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Q&A with Lina Khan, Chair of the U.S. Federal Trade Commission and Mark Glick, Professor of Economics at the University of Utah

Lina M. Khan
Columbia Law School, lkhan@law.columbia.edu

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Q&A WITH LINA KHAN, CHAIR OF THE U.S. FEDERAL TRADE
COMMISSION AND MARK GLICK, PROFESSOR OF ECONOMICS
AT THE UNIVERSITY OF UTAH*
KEYNOTE ADDRESS

Lina Khan **

Mark Glick (Glick): Let me tell you a little about Lina. Lina attended Yale Law school and while a third-year law student she wrote her famous and influential article *Amazon's Anti-Trust Paradox*.¹ Then, after graduating from law school, she worked as the legal director at the Open Markets Institute² and during that period she continued to write a large number of influential antitrust papers. She then joined the faculty of my alma mater, Columbia Law School. In 2019, she was appointed as counsel to the U.S. House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law and, in 2021, President Biden appointed her as Chair of the Federal Trade Commission (FTC). Quite a trajectory for a young scholar. With that, I'd like to welcome our keynote speaker, Lina Khan, the Chair of the Federal Trade Commission.

We have some questions for you Lina, but before I start, I just want to say that you were here in Utah in 2019 and that was before your appointment to the FTC. At that time, you made a lot of fans here, and we're still fans. Welcome back Madam Chair.

Our first question is about Section 5 of the FTC Act,³ and on our first panel, Bob Lande and Chief Judge of the U.S. Federal District Court of Utah, Robert J. Shelby, are going to discuss whether courts have strayed too far from the actual text of Section 2 of the Sherman Act.⁴ In a recent paper, *Antitrust Antitextualism*,⁵ Dan Crane argues that this is also the case for Section 5 of the FTC Act. In 2021, the Commission voted to rescind the previous restrictions it had placed on itself with regard to Section 5. Where are we now with Section 5 of the FTC Act?

Lina Khan (Khan): Well, first of all good morning, everybody. It's so great to be able to join you all, albeit virtually and remotely. I regret that I'm not able to join in person. I had a terrific time visiting Salt Lake City at the conference you hosted a few years ago and once again you've managed to gather a fantastic group of scholars

* A recording of this Address can be found at University of Utah S.J. Quinney College of Law, *Introduction and Keynote Address—Lee E. Teitelbaum Utah Law Review 2022 Symposium*, YOUTUBE (Nov. 1, 2022), <https://www.youtube.com/watch?v=UpDDSOi7dtg> [<https://perma.cc/R3V4-BK94>].

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¹ Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

² OUR MISSION, OPEN MARKETS INST., <https://www.openmarketsinstitute.org/our-mission> [<https://perma.cc/6X37-AT9A>] (last visted Jan 15, 2023).

³ Federal Trade Commission Act of 1914 § 5, 15 U.S.C. § 45.

⁴ Sherman Antitrust Act of 1890, § 2, 15 U.S.C. § 2.

⁵ Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205 (2021).

and thinkers. You know I think it's easy to forget but all the work that it took to get to this moment we're in reflects just many years of hard work and fantastic scholarship and efforts by many of the people that you have gathered. I really admire what you all are looking to do.

On Section 5, the big picture is we are working to bring Section 5 back in line with our statutory text and legislative history and precedent. For those who aren't familiar, Section 5 really is the heart of the FTC Act, the law that created the Federal Trade Commission, and it prohibits unfair methods of competition. These were the words that Congress used, "unfair methods of competition," which is distinct from the language that was used in the Sherman Act. The legislative history and context also show that it was actually lawmakers' view that the Sherman Act was too limited and that the rule of reason standard that courts had introduced was too vague and too open-ended. This is really what drove Congress to pass the FTC Act, to create a new administrative body with a related but distinct legal mandate.

