**Public Roundtable Discussion Series on Regulation & Antitrust Law**
Session Two: Antitrust Consent Decrees

*Thursday, April 26, 2018*

**TRANSCRIPT PART TWO**

**MAKAN DELRAHIM**: Thank you for being back. We're joined by our Chief Legal Advisor of the Division, Dorothy Fountain. It's within her unit where the Office of Decree Enforcement is. And she has also been spearheading, along with, oh, a good 30, 40 other attorneys, the whole consent decree review process.

So I'm personally grateful for the last at least six, seven months where she has been working. She has created a whole database to digitize these consent decrees. They go back over 100 years. We are looking at the products, the specific provisions, the courts, the duration, the various terms.

There's a part of me that likes to think of myself as an academic. I think it would have incredible value for somebody to look at these once we're through with them and take a look at the history of some of these. They're not only entertaining, they're, I think, pretty informative. And I think we will learn a lot.

Let me ask—start where we left off about post-merger studies. A retrospective, I think, is always useful for us to learn from various remedies we have done. One, the easy answer, I think, is should we be doing them? Who should be doing them?

How should they be designed? And what should be the elements of such a study from which we in the public could benefit from it? And look at what we're doing that might be wrong or what we're doing that's good that we should continue to do. George, you want to start us off?

**GEORGE SLOVER**: Sure. Yeah, I think it's a great idea. I think it obviously takes some resources to do a retrospective when you're trying to focus on what's going on now, too. But I think you can learn from that.

I think who does it may not be as important as that it's peer-reviewed or peer-reviewable. So that if the agencies are doing it themselves, there's somebody who's got access to enough of the same information so that the agency doesn't say, well, we think we've done a really good job, and we really can't share with you all the confidential details that prove that. I think there are people on the outside who would love to be a part of that. And so I think your idea of using the— what—

**MAKAN DELRAHIM**: National Institute of Justice.

**GEORGE SLOVER**: Yeah, using them—

**MAKAN DELRAHIM**: The Office of Justice Programs.

**GEORGE SLOVER**: — as a conduit for that is one idea. I know there are people in academia who would love to be able to do that. John Kwoka has already done a good stab at that, I think. And there are others like him who would like to be involved.

I think it's important to try to figure out— you go into one of these merger investigations – and it's all predictive, and "likely," "may." And it's kind of developed into a higher level of proof being required than may be intended originally under the law and the incipiency standard.

And you're making judgments about what's going to happen. And you're letting a merger go through where you had a lot of concerns about it. And you're kind of hoping for the best, and hoping that you figured it out right. And if you didn't, it's important to know that.

**MAKAN DELRAHIM**: Joel Klein had established, on the international front, the ICPAC on international competition, which had a lot of great work that was done at the intersection of trade and antitrust law, headed by Jim Rill, former AAG. Which led to some of the international convergence efforts that we have now and led to the International Competition Network and some of those studies. There was both trade lawyers, practitioners, former agency officials, as well as antitrust.

Would something like that—where a public advisory committee established by the Division, made up of economists and practitioners— make sense? Or do those have— structure like that have a limitation to do that? Jon, what—

**JON JACOBSON**: So I like the idea. It's critical to have balance. Ideological balance in these issues in particular is an issue that we struggle with at the ABA. And I would think you would want to take some care on that too.

The big challenge is going to be the data and making sure that what comes out of it is not purely anecdotal, which may be difficult. But to the extent there can be data that generates some macro conclusions, I think that would be awesome. I'm not optimistic that that's possible. But it's something to strive for.

**MAKAN DELRAHIM**: Let me throw that to our two economists on the panel. You guys know how to come up with data? What do you think?

**JEFFREY EISENACH**: Well, you mentioned economists. And I was going to say, there are two of us in favor of having economists on the panel.

[LAUGHTER]

At least.

**DIANA MOSS**: Are you going to let me go first?

[LAUGHTER]

Go ahead, Jeff.

