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

Thursday, April 26, 2018

TRANSCRIPT PART ONE

MAKAN DELRAHIM: Good morning. I'm Makan, the Assistant AG for the Antitrust Division, and I welcome you guys to the Department of Justice, the only agency in the government named after a moral imperative. General Ashcroft used to tell me that and it made me think through all the departments. And I continue to find that every day to be what we strive for.

Today, we are pleased to continue the Division's series of roundtables on competition and deregulation. I'm joined at the table by several of my colleagues from the Antitrust Division here at DOJ—Rene Augustine in our Front Office and Doug Rathbun in our Competition Advocacy and Policy shop, Roger Alford, who is our International Deputy AAG, and Bob Potter, who is the Chief of our Competition Advocacy and Policy Shop, and, of course, Daniel Haar, who is the Assistant Chief of that shop, formerly with our Appellate Section, amongst others of the division.

I would like to thank the distinguished participants in this roundtable discussion and their organizations for their participation today. It's an honor to have with us so many thought leaders in the areas of antitrust, many of whom in one capacity or another I've had the great honor and pleasure to work with. Let me also thank everyone who has made the written submissions that will be part of the record. I'm encouraged by the strong turnout of the individuals, not only in this audience interested in these topics, but by the comments the public has submitted and continues to engage with the Division on.

Today's roundtable will focus on antitrust consent decrees and on deregulation through different approaches to such consent decrees. Just as this roundtable is in the middle of our three part series, today's topic is central to our goals of streamlining antitrust enforcement. I believe antitrust enforcers should approach using consent decrees consistent with a view of the Antitrust Division as law enforcement agencies, not a regulatory one.

As Justice Robert Jackson once posited, quote, "We should not spend great sums to obtain decrees which are economically unenforceable, and when carried out in form, are often only lessons in futility." Former Assistant Attorney General of the division William Baxter noted in 1982, quote, "decree provisions that were perfectly sensible and desirable when entered can be unreasonable today if they had been successful in promoting competition where there previously was none. Where competition has been restored in the relevant market, the continued effectiveness of such provisions serves only to restrain competition, not to promote it." He also stated that "Our understanding of industrial organization and the dynamics of competition has improved markedly in recent decades. Many older decrees reflect legal positions that were based upon mistaken economic theories."

I'm happy to report that several initiatives are underway at the Division— an emphasis on structural relief in remedying anti-competitive transactions as the Supreme Court has emphasized repeatedly, improvements to the consent decrees to make them more enforceable and less regulatory, the establishment of the Office of Decree Enforcement, and an initiative to review and terminate legacy antitrust judgments. First, we've announced a renewed emphasis on seeking structural relief when possible as opposed to regulatory behavioral conditions to remedy anticompetitive transactions. Doing so is consistent with the Division's broad emphasis on antitrust law enforcement, not regulation. I'm deeply skeptical that Congress, in enacting Section 7 of the Clayton Act, envisioned a regime in which the Antitrust Division or federal courts would become the overseer of a company with thousands of employees earning billions of dollars in annual revenues and second guessing market competition or future consumer or business behavior.

In Section 7, Congress did not call for illegal mergers to be regulated; it called for them to be prohibited. As Justice Gorsuch reminded us in an opinion just earlier this week, we should, quote, "Start where the statue does." The text of Section 7 is clear. It deems unlawful any, quote, "acquisition" whose, quote, "effect may be substantially to lessen competition." A violation of Section 7 arises in many cases from the acquisition of a company as a whole. But in some instances, a violation comes from the acquisition of one or more parts or subsidiaries.

In either case, the Clayton Act specifically contemplates proceedings initiated by the Department of Justice praying that, quote, "such violations shall be enjoined or otherwise prohibited," end quote. The text specifically contemplates an injunction or other form of prohibition of the violation. If Congress envisioned that anticompetitive mergers should be permitted so long as they are regulated by the Department of Justice or other agencies of the government, it certainly could have said so.

It is therefore unsurprising that many courts, including the Supreme Court, consider divestitures or other structural relief to be the preferred method of remedying problematic transactions. According to the Supreme Court, quote, "Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws" and such relief, quote, "is simple, relatively easy to administer and sure."

The Division's preference for structural relief extends beyond legitimate concerns of administrability and efficiency. As enforcers of the antitrust laws, we have a duty to ensure that the risk of a failed remedy, and thus the harm to consumers, falls on the parties to the unlawful transaction, not on the American consumer and taxpayers. This approach is consistent with the text of the Clayton Act which makes illegal a merger that may substantially lessen competition.

Congress recognized that a risk of harm is what renders a transaction unlawful. Or as the courts say, a quote, "reasonable probability," closed quote, of anticompetitive effects. Where such a risk exists, the role of enforcers or the court should be to eliminate the risk entirely or place that risk back on the parties, not to design elaborate remedies that purport to reduce that risk while still permitting the merged company to retain control over the source of the harm.

Divestiture of the source of anticompetitive harm substantially eliminates the risk of harm. Behavioral conditions merely lower the risk, assuming that they are even effective. At worst, behavioral conditions can fail to curb a company's natural economic incentives to act in ways that harm competition. Most behavioral decrees cure neither the incentive nor the ability of the merged company to exert enhanced leverage gained through an anticompetitive merger. That is particularly true where such conditions require a third party victim to be willing to come forward to challenge the actions of a necessary business partner, potentially scorching their business relationships.

Rational businesses may well decide that paying a higher, super competitive price is better than spending millions in legal fees and risking an unfavorable ruling. That is not an outcome dictated by the free market.

We take seriously our responsibility to protect the American consumer against the risk of harm, as the stakes can be enormous. Some transactions can profoundly transform an entire industry or have a domino effect or precipitating other acquisitions until the competitive landscape has totally changed. Once this has occurred, it is often too late and it's nearly impossible to unring the bell. Behavioral conditions merely muffle the bell's ringing. Divestiture, by comparison, preserves separate control and leaves open the opportunity for independent innovation and collaboration through arms' length transactions.

Turning to the Division's second recent initiative, the Division is incorporating a set of improvements to its consent decrees that will make them more enforceable and less regulatory. The Division has included these provisions in all recent settlements and will include them going forward in settlements of mergers and civil non-merger actions. These include provisions that the Division may establish a violation of a consent decree by a preponderance of the evidence, as opposed to a clear and convincing evidence.

They also include provisions allowing the United States to apply for an extension of a decree's term if the Court finds a violation of the decree. The terms require defendants to agree to reimburse the American taxpayer for the attorney's fees, expert costs, and the costs incurred in connection with any consent decree enforcement effort. In addition, the Division can, after a certain number of years, terminate the decree upon notice to the Court and defendants.

A third development at the Division with respect to consent decrees is the creation of the Office of Decree Enforcement, which I announced at University of Chicago last week. The Office will help ensure compliance by parties to current consent decrees and our enforcement of those decrees.

Yesterday, we announced our initiative to terminate outdated antitrust judgments. Nearly 1,300 such legacy judgments remain on the books of the Antitrust Division and many remain open on the dockets of courts around the country. Some of these judgments are nearly 100 years old. The vast majority of them no longer protect competition because of changes in the industry conditions, changes in economics, changes in law, or for other reasons. The perpetual consent decrees call to mind the famous line from the Eagles' song “Hotel California”: "you can check out any time you like, but you can never leave."

In the earliest consent decrees in the first two decades of the antitrust laws, there was little guidance on what constituted a violation of the relatively new antitrust act. As a result, antitrust settlements played a significant role in providing guidance to businesses on the rules of the road.

TRANSCRIPT PART ONE

Our earliest decrees were almost always perpetual. Why? Simply because that had been the default historically, stretching back at least to the 12th century in agreed-upon judgments inscribed upon vellum much like the perpetual decree from 1599. This is an actual antitrust decree.

It's not that enforcers fail to envision that markets would change or that they assume that antitrust recidivism was extraordinarily high. That's just how settlement decrees had been written for centuries. Assistant Attorney General Jackson challenged the aluminum monopoly in 1937 at about the same time that this department was purchasing substantial amounts of aluminum to provide the impressive detailing and sculptures in this building which I hope you noticed when you came in.

Jackson recognized that the decree the Department entered into with Alcoa 25 years earlier in 1912, perpetually enjoining specific illegal behavior, had not foreclosed the possibility that Alcoa could find other ways to inhibit competition. And it required the Supreme Court in 1938 to determine that the 1912 decree did not prevent the Department from bringing future antitrust cases against Alcoa, which it did.

Periodic reforms of the antitrust laws throughout the 20th century noted the undesirability of perpetual decrees. This is because a decree can be rendered obsolete not only by changes in our understanding of the way the markets work, but also by changes in the laws. The Division long followed the policy of seeking perpetual decrees in cases against per se violations of the antitrust laws. However, certain conduct previously pursued as per se illegal became properly analyzed under the Rule of Reason. Firms bound by perpetual decrees based on an outmoded per se view of a restraint are unfairly prevented from adopting policies that, if adopted by rival firms and analyzed under the Rule of Reason, may be perfectly lawful and procompetitive. Such an imposition, obviously, denies consumers the benefits of market competition.

It's important to remember that consent decrees arise from a collusion-- from a conclusion that a transaction or behavior was illegal. At the same time, a cornerstone of the American legal system is that settlement is favored. And indeed, most lawsuits are settled before trial. In this regard, antitrust is no different than any other areas of the law. Parties often desire to abide by the law. And they seek ways to pursue their objectives within the bounds of what that law allows.

In this way, consent decrees involve putting into effect a settlement where the parties bring their conduct or transaction to conform to the law in the context of an enforcement action. The agencies find the right tools to address the issues presented. However, the tool picked for a company in 1920 may not be the same tool that's right for the job today. So when a decree from 1920 is still in effect, binding companies that are successors of, or successors of the successors of, the companies in 1920, the consent decree can distort incentives in the marketplace dynamics and present complex and expensive compliance challenges for companies.

We remember from history reading of the Gilded Age steel trust, the railway trust, the oil trust— corporate forms that gave us—

TRANSCRIPT PART ONE

We still have in effect a consent decree concerning what the Department quite literally described in 1930 as the bicycle coaster brake trust. The various successor companies today make cabinets, power drills, filters, and many other products likely not in competition with each other, yet are still bound by the same consent decree crafted for the sake of competition in the coaster brake market.

To facilitate the termination of these judgments, the Division is reviewing all of its legacy judgments to identify those that no longer serve to protect competition. The Division has assigned each judgment to a Division attorney who will examine court papers, internal case files, and publicly available information to determine whether each judgment continues to serve competition.

The Division has already identified many judgments that it likely will seek to terminate unilaterally after a public comment period. It will begin its efforts by proposing to terminate a set of judgments entered by the federal district courts in Washington, D.C. and in Alexandria, Virginia.

Today's discussion will consider the perspectives on these issues and others. And it's important that we who work in the antitrust agencies are aware of these perspectives, for a consent decree by its own terms can be entered only with the consent of the parties.

