CPI's North America Column Presents:

CPI TALKS...
... *with Joseph Simons*

Chairman of the US Federal Trade Commission

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In this month's edition of CPI Talks we have the pleasure of speaking with Mr. Joseph Simons, the Chairman of the Federal Trade Commission.

Thank you, Mr. Simons, for sharing your time for this interview with CPI.

1. **In the fall of 2019, fifty States' Attorneys General announced an antitrust investigation into Google, focusing on Google's advertising business, but potentially extending into other aspects of its activities. In 2013, the FTC closed an investigation into Google that would have focused on similar issues. In parallel, we understand that the FTC will look at similar issues relating to Facebook and Amazon. What are your views on the interplay between State enforcers, the FTC, and the DOJ in the digital economy? What are some of the ways in which the agencies are coordinating?**

I can't comment on any current investigations, but I'll note that the FTC has a long history of coordinating with our sister agencies on enforcement matters. The states, in particular, play a critical role in our investigations because they very often are closer to the conduct under investigation or may have closer ties with some of the individuals who are complaining about the conduct. We've worked closely with the states on past litigation matters such as the *Mallinckrodt* case, where Alaska, New York, Texas, and Washington joined our complaint and obtained a portion of the $100 million settlement relating to charges that the company maintained its monopoly by acquiring development rights to a competing drug. And in our recent hospital merger challenges against *Advocate/North Shore*, *Penn States Hershey/PinnacleHealth*, and *Sanford/MidDakota*, we worked closely with the states.

In past cases, attorneys from the states have helped us identify witnesses, taken the lead in conducting interviews, helped develop our thinking around legal theories, participated in depositions, and served as co-counsel when we go to litigation. They are critical partners that share investigative responsibilities and strengthen our ability to prosecute anticompetitive mergers and conduct. Finally, I should note that even when we aren't directly working with the states, states have, on their own initiative, submitted supportive *amicus* briefs in cases that we are litigating in federal court.

At the federal level, the FTC and DOJ typically will come to some mutual agreement on which agency will investigate a matter. We try to "clear" matters to one agency or the other in order to avoid duplicating investigations. Although recently, we have had some difficulty coming to an agreement on which agency should handle certain digital-market-focused conduct investigations, we are working together constructively to ensure any overlapping investigative work goes smoothly.

[1] These remarks reflect my own views. They do not necessarily reflect the views of the Commission or any other individual Commissioner.

2. **In parallel, enforcers worldwide (notably in Europe) have continued to adopt an interventionist approach in the digital economy, both in terms of recent cases (and various sector inquiries and recently-published reports, that suggest that this trend will continue or intensify). Do you believe that in the months and years to come we will see more convergence between international enforcers in their approach to the digital economy, or do you see a risk of greater divergence?**

Headlines may overstate differences in approach to digital matters. For example, this past summer, the competition authorities of the G7 countries, together with the European Commission, developed a Common Understanding on Competition and the Digital Economy, which focuses on shared principles related to the value of innovation, sound competition analysis, competition advocacy, and international cooperation as keys to promoting the benefits of competition in the digital economy.

As for the U.S. and Europe, the transatlantic relationship is marked by deep and frequent engagement. Over the three decades since our U.S.-EU cooperation agreement, our interaction, with few exceptions, tells a story of convergence. The digital economy is unlikely to be different, as we are examining similar conduct (setting aside the EC's single market cases), testing similar theories, and usually coming to similar conclusions. The topics the Vestager-commissioned experts explored in the Competition Policy for the Digital Era report are topics we addressed during our year-long series of hearings. Our hearings even had a session dedicated to understanding our respective approaches to platforms.

Moreover, differences in our courts' approaches to assessing multi-sidedness, or the quantum of effects necessary to find a single firm conduct infringement are not specific to the digital economy, and they are not a harbinger for greater divergence in the digital sphere.

