal effects was impossible and that the bad side of competition formed an integral part of the social relations of production under capitalism, which cannot be eliminated.78

In contemporary anarchist literatures there has been little in-depth discussion about the role of competition. It is probably fair to suggest that most anarchists see no role for competitive markets when they envisage post-capitalist utopias. For example, Bookchin's “moral economy” with “a participatory system of distribution based on ethical concerns” and the dissolution of the antagonism between “buyer” and “seller” seems devoid of competitive rivalry and characterized instead by cooperation and mutualism affirming “a sense of unity and shared destiny between its participants.”79 In a similar vein, ParEcon scholars have proposed a system in which “equitable cooperation” replaces greed and competition, and in which participatory planning and consumer and worker councils replace markets and private enterprises.80 Cooperation is equitable foremost in that the effort and sacrifice of individuals in producing socially desired goods and services is rewarded in the form of consumption entitlements.81 Although the notions of a moral economy and equitable cooperation are very appealing, in line with Proudhon, one might doubt whether competition or even markets can or should be completely annihilated in a non-capitalist order. A certain degree of competition can indeed stimulate human accomplishments as argued by Proudhon, and markets, despite all inherent flaws, also have their virtues. Markets where goods and services are exchanged are surely not an exclusive prerequisite of capitalism: they have existed throughout mankind, in pre-capitalist and also in socialist societies. The important question is thus not whether there should be markets and competition, but rather what kind of competition and, in particular, how its excesses (over-competition) can be contained.

In his response to Proudhon, Marx made a distinction between commercial and industrial emulation, arguing that whilst industrial emulation is essentially about making better products and an appreciation of good craftsmanship (which is absolutely worth striving for), capitalist competition is commercial emulation, or in other words, profit maximization in a commercial system.82 The distinction between commercial and industrial emulation links up to the first chapters of Capital Volume 1, where Marx argues that production in a capitalist system is not primarily based on needs but on commercial gain, that is, products are not produced because of their use value but because of their exchange value. Thus, rather than serving human needs, capitalist production fulfills the needs of capital while use value is merely a byproduct.

Anarchists like Peter Kropotkin also saw that this was the source of many of the absurdities in the way capitalism functions. He raised the seemingly trivial yet important question: “Before producing anything, must you not feel the need of it? […] Is it not the study of needs that should govern production?”83 Kropotkin proposed to reverse priorities to ensure “well-being for all” by “giving society the greatest amount of useful products with the least waste of human energy.”84 Moreover, in his writings, he counter-posed social-Darwinist logics praising the survival of the fittest through competition and argued that people have both selfish and social instincts, while neither is necessarily the main determinant.85 He sought to demonstrate that for ensuring survival, voluntary cooperation, mutual aid, and the pursuit of freedom are much more successful human traits than competition and coercion. This means that as much as a system of fierce competition can become character molding for a society, so can a system that gives primacy to other values, such as cooperation and mutual aid.

In addition to a change in the social relations of production toward more horizontally and democratically managed production sites as a point of departure, in line with Kropotkin, an alternative economic order would imply a reversal of the current hierarchy of principles organizing the economic realm. A cultural shift informed by values and principles central to anarchist thought, such as cooperation and mutual aid, as well as equity, solidarity, mutual respect, and environmental sustainability could offer new avenues in this respect. Subordinating competition to the principle of equity could mean first, to rule out competition on the basis of price wars that take place at the expense of labor as a comparative advantage. This could involve a restriction of competition to what Marx called “industrial emulation,” in which goods and services compete primarily on the basis of quality rather than income disparities. Arguably, also in a post-neoliberal and post-capitalist economy, it is difficult to prevent competition on the basis of product prices. Regardless of the remuneration scheme at play, self-exploitation by workers within self-managed production collectives might be the result, although basic income rights and democratic procedures about wages, profits, and future investments might offer some relief in this respect. To give preeminence to the principle of equity could imply furthermore to rule out competition on the basis of lowering standards and the externalization of damage that relates to non-renewable resources, pollution, and waste creation. Likewise, valorizing extra-economic dimensions, and hence, internalizing the long-term time-horizon of production costs, could make competition also more equitable.