Our first session this morning will focus on behavioral consent decree provisions. We will look back exploring how consent decrees have been used, the trends and lessons learned from various approaches. Then we will look ahead and examine how enforcement should employ consent decrees going forward.

In the second session, we will focus on the usefulness of perpetual consent decrees and on terminating outdated ones. More specifically, we'll consider what effects perpetual decrees have on market competition, how companies subject to these decrees adjust their conduct, and what role industry reliance on a decree should play with respect to the decision to eliminate or retain a perpetual decree. This session will also consider specific perpetual decrees. Perhaps most prominently that affects every one of our lives are the two music decrees, the ASCAP and BMI decrees up in New York.

In addition, we will welcome our panelists' insights on issues the Division should consider on carrying out the judgment review project.

And now for the logistics. I will ask each of our panelists to provide a brief opening statement immediately after I introduce them. At the conclusion of the opening statements, we'll begin the first session and discuss behavioral decrees. We'll then have a brief ten minute break and return for our second session. At the conclusion of that, we will have a wrap up in which each panelist will have the opportunity to make a brief closing statement.

Now let me just turn quickly to our panelists. And thank you, once again, for your willingness to participate today and to share your views on these important issues. We appreciate not only your time, but your views and your considerable input into this process.

TRANSCRIPT PART ONE

On our left, Diana Moss, who is representing the American Antitrust Institute and has been the President of the AAI since 2015. Her work spans both antitrust and regulation with industry expertise in electricity, petroleum, agriculture, telecommunications, and healthcare. Before joining AAI in 2001, Dr. Moss was at the Federal Energy Regulatory Commission. From '89-'94, she consulted in private practice. Dr. Moss holds a master's degree from the University of Denver and a PhD from Colorado School of Mines.

I'll continue with the introduction. Representing the Chamber of Commerce is David Wales, a partner with Skadden Arps. Mr. Wales has the distinctive experience of serving as a senior official in both US antitrust agencies and more recently as the Acting Director of the FTC's Bureau of Competition in 2008, 2009, and as Counsel to the Assistant Attorney General in the Antitrust Division in 2001-03. He regularly speaks and writes on antitrust issues and has held various leadership positions at the American Bar Association's Antitrust Section.

Representing the Consumers Union, the Advocacy Division of Consumer Reports, is George Slover. He is a senior policy counsel there. Mr. Slover works on competition policy, regulatory policy, and other consumer protection issues. Previously, he spent 11 years in our Competition Policy and Advocacy Section at the Antitrust Division, previously called the Legal Policy Section, bookended by two stints at the House Judiciary Committee. He holds a JD and MPA from the University of Texas at Austin,and we're glad to have him back at the Department.

Representing the American Bar Association, the ABA Section of Antitrust Law, is the Chair of that section, Jonathan Jacobson, who is a partner with Wilson Sonsini Goodrich & Rosati. Jon's made significant contributions to the development of antitrust law, including just on this past Tuesday where he argued in the Supreme Court, a great honor, in the Vitamin C case. He was appointed by Congress to serve on the Antitrust Modernization Commission. He was the Editorial Chair of the Sixth Edition of American Law Developments and a presenter of the DOJ-FTC IP hearings, a single firm conduct hearings in the merger guidelines workshop amongst other workshops that the DOJ and FTC have held.

Representing the American Enterprise Institute is another old friend, Dr. Jeffrey Eisenach, the Managing Director and Co-chair of NERA's Communications, Media, and Entertainment Practice. He's also an Adjunct Professor at George Mason University's Law School where he teaches regulated industries. Previously, Dr. Eisenach has served in senior policy positions at the Federal Trade Commission and the White House Office of Management and Budget. He has written and edited 19 books and monographs on competition and regulation, submitted expert reports, and testified in federal courts as well as for the Copyright Royalty Tribunal, the FCC Tax Court, several state public utilities commissions, and regulatory bodies in numerous countries.

Continuing on our right, representing Public Knowledge, it's Ms. Meredith Rose, Counsel at Public Knowledge. She advocates for consumer interest in matters of copyright, intellectual property reform, music licensing, and the DMCA. She has participated in numerous legislative efforts surrounding copyright and music licensing reform. And she is a regular participant in the triennial DMCA Section 1201 hearings at the Copyright Office. She is an Adjunct Professor at the great law school at George Washington University and holds a JD and AB from the other great school, University of Chicago.

Representing the Open Markets Institute is Brian Feldman, Senior Policy Analyst at OMI. He researches competition policy and the effects of market concentration on entrepreneurship. His writings on regional inequality, pharmacy benefit manager consolidation, and decline of small business ownership have appeared in the Atlantic, Washington Monthly, BBC Future, among other outlets. Wall Street Journal, The Post, NPR, Slate, Congressional Testimony, and two class action lawsuits have cited his work. Thank you for being here.

And with the US Chamber of Commerce, Sean Heather is the Vice President of the Chamber's Center for Global Regulatory Cooperation. And we thank him for being here.

We also have with the Association of Corporate Counsel, Ms. Mary Blanche who's the Director of Advocacy and Public Policy. And before that, she worked on regulatory advocacy and compliance issues for Deloitte Tax and was an Associate at McKee Nelson and Hogan & Hartson.

So welcome to the Division. I apologize for my longer than you probably anticipated statement, but an important one to have for the record nevertheless. And thank you for indulging. And with that, we'll start with Diana.

DIANA MOSS: Thank you very much. It's a pleasure to be here. Thank you to the Assistant Attorney General and the Department of Justice. Always an honor to be included in these very important discussions. AAI commends the Division for asking these difficult questions and framing a very constructive approach to resolving some of them.

Our comments filed in the record address three major themes— broader issues of enforcement policy that are raised by consent decrees for one. The second is the disadvantages of behavioral remedies contained in consent decrees. And third are questions and considerations to help guide the DOJ's policy on termination or modification of the perpetual decrees. So I'll speak very, very briefly to each of those three topics.

On the broader issues of enforcement policy raised by remedies, AAI believes it to be vitally important that the guiding principle is that remedies must be effective. In other words, they must fully restore competition, not simply restrain the exercise of market power. And Steve Salop's work puts a really nice point on this in the concept of a design standard versus a performance standard for a remedy. A design standard is designed to ensure compliance with the four corners of a decree containing behavioral remedies. Whereas a performance standard is designed to achieve the ultimate goals of fully restoring competition. And those are most likely to be achieved through structural remedies.

We'd also like to make the point that full restoration of competition is very much aligned with the goals of antitrust as law enforcement. In other words, remedies must deter future violations of the antitrust laws. This point invokes the importance of the alignment of the same standard for violation of the decree as was the standard applied in finding the original violation. And that is a preponderance of the evidence.

On the second point of the effectiveness of remedies, we'd like to make a couple of points here. AAI believes, as I think as most people have read in our advocacy, that behavioral remedies should be strongly disfavored.

Behavioral remedies articulate prohibited, permitted, and required conduct without changing the firm's incentives to exercise market power. They most certainly encourage circumvention of a remedy. They carry a higher risk of failure. And it is a failure and a risk that is likely to be shouldered by consumers and not by the merging companies. Behavioral remedies require ongoing monitoring and enforcement by the agencies and the courts who are not well suited to act as regulators.

Behavioral remedies often depend on smaller market participants under the weak protection of anti-retaliation provisions to come forth and lodge complaints about noncompliance. Many of those smaller market participants fear retaliation because of high levels of concentration in some affected markets.

Arbitration provisions demand time and resources and are likely to lead to suboptimal settlements. Firewalls between affiliates of a merged firm are very difficult to police. As a former sector regulator, we put firewalls into place almost daily and received as many complaints about the violation of firewalls as were issued.

Finally, behavioral remedies undermined by evidence that the types of efficiencies that they are designed to promote are not always realized. These include things like coordination efficiencies and other justifications for vertical integration.

Behavioral remedies try the bounds or press on the bounds of managerial competency. These are managers of organizations that must simultaneously integrate two different companies in a merger proceeding. They must deal with organizational complexity. They must, at the same time, often times manage spin-offs that are associated with the behavioral remedy and a consent order. All of this can change the firm's incentives post-merger and make it difficult to realize claimed efficiencies.

A quick note on structural remedies: they are not always a panacea. There are certain types of structural remedies that have been demonstrated to have low deterrence value. For example the FTC in their 2017 update to their divestiture study observed that targeted asset divestitures are much less effective than line of business divestitures. We are hoping that the agencies, both the DOJ and the FTC, incorporate this learning in their policies moving forward.

Finally, on behavioral remedies, I cannot sit here today without noting that sometimes the most effective remedy is for the government to block a transaction. Indeed, some mergers are too big to fix. There is a commensurately higher risk that a remedy for a complex merger will not be successfully executed. We find too-big-to-fix problems in highly concentrated markets where there are poor prospects for new entry, absence of viable buyers, and very complex business organizations. Viable buyers are very, very difficult to find in some of these cases, as has been demonstrated by a number of recent mergers--Sysco-US Foods, Baker Hughes-Halliburton, and other cases.

On the issue of consent decrees, AAI would like to raise a number of questions. We do not profess to have all the answers, but we would like to raise some questions and issues that might help guide the DOJ in their inquiry into termination or modification of perpetual consents. AAI believes there are some basic non-negotiable justifications for keeping decrees in place. One is noncompliance with the decree. There have been a number of cases where parties have been subject to repeat decrees. That demonstrated noncompliance with a decree would indicate a persistent underlying problem with the possession and potential exercise of market power.

A second reason would be need to preserve concentration—I'm sorry, preserve competition in a market, particularly in markets where we've seen increased concentration over time. For example, if the DOJ's probe into the airlines, concerns raised by the airlines over coordination capacity a few years ago, had resulted, hypothetically, in a decree, further concentration in the airline industry would strongly, strongly recommend that such a decree remain in place.

A third reason, or a third non-negotiable justification, for keeping a decree in place would be longstanding reliance on the decree in industries where there was no kind of competition at the outset and for which structural relief is not possible to obtain. These include examples like music licensing.

We would also encourage the DOJ to think about, as a non-negotiable justification for keeping a decree in place, significant concerns amongst smaller arrivals in an industry that fear retaliation. There have been cases where smaller arrivals have filed comments in proceedings where decrees have been revisited. But they have asked for protection so that their identities were not revealed.

We believe that there are relatively few clear cut cases for conditions necessary for termination. We would strongly urge the DOJ to err on the side of caution. There may be instances where the original firms that were subject to the decree no longer exist. There may be changes in technology or supplier-customer relationships that have fundamentally changed incentives to engage in the proscribed conduct. There may be a broadening of relevant markets that eliminate competitive concerns. There may be new entry that eliminates competitive concerns. We encourage the Division to think very, very carefully and cautiously about what those conditions might be that would provide a fairly clear case for truncating or modifying a decree.

