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Transcript of Coordination and Public Statements Conference Call with Professor Joe Harrington

On August 28, The Capitol Forum hosted a conference call with Professor Joseph Harrington to discuss his recent article "Collusion in Plain Sight: Firms' Use of Public Announcements to Restrain Competition," and whether and how global antitrust agencies should could seek to deter cartelization through public statements in the future. The complete transcript, which has been modified slightly for accuracy, can be found below.

MR. TEDDY DOWNEY: Thank you and good morning, everyone. Thanks for joining us today for our Conference Call on Coordination and Public Statements. I'm Teddy Downey, Executive Editor here at *The Capitol Forum*. And I'm joined today by Professor Joe Harrington who serves as a Patrick Harper Professor of Business Economic and Public Policy at Wharton.

A quick note before we get underway. For the first 15 or 20 minutes or so, I'll interview Joe. And then we'll move into a Q&A format where we will entertain questions from the audience. If you have questions, please email them to editorial@thecapitolforum.com. That's editorial@thecapitolforum.com. And capitol is spelled with an "O".

Joe, I'd love to just dive right into here and just kind of get an overview from you of the study that you did of this paper. Maybe you can start by just giving us how you came up with this idea and how you went about performing the study, the methodologies for the study.

PROFESSOR JOSEPH HARRINGTON: Sure, Teddy. Thanks for having me. And let me also say this study is coauthored with Ehson Kashfipour, who's a recent graduate of Wharton and Penn Law. I've been studying cartels for a good 20 years and one of the things I've come to appreciate about executives when they collude is they can be very clever and subtle. A lot of cartels are of the kind of proverbial form of the kind of smoke filled room, that is executives getting together in some private settings such as a hotel room and talking very openly about how to coordinate their prices without any sort of lawyered up language. There's lots of cases like that.

But there's also a lot of cases where they pursue much more subtle methods, which might be less effective, but are also a bit more impervious to detection or to prosecution. And so I'm always on kind of looking at court documents and trade publications, and other scholars' work to find these other types of methods that cartels have deployed.

And what drew my eye here, what initially drew my eye to the issue of public announcements, was a series of Federal Commission Section 5 cases. So these are cases in which the party invited another firm to collude, but the invitation was not accepted. So there was no unlawful agreement to be prosecuted under Section 1 of the Sherman Act by the Department of Justice. But those have been prosecuted by the FTC under Section 5 as an unfair method of competition.

And what I noticed in some of these was that some of them were invitations that were done privately, but some were done very publicly and through media, such as earnings calls. There was one involving U-Haul and budget in the one-way truck rentals. Or freestanding newspaper inserts. And this kind of opened up this possibility that through media, which a firm could count on their competitor paying attention to, that they could put out invitations to collude. And this would be a method for coordination.

So then what I did was to engage in as exhaustive a search as I could of both any sort of published work, but in particular cases, legal cases, both public and private litigants, to see what other instances were out there. And there's no doubt this is a phenomenon. That is there are many cases where public announcements have been used in different forums in order to coordinate competitor's conduct in order to reduce competition.

MR. TEDDY DOWNEY: And so what a fascinating study. Can you lay out what you found and maybe give us a couple of examples to illustrate what you found?

PROFESSOR JOSEPH HARRINGTON: Sure, absolutely. So one of the things that we sought to do here was to try to identify the different types of messages that were conveyed in order to collude. And as I mentioned, there's the media that's used. And it could be kind of interviews and trade publications. It could be speeches or panels at kind of semiprivate industry meetings. There's press releases. And as I mentioned before, earnings calls, which clearly one thing we found, is the most common medium to be used. So there was that.

And then in terms of what they actually said, what we saw was that there’s really three different types of messages. There's one where a firm conveys how its conduct will be contingent upon a competitor's conduct. Most often this takes the form of them saying that they are going to lead in this industry, most often lead with a price increase, and that they will maintain that price increase if their competitors match it. It's not always as explicit as that, but that's clearly the intended conduct.

So you have announcements which describe, if I'm the firm, how my behavior is going to be contingent upon a rival. And already that's a real concern because that's exactly what can lead to coordinated conduct. Leadership-follower is a very easy method of coordinating conduct. And that's where you're in now the realm of unlawful collusion. So that's one batch.