Second, to realize equity means also to reduce inequality and establish equal opportunities and equal starting points for production units. When departing from current levels of inequality, this is only possible by treating unequals unequally. This is where solidarity, cooperation, and particularly mutual aid as the converse of unbridled competition become relevant. In practice, one could think of knowledge transfer, skill, and technology sharing, or the creation of mutual sites for learning and personal growth. Hiding knowledge and establishing property rights for knowledge, such as patents, can be a competitive advantage, but it also creates inefficiencies, as people cannot build upon knowledge created by others. In fact, the Latin word “competere,” from which the word competition originates, refers to striving and running together and learning from each other. Giving significance to the original sense of the word would be integral in this respect.

Competition could furthermore be subjugated to the principle of environmental sustainability. To be sure, sustainability has become a deceptive neoliberal buzzword meant to green wash (business) practices that continue to sustain economic growth and competitiveness, as well as established lifestyles and patterns of societal development. If sustainability is however understood in its original sense, it necessitates that the ecosystems of the earth are not impaired as a consequence of human activities. Economic growth is then by definition unsustainable as the physical dimension of the economy is a subsystem of the non-growing planet earth.86 A way to counter the growth obsession and to decrease the flows of energy that enter production and consumption is to restrict competition, and with it also trade, geographically and to mutual surplus production only. The principle of subsidiarity in the production of goods and services could serve as a point of orientation. The principle usually refers to keeping decision-making at the lowest possible level and only elevating it to higher levels when it is indispensable. Translated into production, it could imply that what can readily be produced locally or regionally should therefore be produced locally or regionally, notably in the area of foodstuff and basic products. To re-localize economic production and restrict trade and competition to surpluses, rather than focusing on exports to far distant places, paired with energy-wasteful transportation, would not only make production and consumption less alienated, it also reduces “intermediate consumption” in the form of transport, energy, packaging, and advertising.87 Moreover, it could create new opportunities for local producers to increase self-reliance, local autonomy, and possibilities for self-governance, thereby allowing for what Karl Polanyi called the re-embedding of the economy in social relations, instead of running society as an adjunct to the capitalist market.88 At the same time, the subsidiarity principle would not mean autarky or to abolish inter-territorial trade altogether. Trade and competition in the form of industrial emulation can make sense for certain products and sectors, but not where it leaves behind a mammoth ecological footprint, a legacy of abuses of human rights and labor standards, the plundering of the Global South and conflicts over natural resources. Limiting competition could also mean exorcizing a range of sectors completely from the logic of competition, such as utility sectors in the field of energy, water, transport, but also housing, health care, and education. The costs of production could be communally shared, and subjected to democratically managed communal ownership structures.

Avenues to a Post-Neoliberal Non-Capitalist Competition Order

What would it take for such a post-neoliberal non-capitalist competition order to emerge? To begin with, the vast terrain of neoliberal definition power has to be reclaimed. Critique is an important first step in the deconstruction and delegitimization of the one-dimensional atomistic and reductionist social scientific precepts that have come to underpin the current (over-)competition order. Eventually, the assertion of a Homo economicus as an always rationally calculating and utility maximizing and egoistic individual detached from society and nature and competing in a Hobbesian dog-eat-dog world, is not only mistaken with regard to human nature but also dogs. Critique should be followed by the dialectics of formulating alternatives and action instigated to move toward a post-neoliberal order. The question is what type of action and by whom? Like capitalism developed in the interstices of feudal society, anarchists would argue that the transformation toward a post-neoliberal and non-capitalist society can only evolve cumulatively by progressively enlarging social spaces with alternative organizational forms rather than awaiting some mass revolutionary moment. Building a post-neoliberal competition order would thus entail DIY in the form of strategic and direct action by individuals and small communities at the micro level—action directed at removing activities from the sphere of competition and bringing them into the spheres of cooperation and mutual aid. The idea then would be to build the new society within the shell of the old, or as Chomsky put it, the roots of a successor project of capitalism and its neoliberal organization will have to be constructed in the existing economy.89