**JEFFREY EISENACH**: So two things. One is understanding the effects of all these decrees over time will be important. And I think the kind of exercise you're talking about would be very useful in that regard.

But the other question is the process of getting rid of them. So let's assume, out of the 1,300, there are some significant number that just don't make any sense in the modern world. Is there a way to do that with a presumption where you would say, if it's more than 50 years old, it is done, unless someone shows up to complain? And is that a more efficient way of achieving the outcome? And I say this a little bit jokingly. But you could repeal two for every new one you enter into.

[LAUGHTER]

If you wanted to think of it that way. But I think keeping an eye on the ball of, actually, let's get these things retired is also important.

**MAKAN DELRAHIM**: Thank you for that. And Dorothy has made sure we stick with it and keep our eye on the ball and moving forward fast. I don't know if there's a presumption that's temporal. I'd be a fan of anything that's older than me should go away, but—consent decrees. That's a joke.

[LAUGHTER]

**UNIDENTIFIED SPEAKER**: 29 years old. 29-year-old.

**MAKAN DELRAHIM**: Yeah, 29. But I think that we should look at all of them and see if the markets have changed. And then look back to the organic question of, is this the appropriate role for us? So, Dr. Moss.

**DIANA MOSS**: So just looping back around to the concept of retrospectives, they can be done not only for merger cases, but for non-merger cases—Section 1 and Section 2 cases. I just want to add to something Jon Jacobson said over here. He obviously raised a major concern about data, who collects it, how is it made available to any sort of third party that might be helping the DOJ with the study?

But I think there is an even bigger problem. And that is—it's a sampling issue. So what cases do you pick?

**MAKAN DELRAHIM**: Right.

**DIANA MOSS**: Right? So you would really, really want to get a very good representative universe of cases that would help inform policy moving forward. So for example, you'd want cases—retrospectives done on mergers with and without consent orders. You would want to study both of those types of scenarios.

You would particularly want to look at merger cases that occurred in industries where there's been successive consolidation. Telecom and airlines are really good candidates for that. So how you structure the sample of retrospectives in the merger space, but also potentially in the Section 2 space and in Section 1 is a little different because of the criminal implications, as opposed to civil violations. But I think those types of well-constructed retrospectives that are part of a well-constructed model for how that vehicle can be used to inform policy would be really, really helpful.

And we have a lot of good ones already. And they've been done by academics. And there have been individual retrospectives, and then meta studies, studies of the studies. And so that process is chunking along very nicely. But some codification and formalization of it would be really useful, I think, in the agency context.

**MAKAN DELRAHIM**: That's a good point. Dave.

**DAVID WALES**: I have a slightly different view on that. (LAUGHING) Yes. Surprise, right?

As you know, the Federal Trade Commission has the ability to conduct studies by mandate and has done that in more of a limited capacity. They've done multiple merger remedy studies, most recently last year. It's hard to argue with evidence-based enforcement. And it's hard to argue that it would be bad to have more data.

But I think you have to be very careful as to how ambitious that can be, because you're a law enforcement agency, right? You're not a study agency. And so you have limited resources.

And I think it's hard to—I mean, you obviously can design studies and go look at tons of stuff. But I don't think you have the resources or time to do that. And so I this is something that should be very targeted and very specific.

I also think data is a huge problem when looking at mergers. Part of my concern are the costs to companies. This could entail going to third parties and saying, hey, we need data from you. We need you to tell us how the merger went. You are forcing the companies to spend resources and time to comply with a subpoena or something similar. That has real costs.

The other concern is that this could entail very confidential information. And so I don't know how you would obtain and use this data—this is not China, right? We can't just demand tons of data and use it as we like. So I think there's a real limitation on what private parties can do to participate in that kind of study.

I would also have a hard time, saying, "hey, guess what, third party," we're going to have McKinsey or all of these other third parties see your confidential data. I would have some real concerns about that.