A second class of announcement is where a firm or its executive is making forecasts about future conduct in the industry. Now, on one level, making forecasts is perfectly fine. And, for example, analysts kind of expect firms to make forecasts so the analysts can be better informed about what's going to happen in the industry. But when you start making forecasts about conduct of other firms, so the industry at large, then you open up the possibility that those forecasts may actually become self-fulfilling. That is only because you forecast higher prices, do higher prices emerged because that's perceived as an invitation by competitors to raise their prices. So that's the second class.

And then the third class is the most egregious type which is—if I step back for a moment, you can think about the forecast is where a firm is stating what it thinks other firms will do. This third class is where when a firm announces what it thinks other things other firms should do. And so it's making a recommendation as to what other firms in the industry at large should do in terms of prices, in terms of supply. And in this case, if these communications had been done in private, there is no doubt that this would have been prosecuted and there would have been a conviction. The fact that they're done in public, what we've seen is that the courts are a little bit more reticent about kind of convicting the firms.

But the fact is that these things are just as egregious and potentially just as harmful as if these invitations, these recommendations, as to how everyone should behave, if they were made in private. So we identify those kind of three different classes.

And to kind of give you an example, let me give you an example of kind of the first class, which is one from announces how its conduct will be contingent upon arrival. So we're all familiar with first bag fees in the airline industry. That is something that didn't exist 15, 20 years ago. Now it’s quite common. But you can imagine the airlines thinking about introducing a fee for the first bag and its competitors don’t have that fee. Well, there's going to be a concern that if they introduce it, they're not going to be competitive with their rivals because their rivals may not respond accordingly.

So an airline would like to be able to have some level of assurance that if they introduce a first bag fee, their competitors will do so as well. So this instance kind of arose in 2008, particularly in the Atlanta market, the Atlanta Airport, where the big players were Delta and AirTran. And so Delta came out in July of 2008 during an earnings call. They were asked whether or not they were planning to institute a first bag fee. And they said that they had no plans to implement it at that point. Okay, fine. That's innocuous. A few months later in October, AirTran had an earnings call and an analyst asked the CEO whether AirTran was going to institute a first bag fee. The CEO responded, and here I'll quote, “At this point, we have elected not to do it primarily because Delta hasn't done it. I think we prefer to be a follower rather than a leader right now.”

So this is exactly the type of announcement. AirTran is communicating to its rival Delta that of Delta takes the lead on instituting the first bag fee, they can count on AirTran to follow-up and do so likewise. Well, two weeks after that earnings call by AirTran, Delta announces a $15 first bag fee effective December 5th. A week later, AirTran announces a $15 first bag fee effective December 5th.

So here we see the announcement that was the basis for coordination between Delta and AirTran. And we see the actual effect in terms of the prices put in place. What's also interesting in this case is there's actually internal documents in Delta showing that after AirTran made this announcement saying that they would follow Delta if Delta took the lead, Delta's internal probability that they assigned to AirTran actually following Delta's lead was increased from 50 percent to 90 percent. So we see all the components there, going from announcement to anti-competitive effect.

MR. TEDDY DOWNEY: Yeah, this is just so interesting. And you found examples of all three of these types of coordination or collusion. And I thought perhaps some of the most interesting stuff was what you recommend, what changes you recommend to policymakers and law enforcers in these three areas? So maybe you can walk us through, you know, you got the results. You actually see a lot of this collusion going on, not enough enforcement. What can the enforcer do? What can the policymakers do to fix this under enforcement or lack of enforcement?

PROFESSOR JOSEPH HARRINGTON: Sure, absolutely Teddy. Yeah, because the study is descriptive. It's trying to pull together everything that's out there, but ultimately towards the objective of trying to make some recommendations.

And before we get into that, I didn't want to talk too long. So I wanted to give you kind of another briefer example of the third variety, which is when an executive comes out and announces what it thinks other firms in the industry at large should do. And there's a number of cases like that. And in particular, there's kind of a type called capacity discipline, which was observed in the steel industry and also in the airline industry again. And there's a common element here, which is there's a sense that among the executives there's too much supply or too much capacity resulting in too much supply. And the objective here is to try to coordinate the industry to reduce capacity.

And again, what you have here is announcement saying that that the industry—not just the firm itself. It's fine for a firm to come out and say that it's planning to reduce capacity, but come out and say that the industry should reduce its capacity. And then when this actually does happen, announcements commending its competitors for having reduced capacity and resulted in lower supply and higher prices. And there's many other examples in that bucket.