As you alluded to, over the last couple of decades in particular there has been a retreat from really exercising this unique legal authority. For the better part of the last year we've had a team in place carefully reviewing all Section 5 case law—all instances in which the FTC pled a standalone Section 5 violation. We really want to ensure that any articulation of Section 5 that we offer conforms strictly to both the underlying text and the governing law—the law that's still on the books. The policy statement is in the works and I'm really hopeful that we'll be able to share it and publish it in the coming weeks.

Glick: But independent of congressional intent, do you think it's good policy for the FTC to have such broad discretion? Even independent of the Sherman Act and the Clayton Act⁶?

Khan: These policy determinations ultimately are ones for Congress to decide and I don't see it as my role or the FTC's role to second-guess that. In practice, I think there are at least two ways in which having a legal authority that's broader than the four corners of the Sherman Act can be extremely useful. One instance where the Sherman Act is not covering business practices that are pretty clearly violating the spirit of what the Sherman Act is intended to prohibit. The classic example is what are known as invitations to collude where technically there is no agreement that has been formed, so you can't directly reach it under the Sherman Act, but at the end of the day you still have a firm seeking to collude.

The second context is that Section 5, and specifically the text of Section 5, nicely illustrates that Congress recognized a distinction between fair and unfair methods of competition. This language reflects the view that not all methods of competition are fair game. Congress created the FTC to engage in the exercise of distinguishing between fair and unfair, and the Supreme Court has time and time again ratified this broader mandate. When we're engaging in this exercise, we're really doing it with those things in mind.

⁶ Clayton Antitrust Act of 1914, 15 U.S.C. §§12–27.

Glick: One more follow-up on Section 5. I wanted to ask you this up-front. As the FTC broadens its goals, is it going to have the resources that it needs in order to be successful?

Khan: It's no secret that the FTC's resources have not kept up. Currently, the FTC's total head count is around 1,200; that's around two-thirds of what it was back in the early 1980s. Meanwhile the size of the economy has grown, I think, around eightfold, so we're definitely under-resourced. That forces a lot of very difficult questions around what we're able to prioritize and what we're not able to address. This becomes a particular strain during years when we have booms in merger filings. Last year, we saw a 70 percent increase in the number of merger filings. It was just an off-the-charts year, and I think in those instances we're having to divert resources to make sure that we're not permitting unlawful deals.

But we're not able to catch everything. This is why the whole of government approach to competition policy that the Administration has prioritized is so critical. The DOJ and the FTC are no doubt on the front lines of interpreting and administering the antitrust laws. But there is also a whole set of other agencies, including sector-specific regulators, that also have competition tools and the opportunity—especially when they're conferring certain types of government benefits or engaging in other types of more routine engagement with industry—to attach certain types of conditions that can also promote competition. This was an insight that was much more readily acknowledged through the mid-century where things like government procurement were very actively and deliberately structured in a way to promote competition. I think some of the work that we've seen from agencies over the last year really seeks to revive that spirit and approach.

Glick: Okay, let's switch gears a little bit. Let me ask you a completely different question. In March of this year, you received a letter from a bipartisan group of Congressional members, including Utah Republican Congressman Burgess Owens from the Fourth District here in Utah. The letter asked the FTC to enforce the Robinson-Patman Act.⁷ And as you know the Robinson-Patman Act prohibits large retailers or buyers from receiving lower prices than their competitors. The letter argued that small business provides unique benefits to the country, and it pointed out that the FTC has not brought a Robinson-Patman case since 2000. What can you tell us about the thinking at the FTC about the Robinson-Patman Act and its enforcement?

Khan: It's a great question. As you noted, the Robinson-Patman Act is another law in the books that hasn't seen a whole lot of enforcement in recent decades. It bans practices like secret discounts and secret rebates that might only be available to large and powerful firms. It also bans certain types of economic discrimination. When Congress passed the law, it really went out of its way to note that the goal here was to prohibit certain forms of economic discrimination. While it permitted things like quantity discounts, it bans certain types of advantages that could only be won through raw bargaining power or muscle.