Our shared vocabulary and analytical tools suggest an evolution that is more likely to be a continuing force for incremental convergence than an inflection point for divergence. Frequent exchange will allow us to narrow actual or potential differences as together we develop a better understanding of how these markets function. Although each jurisdiction naturally favors its own regime, we have much to learn from the experiences of others as we work to refine our respective approaches to enforcement in light of new learning and information about the digital economy.

3. **What are your views on the role of "big data" for antitrust enforcement in the digital economy, and how does it interact with other regulatory regimes? The notion of "big data" has implications for different types of regulation, beyond antitrust. Notably, the FTC enforces not only antitrust rules, but also certain aspects of Federal privacy rules (See, for example, the recent COPPA settlement with Google concerning advertising on YouTube), and international antitrust enforcers (notably the German Federal Cartel Office) are showing greater willingness to take data and privacy concerns into account in antitrust enforcement *strictu sensu*. How will the FTC balance these roles and rules going forward?**

The use of data in commerce is not a new phenomenon. All firms gather and use data to some degree. Although firms have used data for a long time, data usage in commerce is becoming an increasingly important element of competition. Recent advances in technology have enabled firms to gather vast amounts of information about consumers and the marketplace. Commentators sometimes refer to such datasets as "big data." Harnessing big data can bring enormous benefits to consumers and be a significant driver of economic growth. Firms can use big data to create innovative products and services, develop sophisticated AI applications, and more efficiently market products and services to consumers. Health care providers can take advantage of big data to improve patient care, potentially saving many lives.

However, big data can also be an instrument of anticompetitive conduct that harms consumers. Antitrust enforcers must be vigilant to consider the effects of data on competition. Firms can use data to engage in exclusionary conduct by, for example, abusing their monopoly power to deny rivals access to data through exclusive agreements with suppliers of data. Mergers between firms in markets where access to data is an essential input may also lead to anticompetitive harm. Fortunately, antitrust enforcers at the FTC have the tools necessary to challenge anticompetitive conduct and mergers involving data.

The FTC has been active in enforcement of competition cases involving data. The FTC has had a number of enforcement actions where access to data was a central element of the case. The FTC has required remedies in CoreLogic's acquisition of DataQuick Information Systems (a transaction involving real property data) and in Dun & Bradstreet's acquisition of Quality Educational Data (a transaction involving educational marketing data). Most recently, the FTC challenged a proposed merger between Fidelity National Financial and Stewart Information Services Corporation (a transaction involving property title data), leading the parties to abandon the proposed merger.

Moreover, in 2019, the FTC launched a new division within the Bureau of Competition dedicated to antitrust enforcement in the technology sector. The Technology Enforcement Division specializes in antitrust enforcement in digital markets, including antitrust issues associated with big data.

Antitrust, however, is not the only concern arising out of misconduct involving big data. Firms may also harm consumers by collecting, using, or sharing data in a way that violates consumers' privacy. One of our major priorities at the FTC is to challenge deceptive or unfair practices under Section 5, or violations of other laws enforced by the FTC, relating to consumers' data. Recently, the FTC obtained a $5 billion penalty on Facebook for violating an earlier Order that prohibited Facebook from misrepresenting how it shares and uses consumer data, and required it to take reasonable steps to protect consumer data. The $5 billion penalty is the largest consumer privacy related penalty ever obtained by any government. In addition to the penalty, Facebook agreed to sweeping new privacy restrictions and a modified corporate structure that will hold the company accountable for the decisions it makes about its users' privacy.

It is critical that firms collect and use data in a way that respects consumer privacy. Appropriate privacy rules must safeguard consumers. However, when enacting privacy legislation, Congress should consider how legislative choices in the privacy arena would also affect competition. For example, certain legislative choices could favor incumbents. Ideally, any new privacy laws will both protect consumers and promote competition.