Valuable lessons can be gained from the anarchist logic to search for the future in already existing economic activities at the margins of neoliberal capitalism. Indeed, forms of production in which people control the decisions that affect them already exist all over the world in the form of various types of cooperatives, or in a wider sense in the form of sustainable communities such as ecovillages.90 Such bottom-up initiatives of self-managed production collectives constitute without doubt the groundwork for a more profound systemic change. Here cooperation, and notably “experiments in equitable cooperation” as Hahnel calls it, play a far bigger role than in ordinary corporations.91 Some of these “experiments” have been successful, such as the Italian region Emilia Romagna where about eight thousand mostly small or medium-sized locally owned cooperatives account for approximately 40% of the region's GDP.92 Many of these cooperatives cooperate in industrial clusters of highly specialized complementary enterprises. Cooperation not only relates to the production process, but also to capital investment, the development of products, technology transfer, and market intelligence.93 This cooperative strategy, coupled with various forms of (local) government support, made it possible for these cooperatives to survive and thrive.

However, whilst such cooperative production forms might certainly be less exploitative, they hardly break with the imperatives of the competitive accumulation of capital. As noted by Joseph Kay, “the assets of a co-op do not cease being capital when votes are taken on how they are used within a society of generalized production and wage labour.”94 In order to survive, horizontally organized production collectives have to produce sufficient surplus value to maintain or expand their market shares through re-investments. For the sake of competitive prices, workers who collectively own the means of production may conform themselves to austerity measures such as cutbacks in employment or wages, and hence subjugate themselves to collective self-exploitation. The coercive forces of competition can contradict the organizational democratic core principles and values. This is evidenced by existing cooperatives that follow market terms and compete with capitalist companies (as well as among themselves), including those in Emilia Romagna, but also cooperatives in Cleveland or the renowned Mondragon Corporation in the Basque region. Mondragon, for example has pursued international growth strategies by establishing affiliated subsidiary companies and outsourcing production to China, Mexico, Poland, Brazil, or the Czech Republic where unskilled or semi-skilled labor is cheap.95 Rather than expanding solely through greenfield investments to enhance North–South cooperation, Mondragon proceeded through joint ventures and mergers and acquisitions.96 Although no Basque plants have been closed down, the actual cooperative member employment accounts for only 30%, while external non-member employment is on an upward trend.97 In other words, self-managed and democratically run production collectives frequently have no choice but to adapt to capitalist reality and to outsource to cheap labor areas, expand sales, profits and growth, and hence to compete.

Competition operates at a systemic macro level and this is where the ontological focus of anarchist alternatives is reaching its limits. The centrifugal forces of competition at systemic level are difficult to shake off, particularly under current conditions of globalized neoliberal capitalism. This raises doubts about whether self-managed democratic production collectives alone have the potential to transform the existing socio-economic order. Anarchist theory and practice might not have the ambition to tackle problems that require a macro-systemic solution when probing alternatives. However, as a genuine societal reorientation of the organization of the economy cannot emerge from the micro level alone, anarchists need to redefine their terrain of social struggle. Building up new market institutions can facilitate a cultural change that gives centrality to anarchist values and principles. This requires institutions that assess, guide, supervise, and limit competition at local, regional, and global levels. Thinking beyond the local or regional level entails however a democratic dilemma, as local or regional (direct) democratic decision-making and action cannot extend beyond certain (territorial) boundaries. While horizontal and direct democratic solutions offer patent solutions for the organization of production at micro level, curbing competition requires some degree of hierarchical higher-order and centralized governance at the macro level. This does not imply that such institutions should resemble the “politically independent” agencies that are currently in charge of enforcing competition rules in a top-down manner. Precisely because the scope of competition and its regulation are inherently political, competition controlling instances should be democratized, be accountable and transparent and the content of competition rules be subject to democratic mediation and open to periodic re-evaluation and adjustment. In other words, democratically run production collectives require democratically accountable controlling instances. At the macro level however, nested and hierarchical structures are indispensable. Anarchist types of direct democracy and the ideal of constant communication become unmanageable when tackling macro-level problems. This may sound like an anathema to anarchist thinking, but horizontal organizational forms should not become a fetish either.98 Local micro-level initiatives do not exist in isolation, and without linking the local to the global, the local can too easily be defeated.