⁷ Robinson-Patman Act of 1936, 15 U.S.C. § 13.

For decades Robinson-Patman was actually a real mainstay of FTC enforcement. Through the 1960s Robinson-Patman cases comprised a pretty sizable share of the FTC's docket. That of course has looked very different over the last couple of decades. We're taking a fresh look at Robinson-Patman.

You know I really worry about instances in which enforcers just decide that they don't agree with the values or the policies underlying laws that Congress has passed, so they walk away from enforcement entirely. We're having to build up institutional muscle to determine how we might be able to move forward in this area.

Earlier this year we issued a policy statement noting that Section 2(c) of the Robinson-Patman Act prohibits commercial bribery. Some of the practices that we've heard about in the pharmaceutical context, including these rebates between pharmacy benefit managers and drug manufacturers, could in some instances risk running afoul of that commercial bribery prohibition. To put market participants on notice, we're looking very closely at the Robinson-Patman Act. As we're investigating and reviewing conduct, Robinson-Patman is absolutely going to be fair game.

My colleague Commissioner Alvaro Bedoya, a few weeks ago, gave a speech⁸ noting the importance of the Robinson-Patman Act and the fairness values that it enshrines. In that speech he goes deep into the legislative history and notes his strong support for enforcement. I highly recommend folks give that a read to get a sense of some of the thinking underway at the agency right now.

Glick: I know that the FTC has brought a [Robinson-Patman Act] Section 2(c) case, but will they consider bringing Section 2(a)⁹ cases? My impression is [this issue] is pretty rampant, since there's not been very much enforcement of the Robinson-Patman Act. The sellers of products or the salespeople don't really take into account who their competitors are or whether they're violating Section 2(a) or not.

Khan: We're looking at the statute as a whole. Last December we actually also initiated a Section 6(b) study into supply chain disruptions, and as we were putting that study together we heard a lot from businesses about Section 2(a)-type allegations and the ways that those types of practices may have actually worsened and exacerbated the effects of supply chain disruptions. That's something on our radar as well.

Glick: Would the FTC consider putting out guidelines for how to do a cost study? It's only price differences that aren't justified by efficiencies that are a violation, and to show whether there are efficiency justifications you have to do a cost study. But there are no real guidelines for how to do that.

⁸ Alvaro Bedoya, Commissioner, Fed. Trade. Comm'n, *Returning to Fairness*, Midwest Forum on Fair Markets: What the New Antimonopoly Vision Means for Main Street (Sept. 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf [<https://perma.cc/2XMN-MPU5>].

⁹ This Section provides that "[i]t shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers . . . where the effect of such discrimination may be to injure, destroy, or prevent competition . . ." 15 U.S.C. §13(a).

Khan: That's an interesting idea and I'm under no illusions that Robinson-Patman is a perfect statute. I think it's incumbent on us as enforcers to identify for lawmakers if there are particular areas where clarity could be needed or for ourselves to identify, for the market and for the public, how we would pursue the analysis here. I think it's an interesting suggestion.

Glick: Okay, switching gears again, our third panel is about labor. Recently the FTC issued a policy statement on enforcement related to gig work. Can you talk a little bit about the FTC's efforts to protect gig workers? Might we see a challenge, for example, of a vertical restraint by a gig platform aimed at preventing multi-homing by workers? For example, what if there's a rule that prevents ride sharing or ride-hailing workers from working both at Lyft and Uber at the same time?

Khan: I know many people at the conference have done a whole set of really important work on the gig platform economy that we're definitely learning from and drawing from. I would say this is an area that has really benefited from our looking to break down some of the silos at the agency between our competition work and our consumer protection work. I think the gig context is one where you see how certain types of what might be considered traditional consumer protection violations can be used to obtain market power, and then how market power in turn can be used to engage in certain types of consumer protection violations as it relates to workers. We have a cross-agency working group in place that's specifically focused on gig companies and trying to identify how we might pursue a more systematic enforcement strategy here.