At the same time, I think there's been some really interesting work done, including the 2017 FTC. It definitely contributed to the body of knowledge on merger remedies. And so I would

definitely encourage there to be more thought about how to get the evidence in an efficient and appropriate way that would inform the Division going forward.

Maybe you could have the Division get the data and look at it itself, and do an analysis that is kept confidential, but some of the non-confidential information is shared with broader constituents and members of the bar. Obviously, a lot of the organizations sitting here might be ones that could provide insights on that.

**MAKAN DELRAHIM**: Would a simple analysis of HHI changes be at all informative, do you think?

**DAVID WALES**: That's a pretty crude tool, in my opinion. I think that, obviously, as you know, a merger remedy's goal is to fix the anticompetitive harm that would have occurred but for the deal.

**MAKAN DELRAHIM**: Right.

**DAVID WALES**: And so you can imagine cases where the remedy was successful in that goal, but the HHIs went up for other reasons—e.g., market failure, companies buying other companies, potentially. So I don't know that analyzing just HHIs would really give you much. And the analysis would also depend on how you define the market. There's a lot of real challenges there.

**MAKAN DELRAHIM**: It may change over time.

**DAVID WALES**: Yes.

**JON JACOBSON**: One fact that the data should be available for, that may be relevant to some of this, is entry. So look at post-conduct or post-merger effects on entry. That's less difficult.

And it doesn't answer all the questions. It doesn't answer price. It doesn't answer output. But that is something that can be looked at in, I think, pretty much every case.

**JEFFREY EISENACH**: So one point I wanted to make and I make briefly in the written comments is the Tunney Act requires a competitive impact statement for every consent. So presumably, we have competitive impact statements. Those are frankly not as substantial as I think they ought to be. And that's another topic going forward, maybe.

But looking back, one place to start would be to look at the competitive impact statement. What did it predict? And what happened?

**MAKAN DELRAHIM**: Interesting. I had not thought about that, but that's a good point. I know that Mr. Feldman thinks there's just broad consolidation that should have been stopped in the first place. Anything you want to add on this about if you were going to design a study to examine such concentration increases? Is that something that you think would be good? And

who should be the best person to do such a thing, other than the Open Markets Institute, of course?

**BRIAN FELDMAN**: Naturally, yeah.

**MAKAN DELRAHIM**: Yes, of course.

**BRIAN FELDMAN**: These are all great points that have been discussed. In terms of HHI, I do agree that there are some problems in terms of that as a proxy. I do think it is valuable—is that that's a really great way to see if barriers to entry have been raised before the deal and after the consent decree has been imposed. So that's something I would favor.

And as well, I think that as we've seen with the work of John Kwoka on hospital consolidation—his results showing how the market has shifted from five to four hospitals. And that raised prices, then informed the agencies going forward in terms of blocking deals. So I think that they can be very instructive tools.

**MAKAN DELRAHIM**: Great. George, your statement mentioned that when using behavioral remedies in merger decrees, since the merger is forever, the behavioral decree provisions should also be perpetual. Correct me if in any way we have misstated of embellished upon what your view is. Do you think there are limits to the rule to account for the changes in the marketplace? And how should that be implemented?

**GEORGE SLOVER**: Oh, yes, definitely. And the point that I was making is that having an arbitrary shelf life for behavioral remedies that are designed to address the structural problem—that the structural problem is forever. And to say that we're going to sunset the behavioral protections after a certain period of time leaves the structure problems still in place. So the fact that it sounds so strange—and I think I also say this in my written statement . . . The fact that it sounds so strange to talk about having behavioral remedies that never end sort of points out the ambitious role that you're seeking for these limited-time behavioral remedies to play in fixing a permanent structural problem.

**MAKAN DELRAHIM**: Tough to disagree with that. Jeff, you've commented about the timing issue.

**JEFFREY EISENACH**: Well, don't you have to think about the definition of the word "permanent" there? So if a market is changing rapidly, there's no presumption of permanence to the underlying problem. And so I think the type I, type II error framework here can be useful.