We do think that the Division should also take special care in considering certain types of conduct that have morphed or changed over time that might still be applicable under the decree. For example, we see more of an intersection between IP now, intellectual property law and competition law, and the use of IP in ways to restrain competition. We are looking at instances where algorithmic pricing can be used to facilitate coordination. That might have originally been of concern in motivating the original decree. We now see firms with data, using data, as a strategic competitive asset potentially to restrain competition. We also see firms engaging in commerce across multiple distribution channels. So these are all things that have emerged in the modern era that create incentives and abilities and potential strategies that could still be reached to under the original decree.

We would advise caution on eliminating decrees because of a changed legal standard. This would include things like *per se* violations versus Rule of Reason violations. We do not think a simple change from *per se* to Rule of Reason is necessarily sufficient to remove a decree. One would have to revisit the conduct under a rule of reason standard. And it may be possible, or entirely probable, that a procompetitive effect may not be found.

We would suggest caution in looking at the special case of markets that have involved decrees where there was no competition, where competition has sprung up around the parameters of the decree. And things like rate courts or alternative forms for dispute resolution have become very, very important. In some of these cases, removal or modification of the decree could lead to an excessively litigious dynamic or create a litigious dynamic.

Finally, we would urge the Division to think about what the alternatives are if decrees are terminated or removed. And the question here, I think, is would DOJ seek structural relief in cases where a decree was truncated or modified in some way?

And finally, on sunset provisions, AAI has given some deep thought to what incentives are created by time limitations, various time limitations, on decrees, whether it be five years or ten years. We don't have a final word on this, but we are looking into whether those types of sunset provisions would create incentives for certain types of procompetitive or anticompetitive conduct by the effective firms. With that, I'll finish up. And thank you very much.

MAKAN DELRAHIM: Thank you so much, Diana. David.

DAVID WALES: Great, thank you. Thank you, Mr. Attorney General Delrahim for having me here today. And it's a great pleasure and honor to be back here in the great halls of DOJ. I think this is a really important topic. And having been a former enforcer, I also know that it's a hard topic. And so I thank the Division for organizing this event. Hopefully, it will be a robust discussion on this important topic.

With that said, I'm going to try and keep my comments pretty brief. The Chamber of Commerce has submitted written comments that people can refer to, but I'd like to just make a couple of high level points. Hopefully, we can expand upon those during the discussion.

The first point is that it's really important that consent decrees be surgical, as you, AAG Delrahim have pointed out in your speech. It's important to make sure that the remedy doesn't go beyond fixing the anticompetitive conduct and allows parties to continue to engage in lawful and otherwise procompetitive conduct. There are, at times, decrees that have unintended consequences and really do regulate and chill procompetitive behavior.

Another issue in that context is that I think it is important to bring a dose of humility to the process. It's almost like a bullet hitting a bullet in the sense of defining the competitive problem and then coming up with a remedy that you think endures and fixes that problem without doing more harm than good. And so I think that's an important concept as well.

I would also add that one size doesn't fit all when you're talking about remedies. I get that the Division may have the view that there may be a law violation. But not all violations are equal. You should think about remedies in the context of the case. Is it a merger? Is it a conduct matter? Very different remedies might apply to those. There are different trade-offs when you go back to the question of how do you remedy the problem without interfering with potentially procompetitive conduct.

I think that within the merger context both horizontal and vertical deals are different when you try to strike that balance between making sure you stop the anticompetitive effects but allow the procompetitive effects. But also, too, even Section 1 and Section 2 violations are different. And so different remedies could apply to those as well.

My next point would be don't throw the baby out with the bathwater. There have been quite a few studies of merger remedies. The FTC study done in 2017, that Diana just mentioned, found that, by and large, merger remedies were generally effective. And so I think that's important to keep in mind. That study included both structural and conduct fixes. I think that's also important to keep in mind.

I've got a lot of catchy themes here. The next thing I would say is don't let the perfect be the enemy of the good, in the sense of I think sometimes there's an attempt to be perfect in a remedy. The reality is that's probably impossible. And so I think you have to try to have an effective remedy—that doesn't mean you shouldn't work very hard. I know the Division works hard to protect consumers and prevent any competitive results. But I think that process really is not one that can be perfect in that it requires trying to predict the future. Again, that is like the bullet hitting the bullet. I think you have to try to have something pretty close to perfect without necessarily going all the way.

The last point I would make is that forever is a long time. I was surprised you didn't have that consent decree behind glass. It's a pretty old document. And I applaud the Division's initiative of looking at perpetual decrees. I think those are a real issue. I also think that 10 years is a long time. It's a good idea to think about the proper term for consent decrees going forward and whether 10 years, which has been kind of the default, really makes sense in certain industries, especially high tech industries. Thank you.

MAKRAN DELRAHIM: Thank you so much. Mr. Slover.

GEORGE SLOVER: Thank you. It's an honor to be part of this discussion. From our founding over 80 years ago, we've been strong supporters of the antitrust laws. Sound and effective antitrust enforcement protects and promotes healthy competition, and the benefits that brings consumers through the leverage of choice.

Consent decrees are a key part of that. Each decree resolves a practice or merger that posed enough concern to convince enforcers to marshal resources to stop it. Each decree embodies an agreement by the defendants who created that concern on what they will do to remove it.

Most defendants don't really have much of any equitable claim to getting out from under what they agreed to. But the rest of the marketplace does have an equitable claim, in the marketplace's continued healthy competitive functioning. If the restrictions and obligations imposed on the defendants begin to interfere with that, to hold back overall growth and innovation, then that's a reason to reconsider. But what's important is what's good for the marketplace, not letting the defendants off the hook.

In a conduct case, the consent decree is designed to give the defendants guardrails to make sure they don't slide back into their old habits. Once they get out of the old habits and into healthy new habits, after a time it probably makes sense to think about removing the guardrails, especially if the guardrails are interfering with the healthy competitive functioning of the marketplace.

Two reasons it would not make sense—first, if it looks like the defendants might still be inclined to slide back into their old habits.

And second, if the case revealed a more fundamental market dysfunction. If the default state is chaos, and if the natural market response is to rein in the chaos with collusion or market power, then the government needed to step in, and needs to stay. Congress could always step in with a regulatory framework, but the antitrust solution could be a consent decree that adds just the right amount of structure to quiet the chaos while guarding against the market power.

One good example is the ASCAP and BMI decrees. They've worked quite well in enabling music to be used conveniently and the creators to be compensated reliably – notwithstanding the complicating factors that continue to be discussed. Another good example is the AT&T decree that restructured Ma Bell.

By far, most consent decrees in conduct cases are behavioral: You are doing x. We brought enforcement action and you're now agreeing to stop. Maybe you're also agreeing to stop doing y, or agreeing that you *will* do y, because that makes it harder to do x without being detected.

Consent decrees in merger cases are different. The merger is making a one-time change to what we call the structure of the market, the array of competitors. And the concern is that the change in structure will lead to a substantial lessening of competition. It could result from new or easier opportunities for collusion or monopolization in violation of the Sherman Act. But it could also result just from the merged company acting on its new incentives and abilities that the merger creates, in ways that may now be legal under the Sherman Act, but are still harmful in comparison to what we have seen under the former pre-merger market structure.

The best response to a structure-based concern is to fix the structure. That can mean divesting businesses or facilities or other key assets, so the important parts of the pre-merger structure remain intact. Or if divestitures here and there aren't enough, it means challenging the merger outright.

Behavioral remedies, essentially promises to behave, fall far short of a structural fix. As explained by others, including AAG Delrahim and AAI President Moss just today, a behavioral remedy relies on the merged company to ignore new profit-maximizing opportunities created by the merger, to act against its incentives and abilities to increase profits, to defy its basic business DNA. This almost unavoidably means you end up needing to monitor its actions, including internal business decision-making that would ordinarily not be known outside the company walls, and to referee complaints.

The structural remedy is a permanent fix. The behavioral remedy is impermanent. It is a recipe for a quagmire that lasts until the behavioral conditions are removed. And after that, we're left with the merged company still having the problematic new structural incentives and capabilities.

I don't think we can quite say behavioral remedies have no place in merger enforcement. We can imagine a situation where some merger is shown to be overwhelmingly positive in the synergy and innovation benefits it will bring to society. Where those benefits would simply be impossible without the merger. Where, now that we know what those benefits would be, we simply can't justify depriving society. Where there is no possible divestiture that could help address the competitive concerns we've identified, without destroying the reason the merger makes sense for the merging companies, or without sacrificing those benefits. So that all we're left with is to try to come up with some set of behavioral conditions and try to make them work.

And lo and behold, what appears to be a suitable set of conditions presents itself, one that appears to be fairly easy to monitor and administer. But those are exactly the kinds of claims I would try to make as an antitrust lawyer for my clients. I would always be ready to negotiate promises to behave.

So I think the expressed policy that behavioral remedies or structural concerns are “highly disfavored” is the right policy. And I'd like to look for an even stronger word than “highly.”

No behavioral remedy for a structural problem should have an arbitrary shelf life. It should last as long is the structural problem does. That could be forever, or until the marketplace is so evolved that the structural problem is truly gone. And depending on how the marketplace evolves, the structural problem may remain, but the behavioral conditions no longer work. Then you’d need to keep the conditions, but update them.

We wouldn't want to see a shift away from behavioral remedies become a retreat on merger enforcement. I don't think that's anyone's intent. But when the enticement of behavioral conditions is presented as an easy win-win, enforcers need to not only resist the enticement, they also need to be resolute in going the distance and insisting on effective structural relief. Keeping in mind that, by definition, these should all be situations in which the enforcers have determined, based on a thorough investigation, that the merger would violate the law. Thank you.

MAKRAN DELRAHIM: Thank you, George. Mr. Jacobson.

TRANSCRIPT PART ONE

JON JACOBSON: Thank you very much, General Delrahim. It's always an honor to appear here and today particularly so. My remarks are going to be very brief.

First, that there are still 1,300 outstanding consent decrees is a real eye opener particularly given that General Baxter had a program to reduce the number of consent decrees back in the early '80s. And I'm confident that the Division under your supervision is going to cut that number down way down. And I think it's great.

I looked at the list and the first one there is a 1926 decree telling people who sold tickets to movie theaters to stop allocating customers. All right, so 1926. So it's an excellent initiative, because those are a drain on the Division and on the economy.

When we start looking at these issues, we need to reflect the various changes in the economy that have happened since Celler-Kefauver was passed in 1950. In 1950, it was most common for even the largest companies to have one or just a handful of products.

For example, in 1950, the Coca-Cola Company had one SKU, the 6.5 ounce returnable bottle of classic Coca-Cola. Today, the Coca-Cola Company has many hundreds of SKUs.

And why is that important? It's important because the presumption in favor of blocking a deal or a structural remedy involving a discreet divestiture grew up under that milieu. And it did not really take into consideration, until decades later, the conglomerates that arose, the multi-product companies that arose, and all of the different contexts that have arisen since then.