We recently issued a policy statement that identified three prior priority areas. One is false or deceptive earnings claims. We've heard allegations that some of these companies have made claims about how much, say, drivers could be earning through their platforms that are not always entirely accurate. Those types of deceptive claims can be bread and butter violations of some of the consumer protection violations. We've also heard about certain types of constraints imposed on workers, including through contractual terms and certain types of restrictions on mobility that can implicate both the competition authorities as well as our consumer protection authorities. And then we're looking at unfair methods of competition more generally, including allegations of wage fixing and other types of unlawful business practices that may be transpiring. We're taking a broad look. Again, I think this is an area that's really benefited from a more interdisciplinary or cross-agency approach.

Glick: I want to ask you a few questions about mergers and I want to start with a case¹⁰ that was brought by the FTC here in Utah. The case was to prevent HCA Healthcare, which owns Saint Mark's Hospital, a short drive from the law school [in Salt Lake City], from purchasing Steward Health. HCA owns Saint Mark's and Steward Health owns Salt Lake Regional, a short walk [from the law school]. These

¹⁰ *HCA Healthcare/Steward Health Care Systems, In the Matter of*, U.S. FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/browse/cases-proceedings/2210003-hca-health-caresteward-health-care-system-matter> [<https://perma.cc/9ED3-J99R>] (last visited Jan. 16, 2023).

hospitals are fairly close geographically. The case was brought before Judge Tina Campbell here in Utah, but it settled I think. Or the deal was just abandoned right before the hearing. Typically, in the past, what's happened with hospital deals here in Utah is that they would go through, but there'd be spin-offs. The competitive overlaps would be spun-off. Is the FTC becoming more skeptical of merger remedies these days?

Khan: Great question and there's a lot there. I'll say as a general matter I think the FTC's approach to hospital mergers has been hailed as a model of success in part because the agency went from losing a lot of its challenges to hospital mergers, to going back and doing a series of studies and really being able to make the case to the courts that these mergers led to unlawful effects. I think that across the scheme of things we're really seeing tremendous progress.

That said I do think that for us as enforcers one question that also has to be at top of mind is one of deterrence. How do we deter unlawful deals in the first place? Especially if we're still seeing hospital proposed mergers that are basically three to two or sometimes even two to one,¹¹ I think that really compels us to think about how we can be more effective here. We're looking at some of this work afresh and one of the components includes thinking about our approach to merger remedies in a whole set of industries. In certain instances in our hospital work, we've basically identified where there might be overlaps and ask the companies to divest those. The agency approach has been to say that's sufficient to preserve competition. I think we've seen a lot of research and scholarship, including from some folks in the room, that really questions that on a whole bunch of dimensions. Thinking about whether overlaps are really a sufficient dimension of competition for us to be focusing on and what dimensions of competition might not actually be captured even if you're just getting the firms to divest the overlaps is a big question for us.

We've also seen time and time again that divestitures can also be rife with risk. There have been, unfortunately, too many instances where divestitures that the agencies have signed off on have actually either involved delay after delay or in some instances failed entirely. We need to be very mindful about those risks and what types of factors create those risks—be it questions around the buyer and making sure the buyer is being more closely scrutinized, or even just thinking about what is the size of the asset package that would need to be divested. If you're getting to, you know, 30, 40, 50 [percent], that starts to look like corporate restructuring. And I think it would be arrogant for us to think that we have the expertise to really be able to see that sort of thing through with confidence. At the end of the day, the risk is always borne by the public if these divestitures fail. It's the public that suffers and I think that's something that we need to be weighing much more heavily as well. We're looking afresh at the FTC's approach to remedies including these instances where we've signed off on divestitures.