What is the likelihood of a decree, over time, outliving changes in the marketplace and becoming harmful as opposed to assuming we can design a decree which is beneficial tomorrow and next week and even next year and even five years from now? At some point, the level of certainty around that benefit-cost analysis has to decay. And in some markets, maybe faster than others.

**GEORGE SLOVER**: Yeah. And that, I think, is the point that I led with. This is in the context of having some mechanism for going back after an appropriate period of time and deciding whether the decree is still necessary, whether it's still working effectively, whether it's causing more problems than it's solving, whether it needs to be relaxed or altered in some way to be more effective. So I absolutely agree that, in my saying that they should be— what I meant was that you don't start with a time limit on the protections that you are creating to take care of what is a permanent problem, or at least a permanent problem until the market evolves. At some point, you may have a completely different structure in which the decree makes no sense.

**SPEAKER 2**: Can I ask the question whether or not something like in the anti-dumping and countervailing duty context—where this is sort of a sunset review process where, after a certain period of time, there's automatic review process. And then they decide whether or not they're going to continue with the duty or not. Is that the kind of thing that you're talking about?

**GEORGE SLOVER**: Potentially. Although, there's a resource issue here. For example, the MFJ almost immediately led to an unending cascade of requests for exceptions.

And so one of the things you have to think about is how often and for how many of these decrees do you do that? There should be some, I think, minimal threshold for reconsideration. Not just, every year, everybody gets a shot to come in and see if they can get out from what they agreed to. But absolutely, some mechanism for methodically looking at them to make sure they still make sense.

**JON JACOBSON**: So I don't think that this is a one size fits all situation. If you have decrees that-- and there are lots of them in the 1,300 and otherwise that simply say, stop violating the antitrust laws. Don't do it anymore. There's no reason for that to be perpetual. And certainly, five years is a pretty good presumption for that length.

There are other decrees—and these were more common in the past—with fencing-in provisions. And those need to be looked at, I think, in each case to say, how long do we really think these fencing-in provisions provide? There are others that are more structural. So you will license this asset today forever.

And there's no reason why, once that license has been signed, that decree needs to continue further than that. So I think it's a case-by-case situation. But certainly, the point that you've been making, which is that there ought to be a heavy presumption against perpetual decrees, is correct.

**SPEAKER 2**: And what about

**MAKAN DELRAHIM**: Diana has something.

**SPEAKER 2:** Do you wanna-- oh, I'm sorry.

**MAKAN DELRAHIM**: Go ahead.

**DIANA MOSS**: I think one really important point here, in terms of finding guiding principles for these types of questions for decrees, is whether the remedies contain therein—whether it be behavioral, structural, or a combo platter— whether they've been effective in fully restoring competition. I mean, that's the purpose of an antitrust remedy. And full restoration of competition is the best deterrence that the DOJ can find, as a law enforcement agency, to deter future violations. That should be the guiding principle.

So if in filing a complaint and simultaneously negotiating a consent, the DOJ was concerned enough about a violation of the law that a consent went into place. And that consent was in place for perhaps 10 years or 5 years—says something about what the Division's concerns were in the first place. That competition would be harmed by a transaction or a form of conduct, and that needed to be remedied for a period of, say, 10 years in a consent order.

I don't think that closes the door on revisiting consent orders in some cases, much like requests for immunity for the international airline alliances should be reviewed every three years. They're not, but they should be. And we strongly encourage DOT to work on that, and I think you all have as well.

But unless and until the remedy has fully restored competition, it should stay in place. And I guess the question is-- where the rubber meets the road is, how do you determine full restoration of competition? Well, accounting for all of the exogenous factors that spring up around markets and dynamic concepts, like innovation and market entry, and that sort of thing, that's the rub. And that's the difficult part of the calculus.