And those different contexts make remedies more difficult, but make it important to look at the possibility of consent as a resolution of a competitive problem. When the overlapping assets in a horizontal deal, for example, occupy 2% of the combined company's turnover, you know that's not a deal where a full stop injunction is really an appropriate remedy, even though the law would permit the Division to go after a full stop injunction in such a case.

And David Wales stole my bathwater line. But I'm going to agree with him on that concept. Particularly in vertical deals, there are a number of transactions with massive efficiencies that do pose potential competitive problems. And those, I think, we still need to be open to the possibility of behavioral remedies. And I hope to talk about that further in the discussion. We gave a few examples as an appendix to my paper.

And then, finally, although I've been rambling on a bit, I am not authorized to speak on behalf of the American Bar Association, although I'm confident my views are not totally out of line. But I'm 100% not qualified to talk about the clients of Wilson Sonsini and, therefore, do not. Thank you.

MAKRAN DELRAHIM: Thank you so much, Jon. Dr. Eisenach.

JEFFREY EISENACH: Thank you, General Delrahim, for the opportunity to be here. Before getting to the substance, I'll start with my disclaimer first. I'm here speaking solely for myself not the American Enterprise Institute or NERA Economic Consulting or any clients or anybody other than me.

Consent decrees are the primary means by which the antitrust enforcement agencies seek to remedy harms to competition caused by mergers and by anticompetitive conduct. Such remedies generally are classified into two main categories: structural and conduct remedies. Structural remedies separate the ownership of asset, which might otherwise if owned by a single firm be used to harm competition and consumers. Behavioral or conduct remedies allow the potentially anticompetitive assets to remain together under a single owner, but restrict or place conditions on the manner in which they can be deployed.

The appropriate design of antitrust remedies raises a multitude of issues, which we're going to talk about here today. But I want to focus on two themes. David stole some of my thoughts also, but pre-staged. But I'll talk about them anyway. First, in thinking about remedies from a policy perspective, I'll make the point that it's useful to distinguish between remedies that address horizontal concerns and remedies that address vertical concerns and between remedies involving mergers and remedies involving anticompetitive conduct. Second, in all of these conducts, remedies policy should be guided by the principle of regulatory humility.

First, while antitrust practitioners understand that every merger and every conduct case is unique when it comes to discussing policy-- and by policy I mean guidance. So I think part of the effort here is to lay out for the private sector how we're going to address remedy issues going forward. And in that context, I think it's useful to think about this distinction between horizontal and vertical on the one hand and conduct and mergers on the other.

So in my prepared statement, I have a table where I characterize some of the issues that come to light in those four cases— horizontal conduct, horizontal mergers, vertical conduct, vertical mergers. And they're very different, as David said.

Two distinctions I think worth focusing on, I think it can be argued that the issues in vertical matters are both harder to assess that horizontal matters and also more likely to implicate dynamic competition and innovation than horizontal mergers, and thus have larger implications for our economic welfare. The upshot is that the risk of getting remedies wrong in vertical cases— Type 1 and Type II error—are likely higher than in horizontal cases. And the current focus on better understanding both the consequences of vertical transactions and conduct and the appropriate remedies, I think, is very well placed.

Second, but important: distinctions between remedies policy in conduct cases as opposed to mergers. And just to skip to the bottom line there, obviously, in a conduct case, we have the presumption of anticompetitive conduct and the hypothesis of efficiencies that might be harmed by a remedy. In a merger case, you have the opposite. You have no evidence of anticompetitive conduct yet in the presumption of merger synergies. So presumably, the benefits and costs in those two cases ought to be thought about differently.

Those thoughts bring me to two recommendations. First is I do think the agencies ought to give considerations to proposals to update the 1984 Vertical Merger Guidelines, 1984 being a long time ago. And second, the agency should also consider providing policy guidance on the design of remedies in vertical conduct cases, picking up where the Antitrust Division's 2008 Report on Single Firm Conduct left off.

My second overall theme relates to regulatory humility and the purposes of antitrust. FTC Chair Maureen Ohlhausen has eloquently explained that regulatory humility means keeping in mind the limits of government's ability to improve market outcomes through regulatory interventions. Happily for antitrust, the antitrust laws are broadly consistent with that principle. As the Antitrust Modernization Commission put it in 2007, "Antitrust law in the United States is not industrial policy. The law does not authorize the government or any private party to seek to improve competition. Instead, it seeks to defer or eliminate anticompetitive restraints. Rather than create a regulatory scheme, antitrust laws establish a law enforcement framework."

Now there some unavoidable tension between those principles and the use of remedies, since every remedy is in at least some sense a regulatory scheme designed to improve competition relative to some but-for world. That's the nature of the beast.

So the goal of remedies policy ought to be to reduce that or eliminate those tensions. And I think three principles can help to do that. First, as the 2004 Remedies Guidelines explained "Structural remedies are preferred to conduct remedies because they are relatively clean and certain." I think we've heard that quote already today.

The Remedies Guidelines laid out four reasons why that is the case. And I would add a fifth and that is favoring structural over-- a fifth reason to favor structural over conduct remedies. And that is the potential for conduct remedies to spawn *de facto* regulatory agencies with lies of their own complete with budget staff and constituencies. As Peter Huber put it in his assessment of the 1982 AT&T Modified Final Judgment, in such cases quote "The best of antitrust degrades into the worst of commission" producing what Huber called "degenerate antitrust bureaucracies that develop their own lore, unique traditions, precedence, procedural formalities, and technical vocabularies, all of that to be avoided."

Now to be clear, the 2004 Guidelines did not reject use of conduct remedies outright, nor am I. Rather, I'm suggesting that they be applied with more care and greater caution than the revised 2011 Remedies Guidelines seem to suggest.

Two more principals quickly. First, conduct remedies when applied should be of limited duration. Sunset provisions limit the potential damage associated with imposing inflexible conditions in a changing market and also serve as a prophylactic against institution building. Third, and finally, my third guiding principle applies to both structural and conduct remedies and consists of a simple admonishment to heed one of the most fundamental and enduring laws of economics, the law of unintended consequences.

Applying the remedies policy to law of unintended consequences reminds us that despite the wealth of data and sophisticated analytical tools we bring to that task, our ability to accurately predict the effects of regulatory interventions in the economy is limited. As a practical matter, in this context, it suggests that the burden of proof in designing remedies of all kinds should be on the government to demonstrate that the benefits of any remedy are reasonably likely to exceed the costs. Thank you for the opportunity to be here and I look forward to participating in the discussion.

MAKAN DELRAHIM: Thanks very much. Ms. Rose.

MEREDITH ROSE: Great. First of all, I would thank the Division for holding these roundtables and inviting voices from the consumer advocacy community who are, often, sort of underrepresented in many of these discussions and very appreciative to be here today.

MAKAN DELRAHIM: You're well-represented today.

MEREDITH ROSE: What's that?

MAKAN DELRAHIM: So you're well-represented today.

MEREDITH ROSE: Very well-represented is a good thing. So I went into a little more detail in my written statements. But I will say— and this was a high level point— I will keep my opening comments brief. Generally, consent decrees-- --in certain market places.

Most of my discussion will focus primarily on the music consent decrees for ASCAP and BMI. But I would also like to talk very briefly about the Comcast-NBCU consent decree which we've shown previously talked about.

So the structure of music isn't good. And in particular, it makes the industry unique even among media markets. And the inherent incentive for issues of collective permitting and the intended interest and anticompetitive concerns that those raise.

Without getting into too much detail, the creation of these rights organizations such as ASCAP and BMI is, in many ways, a natural outgrowth of the legal and economic structure of music and that product. But that same collective bargaining raises inevitable competitive issues. Music delivery is a multi-layered system with numerous intermediaries that relies on what, to consumers, are fundamentally non-fungible benefits.

PROs are structurally invisible to an individual consumer. And so in order to accommodate consumer preferences, intermediaries along the chain must generally obtain licenses from all the four right organizations, such as ASCAP and BMI. This tends to create natural incentives for collusion among PROs who enjoy relatively captive buyers and delivery services.

This situation led to the imposition of consent decrees on the two major PROs-- --continue to provide their value and services, while it makes some of the anticompetitive threats that this collective negotiation poses.

Now admittedly, this shifts signs of streaming in recent years. The kinds of uses and musical equipments have changed. And some owners have decided to pull out of the two major PROs. However, the same basic tensions remain. And the market at every stage has become increasingly concentrated from where it was in the early 20th century. So for whatever their flaws, the consent decrees in these instances are critical to the ongoing functioning of the robust marketplace.

To shift gears very briefly to Comcast-NBCUniversal, which is the other primary consent decree that public knowledge has focused on, this transaction is another example of an imperfect set of rules that is nonetheless responsive to a very real and continuing problem, namely increasing vertical and horizontal concentration in the video marketplace that could limit the development of new and lower cost alternatives for consumers.

Obviously, the efficacy of this particular consent decree has been very hotly debated, including by people at this roundtable. Critics say that it did very little to protect video competition, while supporters say that it worked as intended to curb the worst potential anticompetitive excesses that might have otherwise have occurred.

Looking back, Public Knowledge does believe that the consent decree did prevent Comcast from fully leveraging its NBC/ Universal assets to harm rival distributors or from fully using its distribution platform to harm rival programmers. Much of this, however, seems to have been as much a result of the structural side effects of the consent decrees very existence as of its terms as it provided major counterparties with a ready legal recourse in the event of perceived bad behavior. That said, the decree likely failed to protect potential new competition delivered by independent and smaller providers as the dispute over pure programming conditions has demonstrated.

Also interestingly, though the online video marketplace has continued to grow since the time of the merger, its development has not been along a trajectory that was directly expected. Major online video services, such as Netflix and Amazon Prime, have not evolved to become full-fledged cable replacements, but remain complimentary services that occasionally create original programming, much more like cable channels than cable systems.

More recently, a number of cable-like services have been launched including AT&T's DirecTV Now and Dish's Sling TV, but this market is dominated by video incumbents with the notable exception of Google's YouTube TV, which serves only to underscore how expensive it is to enter the video marketplace in the first instance. On balance, the consent decree was predicated on the idea that Comcast could benefit from merger efficiencies without resorting to anticompetitive behavior. It is difficult to see why if this behavior was considered anticompetitive and disallowed in 2015 or 2016, it should be allowed in 2018 or 2019.

Thus, late last year, Public Knowledge asked the DOJ to extend the consent decree. We recognize the problems that the decree addresses are not limited to Comcast. And we share many of the concerns about the use of consent decrees in place of regulation. However, until there is a better alternative, the DOJ should seek to keep its competitive protections in place.

And sort of as a sum up high level point, one size fundamentally does not fit all. But in some situations, particularly such as the ASCAP and BMI consent decrees, ongoing decrees are the best and most effective option currently on the table to preserve a competitive market place.

TRANSCRIPT PART ONE

MAKAN DELRAHIM: Thank you very much. Mr. Feldman.