4. **More broadly speaking, what are your views on the interaction between antitrust enforcement and sector regulation as it relates to the digital economy? Leaving aside their merits, there are growing calls at a political level for greater intervention in this sector (see for example, the 2019 Congressional hearings into the activities of the large technology companies). Do you think the existing antitrust and regulatory toolkits are sufficient to deal with any problems identified, or do you believe additional legislative or regulatory rules are required to deal with problems unique to this sector?**

Antitrust laws work in conjunction with other federal laws and regulations as well as with state laws and regulations. Antitrust laws focus on protecting competition and ensuring that markets remain free from impediments to competition. Other laws and regulations typically have broader social goals and priorities, such as promoting universal access, protecting the environment, ensuring the safety of workers and consumers, protecting privacy, and eliminating deceptive marketing practices. In general, federal antitrust laws apply across all sectors of the economy. Firms that operate in regulated sectors of the economy are generally not immune from antitrust enforcement. However, in some limited circumstances, sector-specific regulations may supersede antitrust enforcement.

Over the past several decades, the United States has reduced regulations in many sectors of the economy with the goal of eliminating impediments to competition in these sectors. Sectoral regulators have also increasingly promoted competition and free markets in pursuing broader policy objectives. I should also note that the FTC has an active ongoing advocacy program to encourage states to adopt laws and regulations (or revise existing standards) that enhance and promote competition. Indeed, many technology-enabled business models have challenged existing regulatory approaches and caused policymakers to adapt regulations to allow competition from newcomers. In addition, the FTC engages with Congress to promote laws that are likely to enhance competition in the U.S. economy.

Current U.S. antitrust laws provide the tools necessary to address competition challenges in the digital economy. U.S. antitrust laws are sufficiently robust to handle competition problems as they arise. Over the years, antitrust laws have proven to be very flexible and resilient in enabling enforcers to challenge conduct that harms competition in a broad range of markets. These laws have proved themselves effective even as the economy evolved with technological progress. I do not expect this to change when it comes to enforcement of antitrust laws in the digital economy.

5. **In parallel to the Congressional hearings discussed above, in the fall of 2018 and spring of 2019, the FTC held a series of hearings examining whether changes in the economy, business practices, and in particular digital technologies might require adjustments to the law, enforcement priorities, and policy. What are your views on the submissions made during this process? Do you foresee any outputs from this consultation in the near-to-medium term and what are some lessons learned so far?**

As you note, last fall, the Commission commenced its *Hearings on Competition and Consumer Protection in the 21st Century*. These hearings underscore the unique role that the FTC plays in the development of sound competition and consumer protection policy. We asked for public comment on several questions and topics, and we are taking into account the submitted comments and public testimony as well as the FTC's experience, judicial decisions, and academic writings as we create our output.

We are planning to release several pieces of output. I expect we will be releasing output from our international hearing very soon. I previewed the content from that hearing in my speech at the Fordham University Conference on International Antitrust Law and Policy. Specifically, the output will discuss the broad interest in the following:

- Reauthorizing the U.S. SAFE WEB Act;
- Stronger information sharing and investigative assistance mechanisms;
- FTC's continued international leadership on competition and consumer protection issues;
- Expanded programs to build strong relations with counterparts; and
- FTC's role in formulating broader government policies that relate to competition and/or consumer protection and involve international issues.

We also are working earnestly on Vertical Merger Guidelines, and we have been coordinating with DOJ in that effort. We are drafting a guidance document on the application of the antitrust laws to technology platform conduct, which we also plan to share with DOJ. Beyond that, we are drafting commentary on vertical and horizontal mergers — very similar to the Commentary on the Horizontal Merger Guidelines from 2006. We are conducting a review of

the economic literature on “common ownership” or horizontal shareholding. We are developing a protocol for merger retrospective studies that will help us to identify good candidates for horizontal merger retrospective studies.

I should note that while the hearings created direct support for several pieces of output, they also are indirectly kindling other initiatives. For instance, our hearings on labor monopsony issues have partly inspired our interest in hosting another workshop on non-compete clauses in certain labor contracts. We are using this workshop, which we are hosting on January 9, 2020, to gain a better understanding of what support we would need to develop a rule relating to non-compete clauses in certain labor contracts. I wouldn’t be surprised if our work on the hearings inspires other offshoots in our policy work.

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