In fact, a range of anarchists have thought through how to link the local to the global. Proudhon, and with him many anarcho-syndicalists, suggested that workers should form local sovereign associations that are organized bottom-up and linked up through re-callable delegates in regional councils. In the vision of Proudhon, these associations would come together in a grand international agro-industrial federation.99 By following the principle of subsidiarity in decision-making, the larger units in the federation would have the fewest powers and be subordinated to the lower (local) levels, leaving the anarcho-syndicalist federation with the task of mere coordination.100 The utopian vision of a libertarian “municipal confederalism” by Bookchin expresses basically the same idea. Bookchin envisaged a replacement of the state by direct-democratic open municipal assemblies, which through recallable delegates participate at confederal assemblies where higher-order decisions are taken.101 By interlinking municipal citizens' assemblies via a coordinating and administrating confederation, power would flow bottom-up rather than top-down. A concise roadmap on how to get there would be beyond the scope of this article, but these are issues that deserve consideration. New alliances between social forces that proactively and continuously support and discuss alternatives—and that eventually coalesce into a broader movement—are indispensable. The outlined alternative to the existing neoliberal competition order could provide a certain degree of thematic unity and coherence that disparate progressive social forces could subscribe to or simply reflect upon and discuss.

Conclusions

As Erik Olin Wright has noted: “diagnosis and critique of society tells us why we want to leave the world in which we live; the theory of alternatives tells us where we want to go; and the theory of transformation tells us […] how to make viable alternatives achievable.”102 This article departed from an explanatory critique of capitalist competition from a historical materialist perspective and subsequently argued that anarchist-inspired utopian thinking provides a challenging and exciting avenue for exploring a post-neoliberal and for that matter post-capitalist alternative economic order. Anarchists make an important point in disdaining clear-cut blueprints and in favoring a myriad of different types of economic arrangements—arrangements that go beyond production for the sake of profits and that revolve around democratically managed horizontal production collectives. However, past and existing practices need to be subjected to a critical evaluation when exploring alternatives. This article has argued that by quintessentially limiting the focus to micro-contexts, anarchists frequently miss out exploring important questions on how local practices can be linked to the global economy. Particularly, when envisioning a non-capitalist economy, anarchists have not sufficiently dealt with competition and its profoundly global dimension. While competition, in the form of industrial emulation as Marx called it, cannot and maybe also should not be abandoned completely, competition nonetheless needs to be limited geographically and to surplus production only. Profound changes in the social relations of production and the emergence of a no-growth economy require a cultural change—a change that gives preeminence to values and principles central to anarchism, such as equity, solidarity, cooperation, mutual aid, and environmental sustainability, rather than cut-throat competition. Anarchists are correct to point out that there is no such thing as an instantaneous and grand transformation and that a new order will have to be built from existing social structures. One way to get there is to build new democratically managed competition-controlling institutions that embody anarchist values and logics. Given the macro-level nature of competition, such institutions have to extend from the local to the regional and global level, and hence require a certain degree of nested governance structures.

The suggested alternative comes at a “cost” for those who benefit from global competition. Although it does not mean to retreat into a bygone peasant or tribal society of hunters and gatherers, the proposed alternative will certainly negatively affect the possibility to choose from a huge assortment of affordable and entertaining but also environmentally unsustainable products and services. In a world of limited competition, many products will become more expensive and the pace of innovation may slow down in certain industries, forcing many people to change their current lifestyles. Undoubtedly this makes the ideas outlined here “a tough sell,” notably to those accustomed to hedonistic consumerism. This consumerism is however one that “pacifies but never satisfies” as Bookchin observed.103

The catastrophic and irreversible destabilization of the climate and the ensuing destruction of the natural life-support systems on which our existence depends is currently advancing in full swing. We do not have the luxury to retreat in a collective form of lethargic stupor but have to consider an alternative economic order. Against the backdrop of the current political climate and configuration of power, a post-neoliberal and non-capitalist society may seem utopian. Indeed, one might easily be inclined to what Antonio Gramsci famously called “optimism of the will and pessimism of the intellect.” However, a lot is possible, especially in the context of the current economic crisis with hundreds of thousands of people taking to the squares around the world, expressing the selfsame insubordination to neoliberal capitalism and demanding “real democracy now.” In fact, without the hypothesis that a different world is possible, there can be no politics.104