BRIAN FELDMAN: Thank you, Assistant Attorney General Delrahim for your comments. And Open Markets welcomes the opportunity to participate in this roundtable discussion on antitrust decrees and we look forward to continuing to engage with the Antitrust Division on competition policy.

We believe that preserving competition requires enforcing the antitrust laws, to stop economic concentration in its incipiency, and to prevent market power rather than to police it. This philosophy informs our view of consent decrees. We believe enforcement agencies should generally avoid such provisions. In many instances, consent decrees fail to strike at the root of anticompetitive conduct. Behavioral decrees, in particular, can often serve as Band-Aid solutions that seek to regulate the harms generated by market power without addressing the underlying incentive and ability that firms have to wield it.

In three instances, involving a consent decree in 1995 of Eli Lilly and Company and PCS Health Systems, between Ticketmaster and Live Nation in 2010, and Georgie's and Tyson Food in 2011, blocking the deal outright would have been a more practical and efficient use of agency resources. In these instances, the effects were clear. They further entrenched incumbents, raised barriers to entry for upstarts, and, in some instances, even allowed dominant firms to engage in price discrimination. Furthermore, behavioral decrees can be costly and resource intensive to enforce and can create conditions that are ripe for regulatory capture.

In concentrated markets, structural remedies also can have the effect of weakening rivalry among industry players. Again, in three instances, in 2001 in a consent decree involving Premdor and Masonite, in 2013 involving the Dollar Thrifty and Hertz deal, and in 2015 in Albertsons and Safeway, the effects, again, they failed to address the concentrated nature of the underlying marketplace, further concentrating the industry. Removing the number of industry players either from four to two or from three to two.

Therefore, recovering the prophylactic orientation of the antitrust laws is therefore the most effective way to tackle market power across our economy. However, recognizing the flaws of decrees is neither justification to relax antitrust enforcement nor to advocate for the removal of decrees altogether. In some instances, we still may be better off with the Band-Aid solution than with the open-wounded market concentration so to speak. If a merger is to be consummated, in limited and narrow circumstances, behavioral decrees can make structural relief more effective. An interesting example of this is the ongoing consent decree involving ABI and SABMiller.

Furthermore, nondiscrimination provisions in mandatory licensing, especially in network and infrastructure industries, can help neutralize the power of companies that have used their patents to exclude competition.

Lastly, on the topic of perpetual decrees, it's important to evaluate how the market structure has changed and if it has changed before making a decision. While some of these decrees surely have outlived their relevance, we believe they shouldn't sunset unless the underlying market power has been addressed or if their removal would spur further market concentration.

So in conclusion, enforcing antitrust laws by blocking anticompetitive mergers is often the first line of defense to preserve competition. The second line can be the select use of consent decrees coupled with structural fixes or the select use of nondiscrimination provisions or mandatory licensing to help create open marketplaces in which firms can compete. These elements combined form a competition policy that can help stop economic concentration in its incipiency. Thank you for the opportunity to be here today.

MAKAN DELRAHIM: Thank you so much. And thank you for all of you for your testimony that you've submitted as well as your oral editions that some of you have added to it. I think a lot of important points, lots of, I think, general agreement amongst very diverse points of views on the antitrust economics ideological spectrum. I think, generally, a preference towards-- what I kept on hearing-- structural remedies, whether it is a way to prevent harm in the first place from a transaction. And probably more appropriate and necessary in a transaction rather than a Section Two type of violation.

But also, I think, it seems like a recognition that in some certain circumstances, behavioral remedies may be appropriate. And some of your circumstances, certainly existing ones, should continue as a Band-Aid rather than the open wound. I start a lot of the views that we have-- and I think the overarching discipline to a lot of these workshops is what is the power? What is the statutory mandate that Congress has given us and through the years, and under the common law regime that we have, the Supreme Court has further defined? And how does that apply to what we do?

That gets to-- I'd rather not use the word regulatory humility, but humility in the prosecutorial discretion that us as an antitrust law enforcement agency-- I don't think the Federal Trade Commission thinks of itself as a regulatory agency, but maybe they do some of them. But I view what we do is really law enforcement. It's very clear, whether it's Section 7, other areas. If Congress wanted to give us other powers, they certainly could. And they have not been shy about doing them and creating regulatory agencies in other areas, particularly where antitrust enforcement has failed.

The 1996 Telecom Act replaced a 1982 consent decree and continued enforcement through the judicial system of a whole industry that ultimately led to the '96 Act. And you wonder if effective and timely enforcement of the antitrust laws and proper remedies a lot of times could obviate the need of heavy handed regulations that Congress needs to step in where markets have failed.

So part of the reason for this is to find where are the appropriate remedies where you let the markets determine, not some person who we just deputize. We can do that in the private sector perfectly fine, where it's part of a settlement in a private antitrust dispute. When we're dealing with a public enforcement, particularly in merger transactions-- whereas Dr. Eisenach mentioned, you have different considerations for Type I, Type II errors.

When you're trying to remedy that public enforcement, should we have a remedy where the markets decide rather than our continued involvement or imposing upon—whether it's a judge or some third party panel-- to determine what an appropriate price should be? If we go down that road, then we should just admit that that's what we are, a regulatory agency rather than trying to police the free markets, which is what I believe antitrust laws— as Dr. Eisenach mentioned, AMC's report and statement-- and I had the great honor to serve on that with along with Jon— antitrust laws in the United States at least are not some industrial policy, should not be. And it is not a way to promote competition, but to police it, and best policed by the free markets to determine what those are.

We don't have-- as some in Europe previously had called competition in the markets— gentlemanly competition. We don't. We have very violent competition. That's where you have dynamic competition and the consumer benefits. That's where you have the greatest innovation. That's where you have the greatest price wars.

We'd like to keep the structures of the markets policed in such a way to allow for that to continue. Whether it's a transaction, you want the pre-merger conditions, competitive conditions. Not necessarily the conditions as they are, because there are great efficiencies from vertical mergers that sometimes allow for great innovations, to allow for dynamic benefits for consumers. And you would like to allow that, particularly if there is ready ways to address a problematic element of such a transaction but preserve the procompetitive benefits of that.

A lot of times just because certain behavioral decree from, I don't know, 50, 60, 70, 77, 80 years ago in the area of the movie industry and movie distribution under the Paramount consent decrees that have existed since 1948-- just because they exist and there's businesses that have come around them, those consent decrees have now created market structures in and of themselves. They create monopolies and people that feed off of those systems. They don't allow for competition to occur.

Some people wonder, well, for 77 years we have a certain industry structure. Well, maybe if we didn't, we would have greater competition. Maybe you could have a one stop shop mechanism for licensing music. And you'd have greater competition to allow for that. And with that, greater innovation. So I think there's a lot of innovation that has probably been foreclosed because of the structures that some of these consent decrees have created.

And it gets back to the issue of who is in Congress, whether it's Congress, the courts, or the executive branch, and particularly, this Antitrust Division. Who should figure out what that is? Who has the appropriate constitutional power to do that? If a particular structure of industry has failed or continues to be problematic, is it the consent decree that needs to be in place or should policymakers step up and look at what are the broader policy implications not only for businesses but for innovation and for consumers ultimately and determine a path going forward?

Believe me, I know that's not an easy process, the legislative process. But when it's needed, I have all faith in our elected officials to do what they ultimately believe is the right thing. And it may not be as effective sometimes as the antitrust enforcement, but it might be the more appropriate use of the constitutional authority rather than us continuing with a certain structure and policing that and being there. We just don't have those resources.

We're a Division we continue to— our budget has gone down effectively about 20%, 25% the last 10 years. And merger transactions have been up 45%, 44%. And the size and complexity for exactly the reason that Coca-Cola is not just one SKU, it's hundreds. You have businesses that have real implications. And you have mergers, particularly new vertical mergers, that are really complex. And you try to do the right thing.

We're not in litigation to win, like private parties do. We're in litigation to do justice, to do what's right. And we're not in it just to win at all costs, it's to do what ultimately fixes the competitive failures.

And I do hope that we can consider the overarching issue of who is the appropriate body. And what do we do to preserve the market competition that creates the greatest dynamic innovation. Mr. Jacobson.

JON JACOBSON: So, I think the BMI-ASCAP, and Paramount decrees are an important discussion. But I think they are exceptions to the general rule. I think 99% of the cases should be resolved with either a full block or a structural remedy, except in vertical cases and we'll talk about that further.

But BMI, ASCAP, it's completely clear that the better solution would be for Congress to legislate and for the Division to get out of the regulation business and Judge Cote to get out of the regulation business. There's no question about that. But those decrees have been on the books for forever. And Congress has not acted. And in terms of public policy, they certainly should.

But in the absence of action, I think continuation of those decrees, perhaps with some modifications, is essential, because you certainly you don't want to break up BMI and ASCAP. The efficiencies of two stop shopping for broadcasters are really too great to provide.

But if the Division can push Congress into legislating in this area to take the Division out of the business, that would be great. But good luck with that.

MAKAN DELRAHIM: I don't think the Division could push Congress to do anything, but it would not be a bad thing if that was done.

JON JACOBSON: And then briefly, Paramount arose because of a mistake in the antitrust laws. The Edison patent on the movie projector was allowed for years until the Clayton Act was passed to cartelize the motion picture industry. You couldn't make films without a license from the Motion Picture Patents Company. You couldn't make a movie without a license from the Motion Picture Patents Company.

So finally, when the Clayton Act was passed and the Motion Picture Patents case got decided in 1917, there was an injunction. But the harm had been done. And something needed to be done. And the Paramount decrees were a good solution for 1948, and again, in an area where Congress should have, but failed, to step in.

So my point is a simple one which is, yeah, most of the time, absolutely, let's go for a full block or structural. But in these particular instances-- and there may be one or two others-- if Congress is not going to act, the Division has to be there as the stopgap.

MAKAN DELRAHIM: Well, and Paramount I would say is largely a structural. It's kept two different industries from— at least the ones that have been signatories to— from integrating. And probably kept a lot of great B-movies from being combined to be shown and get theatrical distribution. There are some phenomenal movies, Oscar winner Hurt Locker that got maybe, I don't know, a total gross of $80 million, wins the Oscars, but only had $8 million dollars in theatrical, because it just wasn't there. You don't have the $100 million to do the promotion.

But had that been, let's just say, tied—for lack of a better word—in antitrust parlance to another movie and had been in theaters, many more consumers would have enjoyed it. And you probably would have filled a lot of the theaters 90% capacity that during the week is empty. But the antitrust laws prevented that.

Who knows? There was recent news that Netflix might be buying a theater circuit. That would be kind of interesting. But I think there's a lot of factors to those consent decrees that are structural. Just because it has got a label structural, doesn't mean it is perfectly fine and procompetitive. It's actually created a lot of anticompetitive harm, I think, to not only consumers, but to filmmakers, and the thousands of people who work on those.