I think over the last decade we've seen a healthy swing of the pendulum from a recognition that behavioral remedies can often be ineffective and difficult to

¹¹ Eds: This is a reference to a hypothetical ratio between the size of the target and acquiring entities.

administer. I think we also need to be thinking about structural remedies through that same prism and be identifying instances in which we think that those have really failed to preserve competition. I think in the healthcare context the stakes are particularly dire, given that we can see the emergence of healthcare deserts, like in rural communities with high prices and staffing shortages. I mean this is really life and death stuff. This is a context in which we are particularly sensitive to these concerns.

Glick: Besides hospital mergers, in what other areas of healthcare do you think antitrust needs to play some role? Give me the top two.

Khan: I think the list is quite long. As an agency we've noted that drug prices are an area of big concern. Generally, there are a lot of actors involved in determining how drug prices are set. The pharmacy benefit managers are some of those, as well as drug manufacturers.

We're also looking closely at the role of private equity and, in particular, areas where we've seen PE roll-ups¹² in the healthcare context. We've seen some troubling research suggesting that there is serious quality degradation that has resulted from PE roll-ups in the healthcare space, including things like increased mortality rates at nursing homes. Again, the stakes here are high and it's something we're looking at closely.

Glick: I know the FTC and DOJ are in the process of revising the horizontal merger guidelines, and I don't want you to give away any secrets, but can you tell us anything about how the revision process, generally, is going to try to take into account the difficulties raised by mergers involving digital platforms?

Khan: The revision of the merger guidelines is really a signature project for both of our agencies. We're now almost a year into it and our teams have been taking a very close look at the underlying case law and identifying how we can better bring these guidelines into conformity with the underlying case law. Also, we're trying to make sure that we're learning from commercial realities and making sure that we're not seeing a big gap between how our guidelines are conceiving of how market power is attained through mergers and what we're seeing in the real economy. Digital platforms of course have emerged as such a key intermediary, an artery of commerce, and so the stakes with those in particular are high.

I think we've seen how at the turn of the century there was an assumption that digital markets are fast-moving and so we should really err on the side of being hands-off because any instances in which firms would acquire market power would be quickly dissolved through new entry. I think we've now seen that not only did those assumptions not hold, but, in fact, digital markets may be characterized by certain features that actually caution earlier action or greater action to prevent markets from tipping and from incumbents locking in their market power in ways

¹² Eds: A private equity roll-up (PE Roll-up) is the process of acquiring and merging multiple smaller businesses in the same industry into one larger consolidated company. See generally Sajith Mathews & Renato Roxas, *Private Equity and Its Effect on Patients: A Window into the Future*, INT'L J. HEALTH ECON. & MGMT (2022), <https://link.springer.com/content/pdf/10.1007/s10754-022-09331-y.pdf> [<https://perma.cc/6XG4-EEYW>].

that can make competition much more difficult. I think we've been going through a process of revisiting those assumptions and determining how things like network externalities and network effects should be considered in the analysis.

I'd also say, more generally, that I think there's an interesting way in which we see some of these platforms make serial acquisitions or acquisitions in unrelated markets, and that's an area of analysis that I think really requires greater thinking and for the agencies to be engaging in that exercise. Back in the 1970s and 1980s there was a robust discussion about what were then known as "conglomerate mergers." The FTC was very much involved in thinking about how the merger laws should apply in the context of conglomerates. What happened was that we ended up seeing divestitures and the breakup of these conglomerates. That discussion about how to think about when incumbents enter unrelated markets hasn't really occurred in the same way. Unlike in the Industrial Age when you would see certain types of diseconomies of scale hit such that there would be more obvious limits to when a particular firm might enter into an infinite number of markets, I think the dynamics in digital markets are different. Those diseconomies don't hit in the same way or just hit much later, which really compels us to think afresh about how to approach instances where you have dominant platforms that are engaging in all sorts of lines of business, including through mergers and acquisitions. It's something that's top of mind for us.