**MAKAN DELRAHIM**: Go ahead. [INAUDIBLE]

**SPEAKER 2**: So one question I had is the idea of a default period of 10 years, is that an appropriate thing to do? Because, obviously, it's very stock-specific on the market. Is it better to have a situation where there's sort of a baseline expectation of 10 years, but that's a situation that's negotiated as part of the settlement?

**DIANA MOSS**: If I may, just one more comment on this. I think the time period is really critical. And again, I'll refer to DOT's reasoning in these grants of immunity for airline alliances.

DOT specifically shows a five-year period in the Delta-Aeromexico case-- as you all know since you were involved-- because it was a long enough period of time for infrastructure modifications to be made at both airports and for the companies to be able to plan ahead and engage in procompetitive expansion and efficiency-enhancing activities. If it had been shorter than five years, that wouldn't have happened. 10 years, probably plenty of time for all of the procompetitive activities-- for the company to implement those kinds of things.

It's going to depend on the markets. Highly dynamic markets, maybe a shorter or even a longer period of time, depending on what you are talking about. Infrastructure markets, traditional markets, there's more guidance there based on the Division's history. But I think those are some of the key considerations that go into that.

**JEFFREY EISENACH**: I completely agree with what's been said in terms of case-by-case. I just think every market is evolving at a different pace. And every problem is different. So an intellectual property licensing solution may be something that can be very temporary in nature. A more structural kind of problem may require a longer period.

**GEORGE SLOVER**: I was just going to say the same thing. I think it's got to be case by case. And rather than a hard and fast deadline, you might want to have a presumption or some ability to go back and make sure that it's time to get rid of it. And it could be sooner than you expect. Or it could take longer than you expect for not only the competition to be fully restored, but the risk to competition in the structure of the marketplace be satisfactorily resolved.

**MAKAN DELRAHIM**: How should we measure those market changes? Not a one size fits all. However, what should be the analytical framework to examine the change in the market dynamics that we should apply when we look back?

**GEORGE SLOVER**: That's *really* going to be case by case.

**JON JACOBSON**: It is. I think you have to start with the basics— entry, price, and output. I think those are the key considerations. They can be very difficult and impossible to measure or get data for. But I think, going in, those are three things to be looking at.

**JEFFREY EISENACH**: When you look at future markets, for example—Tokyo Electron must have been a lot of fun around here. Looking at those cases, I think the time period is going to depend a lot on the innovation cycle. So you would think about that differently for a pharmaceutical market from a steel market, from a car market, from a market for airplane cockpits, to go back to an old case.

**SPEAKER 3**: I was just going to follow up on the innovation part. You look at entry. You look at price. But how do you measure the benefit or missing the innovation because a decree was in place?

**JON JACOBSON**: Well, you can't. Absent some extraordinary document somewhere-- like The Man in the Gray Suit, where all of the textile manufacturers wanted to put him out of business because his suit lasted forever. So it would depend on the nature of the IP right, the nature of the type of remedy and license or disposition that would be required. But in terms of projecting what innovations died on the vine because we allowed this deal to go through, I don't know how you do that.

**JEFFREY EISENACH**: Well, actually, I think—

**JON JACOBSON**: I'll stand corrected.

**JEFFREY EISENACH**: No, you— I mean, we have done it. So in the one case— which I cite someplace. And I'm blanking on the case. *FTC v. PPT Industries*, 1986.

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This is a case involving airplane cockpits. There were basically two firms that were innovating. They looked carefully at what was the next product cycle.

What would the impact be if one of the two firms was taken out of the market for the next generation of product cycle? And were able to come to some pretty concrete conclusions about that. So it's intensely fact-specific. And it may be, in a lot of cases, you'd be throwing a dart at the wall.

But in many cases, you can actually look at the realities of what's happening in the innovation cycle and make some— I think it's reasonably— it's becoming clearer and clearer where 5G wireless technology is going and how that's going to evolve. It was very foggy 18 months ago. It's less foggy now. It'll be less foggy 12 months from now. So in cases like that, there's stuff happening, and you can predict where it's going to go.