JEFFREY EISENACH: Well let me pick up on two points that were just made, and just very briefly. I think the right question on BMI-ASCAP is not so much-- and I'll come back to the question of what should we do with them-- but the question, maybe, that's more relevant for going forward is would you do it again? And I think the answer to that question has to be no, right? Is it the--

JON JACOBSON: Well, is that right? Would you want to enjoin a blanket license? Where is CBS going to go?

JEFFREY EISENACH: Is it the proper purpose of the Antitrust Division of the Department of Justice to impose upon parties a perpetual regulatory rate regulation regime in perpetuity? Is that-- where in the Sherman Act, where in the Clayton Act do you find that authority?

MAKAN DELRAHIM: Whether it's perpetual for seven years or five years or 10 years?

JEFFREY EISENACH: Well, it'd be different. I mean five years, I would argue maybe is a different question. That doesn't mean I'd be for it, but I think you'd look at it differently. So I don't think you would do that. Or at least, I think you would almost never do it. Never say never.

With respect to ASCAP and BMI-- I'll come back General Delrahim to the point I think you were making earlier-- I don't have an opinion on whether those ought to be reviewed or how Congress is in fact considering legislation that would make some changes in the music licensing regime, and maybe good ones. But the criteria that one would apply to ask the question should we give it a hard look must surely be satisfied. The technological and market changes that have taken place in the music marketplace since those two consent decrees were entered are transformational, starting with Pandora, Spotify, et cetera, the online music marketplace.

And what we see is, in fact, a working marketplace solution for a lot of music licensing today, which we didn't have at the time those consent decrees were entered. So I don't know—

JON JACOBSON: Pandora and Spotify both had to go to Judge Cote—Judge Stanton and Judge Cote for relief. The decrees really were not designed for Spotify and Pandora. And that's part of the—

MAKAN DELRAHIM: You mean 77 years ago, they didn't anticipate Spotify being created?

JON JACOBSON: Exactly. Which is which is why a legislative solution here is the optimal outcome. But it's hard to get anything done by Congress these days. I remember an Assistant Attorney General appointment and it just sat there for months, for example.

MAKAN DELRAHIM: There's a few of them still pending. Ms. Rose, you mentioned with respect to, specifically, to PROs-- and we're jumping a little bit to issues because these were topics raised in the public discussion and the oral discussion— you mentioned that because of certain uncertainties, licensees have to now license all multiple— and I guess there's now four PROs, at least currently— get licenses and allows for potential collusion in that industry. Tell me about that. What are those uncertainties in those consent decrees in those markets that could be remedied so that a consumer of music, whether it's a radio station or a Spotify who might target specifically a particular consumer? My guess is Mr. Feldman may not be necessarily into certain kinds of music that I may like. You know, it might from the '70s or '80s.

BOB POTTER: He likes the Eagles.

MAKAN DELRAHIM: But you know, he might like-- who doesn't like the Eagles? But maybe there's a service that targets and you only want to license particular kinds of music. And you don't want to get a license from all four. So what are those uncertainties and how could that be remedied?

MEREDITH ROSE: And so I'd respond to that by saying that the PROs are not divided by genre. Any given genre is going to be split along ASCAP-BMI and to a lesser degree SESAC and to a much lesser degree the fourth one—whose acronym I'm currently forgetting.

MAKAN DELRAHIM: GMR.

MEREDITH ROSE: GMR. Thank you very much. Bad music licensing lawyer. I forgot that one. So at the end of the game, fundamentally—and I think, and please correct me if I'm sort of misinterpreting your question here— the ability of a given service to sort of hyperspecialize—for example, if you wanted to create, for example, a music delivery services that specializes only in hillbilly music, if we're going all the way back to the 1930s and '40s.

The issue there is that, again, the consumer at the end of the day-- I as a consumer do not know, I have no reason to know, I have frankly no energy or time or motivation to figure out what is in the ASCAP and BMI catalogs respectively. And whatever service I go to, even if it is specifically down to a given genre, I'm going to expect it to obtain what are, unbeknownst to me, musical works from both catalogs. And because, at the end of the day, these PRO arrangements are invisible to consumers, consumer demand is not shaped by them, even when you get down to hyperspecific sort of genre subsets.

MAKAN DELRAHIM: But certainly the availability of that service for that consumer demand would have to need to know what that is right? The service would be sensitive to the genre specific or the catalog and the PROs.

MEREDITH ROSE: Correct. But at the same time, the service also must be sensitive to my demands as a consumer. And so I'm not saying that it is inconceivable that we could have a specialty delivery service that focuses only on hillbilly music and early country from specifically from, for an example, the BMI catalog. That is entirely a possibility. However, I would have serious doubts as to its financial longevity and its ability to attract subscribers and consumers.

MAKAN DELRAHIM: So what is the problem with the current system then?

MEREDITH ROSE: Currently-- and this is a larger structural issue with just the way that the music market-- music as a good functions in the market is currently sort of subdivided-- it is fundamentally a legacy market. And this can go back into well over 100 years of history here. But at the end of the day, music is a very short product temporally. It's three to five minutes, unless you're really getting into Hans Zimmer, I guess.

As a consumer, I interact with many, many, many pieces of these works a day. Therefore, I attract many, many rights holders. And I do this in a PRO blind fashion. And because of this sort of, like, this multitude and high volume that I interact with, any service that is seeking to deliver that message to me is going to seek to obtain a blanket license. Blanket licenses are highly efficient. They allow, essentially, a delivery mechanism to say I would take one of everything, please. And to do so at a rate that is overseen by a rate court in the event of a breakdown of discussions.

At the end of the day, because music is fundamentally a non-fungible good, if I want to listen to Lady Gaga's “Born This Way,” then I will accept no substitutes. I must, in fact, listen to Lady Gaga's “Born This Way.” And I will go to the service that can provide that to me and also provide whatever demands I have in particular track from other PRO libraries.

Because of the structure of music, it is not only advantageous for services to obtain blanket licenses, it is advantageous for musicians, specifically small musicians who, when these blanket licenses are negotiated, can often get higher rates than they would in a completely free individual negotiation market. And so essentially, these blanket licenses are actually, in fact, the most efficient solution for everyone all the way down to the end consumer.

The issue is that in the absence of a consent decree and in the absence of any kind of oversight, we have seen examples of anticompetitive behavior that the PROs have engaged in. I don't want to get too much into the weeds, because this bruise on my fire for the second panel. But because of this tendency towards collective negotiation and blanket licensing, which is fundamentally an efficiency for all players involved really, it does raise certain behavioral incentives for these groups to collude or to boycott or to attend things like partial withdrawal where they said despite the fact that we were required to treat all comers equally, we would like to be able to discriminate based on technology. And so these kinds of things naturally arise.

And we've seen arise over and over and over again, including in, frankly, SESAC, which is not subject to a consent decree. It has a substantially smaller catalog portfolio than BMI and ASCAP, which I believe had together over 90% of most of the works in circulation. But we've seen SESAC do sort of similar— the highly legal term I guess would be shenanigans regarding collusion with publishers.

And so, again, I don't want to get too deep into the weeds on this. I don't know that there is a particularly good-- I don't know that there is a one size fits all remedy to fix the market. I think it's an incredibly complex market right now. That, again, Congress is currently in the process of fixing certain licensing pitfalls with the Music Modernization Act which addresses mechanical royalties and to try to solve some of the Balkanization argument problems on that end. But at the end of the day, the system that we have is a sort of a bootstrapped historical system. And in absence of a substantial congressional intervention to fix the sort of systemic problems, I think just the natural state of this market tends to lend itself to anticompetitive issues.

MAKAN DELRAHIM: And that's one of the dangers of these types of decrees where there is a dispute resolution mechanism, whether it's a rate court or a judge like in Southern District in New York that seems to be the price regulator, for lack of a better word, but probably more accurately the price regulator. And the discussion for inefficiency to have that would be just have compulsory license. Congress just does that, which is a horrible idea I think in general because we should not be for that. We actually should encourage greater creativity, whether by songwriters or innovators, inventors, to allow that. And then allow them to have the free market right to set the prices to recoup for that creation. I think that would be probably a more appropriate way, under the constitutional framework we have.

If Lady Gaga wants to hold out to get you know $0.10 per play, but my song the market doesn't care to give me a fraction of a penny, that should be her right to be able to do that even though that might be inconvenient for a new service that ultimately gets her to the consumer. But that's where the market really plays.

And then if we have a system in place that is in effect a compulsory license mechanism, it is probably not the most market enhancing or innovation enhancing system. Now if Congress wanted to come in-- they certainly have done that in multiple areas where they have compulsory licenses-- that's their judgment. That's one thing.

But I don't know if it is a valid exercise of the Antitrust Division's authority to impose such a scheme absent direct congressional authority to do so. And as Judge Cote said, look, if you guys think that there's antitrust violations, there's nothing in these consent decrees rather than creative interpretations to bring yet another case for anticompetitive harm. That's always available and that's the proper exercise of the authority.

JON JACOBSON: It's challenging though, in that case, because you have a Supreme Court decision that says the blanket licenses are efficient and not illegal *per se*. And so if the Division were to just jettison the decree and sue BMI and ASCAP, what's the outcome? There's no guarantee that you're going to get a better public policy outcome from a new case than by tweaking the decree, or better yet, as I've mentioned, getting a congressional enactment.

So in this particular case—I know we've focused on it to the exclusion of pretty much everything else—I think this one sort of has its own glue.

JEFFREY EISENACH: I'll keep this very brief. But the PROs were a result of an information problem. And anybody paying attention might notice that the costs of information have dropped over the course of the last 50 years. The possibility of direct licensing, direct licensing is happening all over the music marketplace and all over the media marketplace. And so the one thing we know is that as long as those consent decrees are in place, we won't be able to experiment with alternatives.

The other thing we know is that we've had two new entrants into that space—SESAC and GMR. And neither of them are charging infinite prices, which is to say the notion that this content is must-have and would allow anybody with a catalog to be able to extract all of the profits and rents out of the licensees is false on its face, because, in fact, that didn't occur. So I do think it's— I don't have a view on where it ought to end up, but I certainly have a view that it ought to be looked at.

DIANA MOSS: If I could just make a broader policy-oriented comment around these types of perpetual decrees, which are I think a very unique case, but very important. So just two observations. You know, revisiting the music licensing decrees, if that were to occur, I would put in the same category as what I did with my colleagues at the FERC in the mid-1990s which was essentially to deregulate the electricity industry.

So you're talking about an industry that grew up around rate regulation, price and profit regulation. It affected everything in the industry all the way down to the ownership of assets. And really, the FERC's approach in that case was very, very careful. First they opened up transmission access. And then they very carefully studied market power, whether companies' generators have market power if they were to give them market based rate authority.

So long story short, it was a very, very stepwise careful process to consider a wholesale change in the landscape of an industry to open it to deregulation. I think there's a useful analogy here in the case of these long-term perpetual decrees.