Glick: Just following up on what you said about serial acquisitions, suppose they're horizontal but they're really small in nature and then they happen one after another like a "drip, drip, drip" sort of situation. And then at some point there's a tip and there's dominance on some aspect of a platform or the whole platform. How do you handle situations like that?

Khan: I think at the very first stage you need to know that these transactions are happening. The FTC actually did a study looking at acquisitions by five big technology platforms and found that there had been over 800 of these acquisitions and many of them had not been reported to us because they didn't meet the HSR¹³ threshold.¹⁴ I think there are questions around how we make sure that the mergers that we are being notified of actually include some of those potentially smaller deals. We've also seen certain types of avoidance devices that have been pursued with an eye toward sidestepping HSR. I think there's an opportunity to be tightening up there. I think more generally the role of data in these markets and the way that that can also enable tipping is something that we need to be more sophisticated about.

The FTC over the summer actually filed a lawsuit seeking to block Facebook's, now Meta's, acquisition of Within [Unlimited],¹⁵ in the virtual reality space. That's

¹³ Hart-Scott-Rodino Antitrust Improvements Act of 1976, § 7A, 15 U.S.C. §18a.

¹⁴ Eds: "When Congress passed the Hart-Scott-Rodino Antitrust Improvements Act of 1976, it created minimum dollar thresholds to limit the burden of premerger reporting." Premerger Notification Office Staff, *HSR threshold adjustments and reportability for 2022*, FTC (Feb 11, 2022), <https://www.ftc.gov/enforcement/competition-matters/2022/02/hsr-threshold-adjustments-reportability-2022> [<https://perma.cc/ZM43-P2ZL>].

¹⁵ See Fed. Trade Comm'n v. Meta Platforms, Inc., No. 5:22-cv-04325-EJD, 2022 WL 16637996, at *1 (N.D. Cal. Nov. 2, 2022).

an area where it's now publicly known that we've been looking. I do think that, more generally, these moments of potential technological transition can be really important because they are oftentimes the biggest opportunity that new entrants have to come in and dislodge incumbents.

We know going back to *Microsoft*¹⁶ that those moments of transition are when the incumbent can feel most threatened and then engage in potential unlawful acquisitions or other types of unlawful conduct to maintain the monopoly even during the period of technological transition. Inasmuch as we are seeing that period of technological transition—be it in the context of the cloud or voice assistance or virtual reality—with these new technological contexts and the potential emergence of these new platforms, we have to be especially vigilant across the board. Particularly in the merger context too.

Glick: A lot of these mergers are vertical. The FTC has been active recently in challenging vertical mergers. For example, the Nvidia-Arm¹⁷ litigation and the Lockheed-Aerojet¹⁸ deal. What does the FTC learn from those experiences?

Khan: Those were both lawsuits that we filed late last year. Both also led to abandonment, so we didn't actually even end up going to trial. Both of those were very significant for our agency as there had been an assumption that vertical mergers in general are likely to confer significant efficiencies. We should again err on the side of under-enforcement there. I think we've seen a whole set of instances in which either those efficiencies haven't materialized, or if they have, they have not been passed on. Also, [we have seen] a whole set of harms that can emerge, be it some of the traditional ones, like foreclosure or the sharing of sensitive information, or just more generally certain types of conflicts of interest. There's been a ton of empirical research and evidence that shows that we really need to be scrutinizing these vertical deals much more closely.

I think this also really touches on the issue of remedies. We need to be, particularly in the vertical context, extremely wary of behavior and structure and make sure we're being mindful about when these will or won't work.

This is another area where we've been taking a very close look at the underlying case law to make sure that the case law that is still on the books is actually the case law that we're using. I think there have been instances in which certain renditions of the merger guidelines have offered an articulation of how we will scrutinize deals that have not actually made full use of the laws that are on the books, including in the vertical context. Again, as we revise the merger guidelines, making sure that the guidelines are fully conforming to the underlying law is going to be a key priority.