**DIANA MOSS**: Can I just—this is all great stuff, for sure. But I think part of the challenge here is to develop some sort of tractable, reasonable, defensible framework around which the Division would be able to conclude that decree is no longer necessary in a market. And I would-- because it's really a question. What should be measured? What should be looked at?

And here, I think this is actually one really good application of the structure, conduct, and performance paradigm. Start with market structure. Look at entry. Look at concentration, all of sort of the basic structural components that economists look to to determine whether markets are conducive to competition or not.

And then move to all the conduct stuff that flows from that. What have prices done? for example. How has quality changed over time? Are firms in differentiated product markets competing hard, because we see a lot of advertising and head-to-head competition and that sort of thing?

And then the innovation part really comes in at the end. That's the performance part of the deal. So good market structure, procompetitive market conduct generally leads to innovation and efficiencies.

So the structure, conduct, performance paradigm is highly controversial. We were joking about it earlier. Well, I don't joke about it, but other people do.

But it is a very useful construct in which to sort of couch or contextualize an assessment of whether a remedy in a decree has been fully effective in restoring competition. And then providing some basis or launching pad for determining that the decree is no longer necessary, it should be modified in some ways, or it is still necessary. And then maybe go for some structural relief and get rid of all the behavioral stuff.

**SPEAKER 2**: Jon, I know you mentioned something about, we should be concerned about what foreign enforcers take from what we do with remedies. Do you want to expand on that a little bit?

**JON JACOBSON**: Well, it wasn't that long ago that we were really the only antitrust game in town. That's certainly changed, particularly after the fall of the Berlin Wall. My concern is that we have a robust consumer welfare standard here in the United States. And when you go abroad, the phrase "consumer welfare" is used, but it's just not the case. The European Commission views competitors as important as consumers, which is fundamentally different from the way we look at it here.

So when we are having conduct remedies-- which seems to be the European Commission's favorite thing to try to do. I think we need to be very careful about, how is this going to set a precedent for use in Europe or in Asia or in other areas? I think the number of cases where you would want to rethink a remedy because of the international blowback are few. But I think the issue is sufficiently important that it ought to be looked at, particularly for transnational companies.

**SPEAKER 2**: I'm curious whether or not you think that the equation is different for smaller agencies around the world with respect to structural versus behavioral revenues. I heard one agency of a very small group say that we know that all the structural remedies will be done by the big guys, and we're going to be doing the sort of specific behavioral remedies to deal with our small problem in our small jurisdictions. Any thoughts on that?

**JON JACOBSON**: Well, I think if you did an up-and-down analysis of those, you would see a tremendous amount of protectionism from the smaller companies trying to protect particular companies rather than consumers there. And so I view those with some skepticism going in.

**JEFFREY EISENACH:** There's a rent extraction problem there too, as we all know.

[LAUGHTER]

**SPEAKER 2**: Yeah, I think the public interest versus consumer welfare standard is really important if the decree is going to be used for purposes of protecting a collective bargaining agreement on jobs in South Africa or something like that. That's a very different situation than the sort of consumer welfare standard that we're trying to promote.

**JON JACOBSON**: Absolutely.

**MAKAN DELRAHIM**: David.

**DAVID WALES**: I'm going to add quickly, I think what the U.S. enforcers do here matters across the world. The foreign enforcers are watching. Their incentives are obviously different, I think, from time to time, and they may not understand how our system is different in that we have judicial review and that agency settlements are not precedent setting. So I think U.S. enforcers need to keep that in mind.

As one example, I heard that Acting Chairperson Maureen Ohlhausen had commented about her recent trip to China, where someone had said to her, "wow, I didn't realize the U.S. had such a

definitive view on essential facilities." The Chairperson said, well, that's not really the case, and what do you mean by that? The person then quoted the FTC's Bosch consent decree and the MMI consent decree as evidence that this had set U.S. precedent.