And to the process issue, I think-- and you all are grappling with how to deal with these decrees, how to triage them, how to put them in different buckets— these types of decrees really raise the question or stress the importance of looking at the but-for world, right? What is the but-for world?

If the decree were to disappear, how would the markets operate? Would they function efficiently? Would there be rampant exercise of market power? Would there be acute resolution problems?

And I think that's a really important question to ask. What does the but-for world look like?

And you know as Meredith was saying, some of the PROs operate not subject to consent decrees. So one exercise might be to say, well, let's go look at-- is it GMR and SESAC? And see what's going on over there in terms of resolving these types of competitive concerns. And that would really inform the broader process.

MAKAN DELRAHIM: Thank you. That's very useful. Now let's getting away from some of the more fun aspects of this-- and we can discuss these further in the second one, but we got a little bit off track. Let me ask a question appropriate to all of you.

So the Division recently introduced some of these new improvements to the consent decrees. We lowered the standard for establishing the decree violation— which you have mentioned a couple of behavioral decrees that are exist on our books, now more recent ones, whether it's the Comcast decree or Live Nation. And the standard of proof—some people question those consent decrees have been so effective and so wonderful, because there's been no violations of them, even though you have a couple of complaints in that handful of them.

But the standard to prove a violation of those decrees is clear and convincing evidence you need to show. Whereas you only need preponderance to show the actual violation. And it's clear and convincing evidence of a clearly unambiguous term of those consent decrees.

When you're dealing in these high-tech areas, you show me five lawyers in this room, there's a few more, who will have 12 different opinions on what any single term is, right? We had a whole debate about the definition of what “is” is a few years ago. So imagine what the definition of “application programming interface” might be or “fair market value” of anything is.

So could you imagine trying to prove those violations, which is why you don't have some enforcement actions in some of these decrees. It's not because the market is working perfectly as envisioned by the visionaries 12 years ago, 10 years ago, 20 years ago. It is for other reasons that has to do with legal barriers. So one of the things we did was to request as part of these, whether it's been structural or behavioral, agreements by the parties that if there's a violation, we would have to show as a preponderance of the evidence. And you interpret the consent decrees through a preponderance standard.

We also allow if there's been a violation, the Division could extend the termination date of a consent decree and also seek reimbursement for the taxpayers. We also allow the Division to terminate it upon the finding that the market has been restored and is no longer necessary. And you can do that unilaterally and go to the court petition for that.

So what I would love to learn is are we on the right track? Are there elements we are missing? And what do you think, given your vast experiences in this, of these provisions? Should we not include them? Should we include them? Are there other areas where we can improve our future consent decrees? Mr. Jacobson.

JON JACOBSON: So, General Delrahim, my paper's a little bit more lukewarm on this than I am. I think it's a great idea and for precisely the reasons that you've articulated. The only caution I would suggest is let's not make it too easy for the Division to want a decree, because sometimes public policy is better served by litigating the case. So if there are-- and this burden of proof change is really not so monumental that it would affect the decision one way or the other—but as we're talking about innovations and consent decrees, let's be cautious to make sure that we're not making it too easy. And the cases that really should be litigated too don't get lost in the process.

MAKAN DELRAHIM: Thank you for that. George.

GEORGE SLOVER: So you had four innovations. And they all strike me as good, constructive improvements. I think it makes sense that the burden of proof for showing that a consent decree has been violated should be the same as the burden of proof in the underlying case that led to the agreement in the first place. I think it makes sense that the costs for enforcing a consent decree, in the event that it is violated, should be borne by the ones violating it, not by the taxpayers.

As to the other two innovations, extending the duration of a decree as a consequence for violating it, and allowing a decree or condition to be terminated early: both of those generally good ideas warrant a little bit more discussion – in part, because they assume a decree of fixed and finite duration. And as I mentioned earlier, I'm not sure that's always the right way to go.

If a decree is violated, I agree that a higher level of monitoring is an appropriate consequence. But the appropriate form for that may be to consider whether the behavioral condition in the decree is written as protectively as it should be, or needs to be strengthened. So you don't want to just say continue the same thing if there's a flaw in it that makes it too easy to violate.

And then as to early termination, the rationale given, that it would be only when the decree conditions are materially impeding healthy innovation in the broader marketplace, I think is the right rationale. I don't think this should be a decision for the Antitrust Division to be making unilaterally.

I think, particularly in conduct case decrees, and in merger decrees where there is a behavioral remedy, I think there should be a notice and comment. You know, like the Tunney Act. You know, you have a situation where you say you are intending to do it and you get comment. An earlier reference you made this morning seemed to indicate that that's what you're contemplating. And in that kind of situation, I think it makes sense.

I also noticed that the three consent decrees in which the Antitrust Division has added these innovations were all merger cases in which the remedy was structural. It was divestiture cases, I think, the three in December.

MAKAN DELRAHIM: That's certainly in our no poach agreement with WECTEC Westinghouse and also in the Baker Hughes and some of the others. I think there's six.

GEORGE SLOVER: I think the three that I had seen reference to were from December. So I do think in the other kind of the behavioral decrees, you just need to be careful to appropriately address ongoing concerns.

MAKAN DELRAHIM: With your point on the Tunney Act, I mean, of course, every one of these is subject to the Tunney Act for civil cases where we go before a judge. You'd think that before even putting those provisions— and they're all subject to the Tunney Act review—we can discuss, the appropriate boundaries of that Tunney Act. But I think the D.C. Circuit has interpreted it, it's OK.

Do you think that there should be a Tunney Act process for considering including these in? Or are you talking about with each of the consent degrees as it already is?

GEORGE SLOVER: No. I mean as I read the description of the fourth proposal, which was that you all would have the right to terminate a decree upon notice to the defendant.

MAKAN DELRAHIM: Determination should be subject to a public interest test.

GEORGE SLOVER: There should be a public process there as well before it happens.

MAKAN DELRAHIM: If Congress wanted to amend the Tunney Act to say it so, we would certainly comply. But I think that's a good point for us to consider that. And I think in some cases, it would make a lot of sense to use our discretion to do so. Diana and then David after that.

DIANA MOSS: So just a quick comment. I think AAI really supports the alignment of the preponderance standard to equal that which was applied at the time of finding of the violation and whether a decree has been violated. I guess I do have a question about how that would be operationalized for behavioral remedies.

So clear and convincing evidence of a violation of a behavioral remedy would require, presumably, or depend heavily on market participants coming forth to complain about noncompliance. That's really the go-to evidence for whether a behavioral remedy has been violated or not.

MAKAN DELRAHIM: Or the new Office of Decree Enforcement from getting CIDs and doing appropriate oversight.

DIANA MOSS: I wonder how that clear and convincing showing would differ from a preponderance showing in the case of a behavioral remedy. So does it give the Division more latitude in determining whether a behavioral condition has been violated? Say it's a firewall or it's an access provision, a nondiscrimination provision. Would you have to rely as much on market participants coming forward? Or would there be sort of a different investigatory tool there?

I think for structural remedies, it's clear. Preponderance would be absolutely different than clear and convincing, because you either complied with divestiture, you maintain assets. If you didn't maintain the assets and you degraded the assets specifically before the divestiture, then I think that's a very clear cut case. But in a behavioral remedy, I think it raises more questions.

MAKAN DELRAHIM: So the behavioral remedy, the question is: are there particular terms that have been violated by, say, a certain kind of company and some other asset in the particular distribution they may have bought or combined? And the provision says you must treat a third party certain way or you must not, in transacting, let's say, I don't know, if it's a concert promotion or something like that. But what do those mean? What do those terms mean?

And can the company and its phenomenally capable defense lawyers argue that you don't have enough evidence to prove by clear and convincing standard of a clearly unambiguous term? So either of those two, you can shoot out a potential legal enforcement mechanism.

So those are some of the problems that the Division faces in investigating and, ultimately, enforcing consent decrees. And I don't see how it wouldn't be beneficial in a behavioral, because it makes it easier if there's been a violation. You still have the burden. And the Division should always have the burden in those cases, I think, because—for various reasons, but I think we should have the burden. But what should that burden be? And obviously Congress can change all that.

But if you are settling a matter and you're agreeing, those would be the provisions. David, you've got incredible experience in these merger areas.

DAVID WALES: The lone dissenting voice on this, Assistant Attorney General Delrahim—

MAKAN DELRAHIM: You have every right to have.

DAVID WALES: I recently negotiated a consent decree with the new language in it. I think what worries me is the unintended consequences from that. I've heard people explain that one of the unanticipated positives of the change in the standard is that people are more focused on what they're actually agreeing to do and scrutinizing much closer—

MAKAN DELRAHIM: I don't know if that's unintended.

DAVID WALES: Yes. But that's one at least unintended or maybe positive unintended positive outcome from it. But I worry about other unintended consequences, especially in conduct decrees. I think this is a great debate about whether structural or behavioral remedies are really the way to go. And certainly, I think no one would argue that looking at structural versus conduct remedies within a vacuum, conduct remedies are harder to enforce. It's harder for parties to comply with them.

But I think there has been a pretty good system in place where the Division and the Federal Trade Commission use their prosecutorial discretion to decide whether to pursue a consent decree violation, whether it's DOJ or the FTC, with its orders. There's some give and take there, because sometimes there are unanticipated problems that pop up with the divestiture. Or sometimes, too, I've seen— and I've actually had a client that was subject to a compliance investigation, where to be honest— as I'm a little biased— the interpretation was really out of bounds from what was negotiated. And so I really worry that if there were a lower legal standard, it would be easier for the agency to bring that case. That would definitely be concerning and one of the unintended consequences of the lower standard.

Another thing is that there is a long line of jurisprudence concerning the higher legal standard when it comes to consent decree violations. So I think there's a bit of uncertainty as to how a court would grapple with the lower standard.

The last thing I would say is that I think there are other things that the Division should consider at ways to improve the consent decree process. And one of those is— and this is kind of I think the quintessential regulatory piece—monitor trustees. And I did see, I believe it was the Martin Marietta decree that just came out, that there's not a monitor trustee, which is great. But whether there needs to be a monitor trustee in other cases is something I think the Division should really think about. In my experience, monitor trustees can be very bureaucratic and regulatory. And maybe with a lower legal standard, you don't need monitors as much, I would posit.

MAKAN DELRAHIM: It's a good point. I mean, obviously, the Attorney General has a policy memo regarding monitors that we, obviously, are following. We try not to use that in one of the transactions. Instead of a monitor, we put incentive payments that if you violate, it creates a self-policing kind of innovation if you call it, that a self-policing mechanism by which they would pay a daily fee for not doing certain things that they had committed to do, rather than installing a monitor to do that. I agree with you, a monitor is yet another mechanism for regulatory intervention. You're just now appointing somebody to do it rather than doing it. And in some cases that are very complex, I could see a benefit of that. But in other areas, it just becomes a creation of another bureaucracy.