So in terms of recommendations, let me preface it by saying that even though some of these cases are incredibly egregious, the fact is I would say that the public prosecutors have been a bit hesitant to take them on. Most of the cases are brought by private litigants. And they are potentially difficult cases because you don't have the private communications, which the courts really want to see. You don't have a leniency with the applicant, which has been a very important program for the Department of Justice in both identifying and prosecuting cases. These are not open to kind of leniency applications because the evidence is more kind of a subtle form. So we have kind of a less, I would say, public prosecution. And then the courts have been, I think, excessively deferential to the companies. That is, as I mentioned before, some of the things that are being said, if they had been said in private, there is no doubt in my mind that the courts would have convicted the involved companies. Just because they’re said in public doesn't mean they should be given any less scrutiny with regards to what they're doing.

When you do make it a public announcement, it does open up the possibility that there could be a pro-competitive rationale. Because there are other parties that are listening to these announcements, potentially consumers and the like. But as they go through in the study, in these cases, you can pretty much dismiss pro-competitive rationales for these announcements. And having done that, the courts should be kind of holding the companies kind of to the law, just like they do with private communications.

So in terms of recommendations, I think probably the two key ones is I'd like to see the Antitrust Division, Department of Justice kind of take on some of these cases and not just leave the burden to the private litigants. They did pursue the airlines capacity discipline case initially, but then kind of chose to drop the case. Private litigation continued. As I said, these are difficult cases. But they're potentially very important because it's expanding the boundary of what we will determine to be what is unlawful collusion. Right now, legally we're in kind of a gray area. We need cases to provide resolution here.

The other kind of recommendation with regards to the courts is twofold. One is within the courts, there's a standard, called the Twombly standard, which is what plaintiffs have to kind of get over if they're able to move on to discovery. And discovery is obviously very crucial, particularly if you think there might actually be some private communication or you need evidence of effect. I think the courts should use more of these public announcements as a basis for engaging in discovery, satisfying the Twombly kind of plausibility standard, which is a standard which says that based on the evidence at pleading that it's plausible there could have been collusion.

That was not the case in a very recent episode in the pork industry where the court kind of dismissed the case even though there were these public announcements and there was some evidence of effect. So I think the court should be kind of more accommodating to the plaintiffs based upon public announcements. And the other key thing is that they ought to be using the per se standard with regards to public announcements. That is just as they're using that with regards to private communications, that if I tell a firm to collude and we see evidence that the other firm accepted it, that should also be applied when that invitation is done publicly. And as I said, the courts are hesitant, it seems like they've been hesitant, to apply the per se rule, but it really is appropriate here. And I think it's not only appropriate, but I think it’s very constructive. Because it would lay down this very clear line to companies, which is that you cannot go out there and basically announce what your competitors ought to be doing. And that that is in the realm of kind of unlawful communications.

MR. TEDDY DOWNEY: I want to hold you to one of your recommendations or at least one of your findings here which is actually a favorite topic of mine, which is the FTC penalties. And I thought one of the most shocking things about this study is I think there's this sort of general sort of expectation and sort of understanding that collusion and cartels are actually something that the antitrust agencies, police and penalize well, but we don't see that here. And one of the most alarming conclusions and you provide is that the FTC maybe not even, it's not only not bringing enough cases, but when they do enforce the law, they don't penalize the companies, they just slap them on the wrist, tell them to stop, issue a cease and desist, and then just ask them not to do it again. And you've talked a little bit about this being ineffective. And maybe you can discuss why, what kind of message do you think this is sending to companies and why it's problematic.

PROFESSOR JOSEPH HARRINGTON: Okay. Yes, and that is indeed another recommendation. And what's true here is what the FTC tends to pick up here are just these invitation to collude cases. Because if the thought is that the invitation to collude has been accepted, so that then there might be an unlawful agreement, then that's something that the Anti Division of the DOJ will handle under Section 1.

But now we're looking at instances where there's an invitation to collude, but there's no evidence that it was ever accepted. And so the FCC, to their credit, has taken on those cases under Section 5. Department of Justice has taken on one case to my knowledge under Section 2, which is monopolization practices.