What does that mean? I think as a U.S. enforcer you have to consider that perspective. And obviously, whether you agree or disagree with those FTC cases, it is important that foreign enforcers understand what the U.S. is doing and have the proper context. Maybe they won't care and they will use settlements as official precedent anyway.

**MAKAN DELRAHIM**: I think, on that point, one of the reasons that we've been advocating structural remedy where there is one to solve a problem-- because it's certain. It gets that markets back in charge. When you do have and you start getting into the behavioral remedies, sometimes, if you're not exercising the humility that you, Jeff, Maureen, George, and others have espoused— is that you could have a tendency to get into areas that have nothing to do with the actual competition nor something that you would otherwise get with a successful litigation. And you start creeping into other policy-setting goals that, whatever your personal views might be, could begin dictating that might not be the statutory mandate for an antitrust law enforcement agency.

And there was an example I cited recently dealing with refrigeration at a chicken farm someplace. This is the type of thing that isn't a good idea for us to do. But businesses would be delighted to offer those types of things in order to get a deal through. If that becomes the holdup that we do because we have the power to do so. So we need to be very careful not to engage in that.

And that is most dangerous when you're doing it in a behavioral context. And you'll say, look, I'd like— Jon you're creating Coke. I'd like you to have a "Makan" labeled Coke. And that's going to be 20% of your market share.

Will you agree? Sure, we'll agree. We get your deal through. And it's not the appropriate role, except for in that case.

[LAUGHTER]

Bob, is there—Dorothy? Do we have any final general thoughts? This has been incredibly helpful. This is an area that's important, that we have huge segments of the population.

Almost every consumer is affected by some of these consent decrees, certainly anybody who cares about music rolls. That's a subject of our consent decrees. Or bicycle brakes, or likes to watch a movie every now and then, or listens to any kind of music—is affected by what we are doing and what we will do down the road. Who should do them, and what are the effects in lieu of some of these consent decrees? And what should we do down the road, more importantly than anything we'll do retrospectively?

But any closing thoughts you would have, I'd welcome you to share that with us now. And anybody in the public who would like to continue to submit any thoughts or statements for the record of this, we continue to welcome that. Meredith.

**JON JACOBSON**: Makan, I just want to say that it's fantastic that the Division is looking at these issues. And I know these are not the only issues that you're looking at. But you're taking a lot of perceived wisdom from the past and giving it a hard look. And I think that's a fantastic thing. At least on behalf of myself and the ABA, thank you for launching this project.

**MAKAN DELRAHIM**: Thank you. Thank you so much, Jon, for your input. Meredith.

**MEREDITH ROSE**: Yeah. I think, just to echo what John said, we're very appreciative that you are having this broad dialogue about all of these very difficult discussions. And I think probably the one thing we all agree on is that there's no simple answer, which is a particularly unsatisfying result, I know, especially when you get a lot of folks with many opinions in one room. But at the end of the day, this all comes down to differentiations in markets and particular products that have certain systemic issues.

And I think that the fact that we can have these discussions is very heartening, and that we can have them in good faith, and that, fundamentally, we can all agree that this is something that does need a much harder, longer look. Especially when you're dealing with very long-term consent decrees, such as, again, ASCAP and BMI. So just to reiterate, we're very grateful to be included in this and hope to keep working with folks moving forward as I look at these.

**MAKAN DELRAHIM**: Thank you very much. Diana.

**DIANA MOSS**: So again, thank you for inviting us here and for holding these incredible conversations. They are very helpful to the advocacy community. I'm sure, as well, to enforcers and to the antitrust community, more broadly, and the business community.

The antitrust laws are here to support open and free markets, which is a fundamental underpinning to our economy and very much incorporates democratic values. Enforcement of the antitrust laws is vital. Vigorous enforcement of the laws is vital for protecting consumers, entrepreneurs, innovators, everything that makes our market system work.