You wanted to and you talked about and you have experience and I think you and Jon and others may want to discuss the issue of behavioral decrees versus structural, specifically to vertical transactions. I know, and I agree, that there's certainly a lot of cases incredible efficiencies that could be created in innovation, certainly, that you could have, particularly in dynamic markets by some transactions. And you would want to allow that.

I'm also concerned that unlike in a horizontal transaction where even if you make an error where you have under enforced, at least economic thinking has shown us that the market-- here is super competitive rents being sought, you have now incentive for new market entry, assuming there's not a structural problem for entry. But it could allow for that. Whereas vertical, you now create foreclosure effects or raising the rival's costs, which even becomes more problematic from a market structure standpoint that if you get that wrong, by under enforcing, it becomes a greater threat to markets that even horizontal.

Of course over 90% of all transactions, horizontal and vertical, are procompetitive and then there's no enforcement action. A lot of times they just go through without even second requests. I'd say probably numbers are closer to 97%. But there are some that pose an issue.

So in vertical transactions, can you discuss based on your experience, the benefits and the problems with behavioral and structural and where it's more appropriate? Jon, maybe you can start us off. And we'll take a break after this segment.

JON JACOBSON: So I completely agree with the points that you've made publicly over the last several months that there should be a strong presumption, even in a vertical case and for a structural remedy. But there are many vertical cases-- we cite four examples in the appendix of my paper-- where there are massive efficiencies and there is a behavioral fix that actually has a good potential to work. And I'm going to add one more and it's another soft drink matter.

So it wasn't that long ago that Pepsi acquired its bottling system and Coca-Cola, at the same time, acquired its bottling system, not 100% of the bottling system. But if you talk to people like Kroger and Safeway and Albertsons, you'll see these chains have operations in the territories of many, many different bottlers. And it was just a real pain in the neck to deal with different bottlers with different pricing for the same product basically and got in the way of cross-border promotion. So it was a real problem. And it was a problem solved by the acquisition of the bottling systems.

Now the bottling systems also were the major bottlers and distributors of Dr. Pepper. And that was the problem.

So we actually did an analysis that it was in Coke's financial interest to keep pushing Dr. Pepper as strong as it can. But the FTC said, well, we're not so sure. And so the outcome there was a firewall. And Pepsi, similarly, had a firewall.

And those decrees have worked well. And that is an example of a remedy that, on its face, you don't like. Because a firewall, how do you monitor it? Difficult to enforce.

But in this particular case, the firewall wall was able to achieve massive efficiencies with, to my knowledge, zero complaints from Dr. Pepper or anyone else. And so I use that just as an example to say let's look at the facts of each of these transactions carefully, because there are a number where the deal really should go through for the benefit of the public, and where the only remedy really can be behavioral.

MAKAN DELRAHIM: I think the alternative isn't important. What are the alternatives in that case? Was it just spin out bottling for Dr. Pepper? Now you're decreasing output for that particular product by doing so. And so in that case, I'm not as familiar with it, but part of the reason it probably worked so well is because they have such excellent antitrust counsel.

JON JACOBSON: Well, well, I'll deny that. But I should say Pepsi had Debbie Feinstein representing them, so she certainly meets that criterion.

No. The remedy I think would have had to have been a full stop injunction or you can't acquire this bottler because it has too much Dr. Pepper which would still result in Balkanization of the bottling system. No. Alternative remedies in that one were going to be pretty tough.

MAKAN DELRAHIM: Yeah.

JEFFREY EISENACH: So I think the upshot of what we're talking about here is the-- and I'm the economist in the room, so I'll make this point, the economist point-- which is continuing to make progress on admitting efficiency considerations into merger reviews is pretty important. We do that, for the most part, kind of through the back door of guppy models and a lot of pretty arcane modeling, which may help get a price effects. It's very difficult when you're talking about innovation effects of mergers.

I think the burden that you place back on that Division is the burden of really being willing to take a hard look at efficiencies. And in cases where the efficiencies are substantial, being willing to allow a merger, which may in some markets in some ways increase market power, but where that increase and its effects are overwhelmed by increases and efficiencies on the other side.

So as you walk away from behavioral remedies, I think it puts a lot more weight on that balancing test. And what you don't want to be doing is throwing out good mergers because the only way to eliminate all anti-competitive effects is with an unworkable or overly regulatory behavioral remedy.

MAKAN DELRAHIM: And, of course, I mean I'm assuming you're referring to what the courts and the guidelines have required for those efficiencies to be merger specific and verifiable rather than some pie in the sky.

JEFFREY EISENACH: Absolutely. That's as it should be.

MAKAN DELRAHIM: Great. And no disagreement. Mr. Feldman.

BRIAN FELDMAN: Just to add to that point, there's been a lot of talk about would it need regulation if these behavioral degrees can be very unwieldy. I would make the argument that if we were to have stopped the economic concentration in its incipiency, then the cost that fell to the department wouldn't have needed in the first place.

And there's a couple of issues here. The first is there's a lot of interesting consent decrees in the 1990s that involved firewalls in the pharmacy benefit manager industry. But one of the perverse effects of this is that it shifted the burden of oversight to other third party competitors in the industry. And as a result, this basically-- if the concentrated industry would have just been broken up in the first place, there wouldn't have been the need for public enforcers to have relied on the private entities to monitor compliance in the first place.

The second thing is the Ticketmaster and Live Nation example. There was a behavioral provision in that, which was an anti-retaliatory clause. Unfortunately, because that market is so concentrated, again—there was a recent *New York Times* article that was just released that showed that these effects, in terms of the behavioral provisions, have not been effective and that ticket prices are now at record highs. And Ticketmaster tickets were also at 80 of the top 100 arenas in the nation.

So I think hindsight is 20/20, but had we looked back and had we already seen that Ticketmaster, which was the largest ticketing service provider, and Live Nation, which was the largest concert promoter, had that been forestalled in its incipiency, then many of these problems that now exist, both in terms of compliance and in terms of imposing behavioral decrees, and now the current market conditions, we likely wouldn't be faced with.

MAKAN DELRAHIM: Thank you for that. Dr. Moss.

DIANA MOSS: So I, too, will speak as an economist.

[LAUGHTER]

MAKAN DELRAHIM: We've got two of you.

DIANA MOSS: Sorry, sorry, Jeff, you didn't get the warning. I just want to make a couple of points. You know, for the most part, if you have lots of competition in a vertical play upstream and downstream, you're not going to have concerns over foreclosure or raising one of those costs. The problem is when you do have highly concentrated markets, up and/or downstream, that the radar starts going up. And AAI has raised these concerns in numerous vertical plays, mergers, most recently in CVS Aetna.

So that really is sort of the threshold market structure, underlying market structure, problem that gives rise to concerns over foreclosure.

I have to point out that in recent years, there have been developments that really should be very much on the radar screen. We would hope would be on the DOJ radar screen about vertical integration. And that is commitments to maintain separate units after the merger. So, OK, isn't the purpose of the merger to integrate the units, to create those economies of coordination, to enhance quality control, to eliminate double margins? All of the traditional vertical economies we talk about in economics, maintenance of vertical units-- as I believe Comcast NBCU have done-- and as I believe-- correct me if I'm wrong-- I think AT&T and DirecTV just proposed as a way to sort of shepherd their transaction along.

I mean that would have serious consequences, real consequences, for the ability to extract efficiencies from the transaction. So I think we have to be very mindful of that.

And second, I would point out that if you go to the business management literature, McKinsey did a study-- a very dated study from '04 now-- but very interesting showing that managers have real difficulties extracting efficiencies from merger transactions. You know, they showed 60% of claimed cost savings were never realized. You can imagine if cost savings are hard to realize, then getting consumer benefits is going to be even more difficult, because those are even more elusive.

So all I'm saying is we should hopefully craft policy around these types of developments and evidence that we see in prior transactions. And hopefully, that will inform future policy.

And then, finally, I would point out that the agencies have taken structural remedies in vertical cases. When we wrote in a commentary supporting the DOJ's case against AT&T TimeWarner, we went back through all of these verbal cases and found that in 25% of them, there was a structural remedy taken. Which really does a lot more to eliminate enhanced ability and incentive to exclude rivals in a transaction.

MAKAN DELRAHIM: Thank you very much for that. And yes, of course, I mean if you promise to keep businesses separate and say that solves the problem of the potential rising rivals costs or foreclosure effects, well, you can't also with the same mouth argue you should take the benefits of the efficiencies in EDM. Nor I don't know if private securities lawyers would agree with that if a company was supposed to act in the shareholders' best interest is not maximizing its profits for those.

Ms. Rose, does anybody have a comment you'd like on this topic? Or should we take a 10 minute break and regroup again? I've really enjoyed it. Dave.

DAVID WALES: Real quick. I just wanted make one point. And again, maybe I'll be more the dissenting voice here. But I think the one thing that is really important is to focus on evidentiary based enforcement. I think it's one thing to say that conduct remedies in vertical cases don't work, but I think you have to really look at each merger individually.

And I can tell you from having done this as an enforcer, if the agency lawyers decide to do a conduct remedy in a vertical case, they're not saying, wow, this is the most perfect thing I've ever seen. This is great. In my experience, they know that there's a tradeoff in allowing the merger's efficiencies and potentially allowing some leakage or anti-competitive effects.

And so I think you have to examine whether the conduct remedy was successful in that light. Not just that, hey, did the remedy just fail to prevent any anti-competitive effects? That's not really the right question, right?

MAKAN DELRAHIM: Correct.

DAVID WALES: You have to look at that balancing or tradeoff. And maybe that was Jeff who made that point. If you're going to basically say that conduct remedies never work in a vertical deal, I think you have to put that in context in any retrospective and make sure that you're doing that balancing that the enforcers did when they signed the decree.

MAKAN DELRAHIM: I agree. And I think we'll talk about it in the second session, retrospective and who is the appropriate person who should be doing that? Should we be doing our own grading and review of what we have done? Should somebody else be doing it? Should some-- you know, are there other ways maybe we should look at the Institute, National Institute of Justice, the DOJ arm, that provides grants to some academics to take a look or somebody that takes a look at that? I think those are important and really good to learn from the past.

With respect to I think behavioral or structural, I don't disagree that these are tough choices. However, where there is a surgical, structural remedy that could allow the remainder of a procompetitive, or potentially procompetitive transaction to go forward-- I realize EDM and others-- that should be had. That's an easy call. That's not a difficult one.

But that's the trade-off rather than one where-- in some of the examples that Mr. Jacobson has provided, there isn't an easy way to do that or to do that in the McAfee case, and Intel, or others, where you could have possibly other mechanisms that could do that. But if you have a business unit that has been separate, it has been kept separate and can be spun off, and was one of the areas that is causing the competitive harm, that's not a tough question.

Let's take a break. Thank you so much for this session.

BOB POTTER: Bathroom's to the left here.

MAKAN DELRAHIM: And the bathrooms are to left.

[SIDE CONVERSATIONS]