Glick: So, you're going to take seriously the Supreme Court precedent on vertical mergers that's never been overturned, but is just ignored?

¹⁶ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

¹⁷ *Nvidia/Arm, In the Matter of*, U.S. FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/browse/cases-proceedings/2110015-nvidiaarm-matter> [<https://perma.cc/8RHX-MNQ2>] (last visited Jan. 16, 2023).

¹⁸ *Lockheed/Aerojet, In the Matter of*, U.S. FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0052-lockheedaerojet-matter> [<https://perma.cc/P6KU-7DKS>] (last visited Jan. 16, 2023).

Khan: Yeah, as a general matter, we as enforcers don't think it's our position to just ignore the case law on the books. Our teams have been taking a very close look at that.

Glick: All right, here's a more difficult question for you about conglomerate mergers since you raised that issue. Would the FTC consider a challenge to a large conglomerate merger? Say, for example, Walmart and Apple, a situation where the competitive overlaps are pretty small, but the resulting size of the post-merger entity is enormous. What would be your thinking in a situation like that?

Khan: I mean without weighing in on any specific deal or hypothetical deal, the law says that deals that may substantially lessen competition are illegal, and I think it's up to us to think carefully about what are the potential dimensions of competition. How do we make sure that we're not just being one-dimensional? And not just looking at things like horizontal overlaps or even traditional vertical relationships. Again, especially in the digital economy, the way that firms are interrelating to each other becomes much more complex than just horizontal or vertical. We need to think about all of those dimensions, as well as the role of data and how that can also factor into how markets can tip or lead to adverse competitive effects.

Glick: Okay, can you tell us anything about the FTC's recent rulemaking regarding commercial surveillance and data security? I guess my question would be, what problem or problems specifically is the FTC trying to fix with the new rule?

Khan: This is a rulemaking proceeding we launched in August looking at what we term "commercial surveillance and lax data security practices." This is a rulemaking process that's proceeding under our Mag-Moss authority,¹⁹ which requires us to start by issuing an advanced notice of proposed rulemaking ("ANPR"). We've issued a whole bunch of questions to start building a record. Those questions touch on a whole set of practices. The reality is that the digital economy has been allowed to evolve in a way where many firms have these behavioral ad-based business models that are basically incentivized to endlessly vacuum up user data. That can create incentives that can be seriously at odds with user privacy and with user security. One thing that we're thinking about is this concept of conditional access. When are firms really conditioning access to their products or service? Are users agreeing to be endlessly surveilled? There are other types of practices that the ANPR also looks at, including the role of automated decision-making technologies, algorithmic bias and the ways that these practices can affect particular communities, including children and teens. It's at this stage that we're looking quite broadly.

But the goal is really to think about business incentives, how to make sure that users' privacy and security are protected, and whether certain types of business incentives may be misaligned with that. I think this is another area where we realize that timely intervention can be critical, including on the enforcement side, to ensure that certain types of business models or technologies or business practices don't get so widely adopted and entrenched. Especially as we see technologies relating to

¹⁹ See Magnuson–Moss Warranty Act of 1975, 15 U.S.C. §§ 2301–2312.

biometrics and facial recognition, that's another area where we're looking closely. It's going to be a major project for us, this rulemaking.

We're also, as part of our data security work, thinking hard about substantive limits. A lot of the kind of privacy and data security frameworks in the past have been focused on this idea of notice and consent, where if firms are making adequate disclosures about their data practices and obtaining at least nominal consent, that can be sufficient. I think we've seen time and time again, especially as these technologies have become so critical for navigating daily life, that type of notice and consent framework can in some instances be quite inadequate. We're keeping all of those things in mind as we pursue this rulemaking.