Antitrust enforcement, we believe, works best in the frame of law enforcement with optimal deterrence in mind. Structural remedies are generally to be preferred in achieving that goal. They're not a quick fix, but they are a one-time fix. And enforcers can go off and open new investigations and look into other types of concerns and conduct. Behavioral remedies don't achieve that for the agencies. They tie them up in a monitoring and regulatory function.

Finally, I would just say that, in moving forward with this project, I think we've seen here today that there are some very, very different consents present very, very different types of problems and concerns. And there has to be a way to develop a framework to triage what these consents look like. And I hate to say "buckets," but what potential buckets they fall in.

Because this is resource-intensive, for sure. And the Division has limited resources, as we know. But to the extent that this process gives the Division better tools to engage in better enforcement, more vigorous enforcement, more creative enforcement moving forward to protect markets and consumers, then we would heartily endorse that. Thank you.

**MAKAN DELRAHIM**: Thank you very much. Anybody else? George.

**GEORGE SLOVER**: Yeah. Rather than to try to repeat what Diana has already said so well, I'd just like to echo my thanks for being invited and being a part of this discussion. No doubt, there's a lot of underbrush that can be cleared out. I think the review that you're doing is good. I hope you'll save all of the decrees that need saving and improve the ones that could stand some improving. And we look forward to working with you on that.

**MAKAN DELRAHIM**: Thank you very much. David.

**DAVID WALES**: AAG Delrahim, we just want to thank you for letting us participate on behalf of the Chamber of Commerce. This has been a fantastic discussion. And we look forward to further dialogue. Thank you.

**MAKAN DELRAHIM**: Thank you very much. Brian.

**BRIAN FELDMAN**: Yes, thank you again for the invitation. Open Markets is pleased to be here and to continue engaging with the department. Just two quick points that dovetail very closely with those that Diana made: first, oftentimes, the upfront costs of litigation can yield savings in the future.

And I believe a lot of this relates to the point that Mr. Eisenach had made regarding decision theory and type I and type II errors. And I do just want to point out one thing is that embedded in that framework, although it sounds mutual, is the idea that markets are contestable and that they can self-correct over time. In some cases, this is true. But over time, as we've seen as certain markets have become more concentrated, this is less and less the case. So I do think that there is a harm to under-deterrence. And in that case, imposing antitrust laws first is a way to stall economic concentration.

**MAKAN DELRAHIM**: Thank you. It's certainly truer in those markets that are not regulated, that limit the entry of new entrants and new innovation. So the freer the markets are-- and that's ultimately, hopefully, our goal. Dr. Eisenach.

**JEFFREY EISENACH**: Brian, thank you for that. And it set up exactly what I wanted to say, which I will keep extremely brief. The great thing about antitrust is that we all gather here within kind of a generally agreed upon framework of analysis and debate over points like that and bring evidence to the table. And that isn't necessarily the way policymaking works in other areas of government. So it's great to be able to sit with a group of thoughtful people and have a substantive discussion.

None of us is perfectly right, but we all learn from it. And I appreciate the opportunity to be here. And I think you're doing a great thing by organizing this. So thank you.

**MAKAN DELRAHIM**: Thank you again. Let me just remind everybody that May 31st is our third roundtable. And it's on anticompetitive regulations, both federal and state. And we welcome public commentary on this.

These things could be state bars. They could be medical licensing boards that somehow limit markets. They could be various regulations. You mentioned some in the Department of Transportation. It could be energy, telecom.

But we have a very active competition and advocacy role in the financial services and other areas where we have provided comments. We continue to do that. We're doing it in a much more robust way.

We're filing statements of interest and private actions around the country. You've noticed the one down in Florida against the Florida Bar for limiting a technology company because they're practicing law. But it's really competition for folks like us, lawyers, who they'd like to limit. And we've expressed our views on the limits of the state action doctrine and other immunities.

But we would welcome public comment and continued participation like this and a great dialogue. So I thank you for that. And I thank you for being here today.

[APPLAUSE]

Thank you.

[APPLAUSE]

Thank you.

[CHATTERING]