Glick: Okay, independent of the rulemaking, do you see any potential antitrust actions that could help achieve greater privacy on the internet? I think that's difficult because the more people that are competing, the more people that are surveilling. It seems like it increases the surveillance, not decreases. But do you see a role for antitrust?

Khan: I think this goes back to the very first question that you asked about unfair methods of competition because it's that type of exercise that is really identifying what are the dimensions on which firms are or are not permitted to compete. Should we be having firms competing on who can surveil users the best? Or who can undercut their workers the most? Or do we want to have companies compete on dimensions of privacy that are actually better serving consumers or workers? I think this kind of relationship between competition and privacy is a really interesting question.

In the FTC's conduct lawsuit against Facebook,²⁰ which was filed before I arrived at the agency, one of the allegations claimed that Facebook's practices to maintain its monopoly ended up degrading privacy. There was a moment at which potential practices that were more privacy sensitive by Google actually also ended up influencing Facebook's conduct. There was a pretty clear relationship just within the complaint between less competition and less privacy, and instances where there was competition actually incentivizing Facebook to promote greater privacy. When the revised complaint ended up surviving the motion to dismiss earlier this year Judge Bosberg actually acknowledged that privacy degradation can be a cognizable harm in antitrust, which was an important step forward. But this is an area that I think continues to require more thinking.

The U.K. has actually been a leader in this space, where their Competition and Markets Authority, and their ICO [Information Commissioner's Office], their privacy enforcer, have been developing a very deep relationship to be able to identify the instances in which competition may promote privacy and what are the instances in which it can undermine privacy. I think we've also recently seen some troubling allegations that some pro-privacy policies that firms have been announcing may also have an anti-competitive underbelly. I think that's another area we need scrutinize

²⁰ *Facebook, Inc., FTC v.*, U.S. FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0134-facebook-inc-ftc-v> [<https://perma.cc/Z6RE-CYBN>] (last visited Jan. 16, 2023).

closely to make sure that firms are not just laying out one set of policies for third parties around data collection, but a different set of policies for themselves in ways that may nominally promote and protect privacy but also undermine competition. That's something that's top of mind for us as well.

Glick: Recently you gave a talk at the 2022 Fordham Antitrust Conference and you talked about an interest in stronger structural presumptions for mergers. I'm wondering if you're getting any support from antitrust economists on this front. I'm thinking about the 2017 paper by John Kwoka,²¹ which shows that just using concentration and changing concentration alone is a pretty good predictor of post-merger price changes. Are there other economists that are starting to become supportive on this issue?

Khan: We've been extremely fortunate to actually have John Kwoka at the agency. Last year he came on board as Chief Economist to my office and it's been really fantastic to have the benefit of his thinking and his scholarship, both as we pursue a revision of the merger guidelines, but also as we take a fresh look at our approach to remedies.

We're certainly looking to learn from and follow empirical evidence, inasmuch as there has been work showing that the structural presumption is important. Actually, the shift away from that has been quite harmful to merger enforcement. That's something that we're learning from.

We, over the last year, have been collecting public comments as part of our revision to the merger guidelines and so we're grateful to receive comments from a really broad set of people, including scholars and economists. One thing that we really tried to prioritize this time around as we pursued the revision of the merger guidelines was ensuring that we're actually hearing from a broad community and not just from a narrow insular band in D.C. and the defense bar. We really made an effort to do listening sessions with people who've been affected by mergers and can speak very directly to their effects. We had one [session] looking at the effects of mergers in agriculture and another one looking at the effects of mergers on health care. We wanted to make sure that we build out a well-rounded record that we draw from that fully informs our guidelines and makes sure that they reflect the day-to-day effects and commercial realities of these deals.

Glick: Well, Lina, I'm out of questions so thank you very much for speaking at our conference. We were honored to have you today.

Khan: Thanks so much for having me and I hope to see many of you in person soon.

²¹ John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTRITRUST L.J. 837 (2017).