But as you just mentioned, the problem here is that there are indeed no penalties. It's really, I would say, it's an attitude of no harm, no foul. Which is, okay, you invited someone to collude, but they didn't accept. So we're just going to tell you don't do it again. And yeah, that creates some very bad incentives. Because it creates the incentive that, well, I can try. And if I succeed in colluding and not being detected, great. If I'm actually detected with the invitation, so nothing gets off the ground, well, okay. I pay a few kind of legal fees, but there's no real harm to the company.

And so when you think about enforcement in the law, it's all about the deterrence. That's what we want to do. You know, it's a second best situation that we identify crimes and convict individuals and punish them. The first best outcome is that the system is designed, setup, in terms of law and enforcement, so that individuals are deterred from committing the crimes.

But here we have a situation where the deterrence is really very weak when it comes down to inviting a competitor to collude. And particularly, it seems like when done publicly because of the hesitancy the prosecute. So I would at least want to see the FTC to penalize to the maximum that they can these invitation to collude cases. And so there's more that can be done there. And then the DOJ as well, it would be nice for them to take on these cases on under Section 2, because they do have far more severe penalties that they can impose.

MR. TEDDY DOWNEY: And I think before we move on from the recommendations, you also have a recommendation that the agencies should provide some guidance on how they think these types of behaviors are against the law. You want some more clarity to that point to make it clear that this is conduct that they want to deter and how they plan to enforce against it.

PROFESSOR JOSEPH HARRINGTON: If I could just add there. That's something which the agencies as a general rule have been very good about, which is providing guidelines. Because once again, they don't want companies to get in—they want to avoid the trouble. And guidelines are very useful for that. And it's just that there aren't guidelines here, but they really are needed.

MR. TEDDY DOWNEY: We're almost a half an hour in. I want to open it up for questions. We don't have any questions yet, but if you have questions, please email them to us@editorialatthecapitolform.com. Actually, I have a question here. This is from my colleague Nate Soderstrom. So all the other questions will be anonymous except for this one. So especially in recent years, it seems like antitrust enforcers have really de-prioritized, coordinated effect questions and merger analysis in favor of a focus on unilateral effects. Do you think this has been a mistake? And do you think coordinated effect questions in merger analysis generally deserve closer scrutiny?

PROFESSOR JOSEPH HARRINGTON: Yeah, that's a very good question. There's no doubt that merger analysis focus is disproportionate effects and coordinated effects and that's for at least two reasons. One is we know with every merger, there will be some unilateral effect. It's just a matter of its magnitude. Not every merger has even the prospect of coordinated effects. But there's another reason which is we have methods, very good methods, for quantifying unilateral effects. And we're still in search of good methods for quantifying coordinated effects. But that, of course, doesn't mean that coordinated effects aren't there. It just means it's more of a challenge in terms of coming up with numbers, and particularly for the court, to say that, well, the coordinated effects of this merger are really quite large.

In terms of the importance of giving attention to coordinated effects, I think it's only going to increase over time. And the reason why is because—and this is somewhat market specific, but certainly there's been a general point made that markets have become more concentrated. There's some debate over this in terms of how ubiquitous it is, but we can certainly point to certain industries—the airlines are another case in point—where concentration has significantly increased over time. And as concentration gets higher, coordinated effects become potentially more relevant.

And to give you an example, in the American Airlines/U.S. Airways merger, coordinated effects was a real consideration. The merger was approved. And while it's hard to kind of establish clear cause and effect, what we do have in the post-merger environment is some evidence of coordinated effects through this capacity discipline.

So I think at a minimum, what one can do is—in fact, let me kind of just step back a moment and put a broader point out there, which is, I think there should be more accountability post-merger. If we think that there might be coordinated effects but yet still approve the merger because we're just not so sure of it, then we also engage in post-merger monitoring and be prepared to do some serious action if there's evidence of coordinated effects. In fact, this is something that can be conveyed to the firms during the evaluation process, which is, yes, we'll approve this merger, but we have some concerns about coordinated effects. If we see coordinated effects afterwards, we might have to break it up.

Now that's pretty draconian, but once again we want to provide good exit anti-incentives. We don't want firms bringing mergers for a primary reason that they have actually unilateral and coordinated effects. So I think coordinated effects is something which scholars are working on to try to develop methods to quantify it. And I think, as I said, it's going to be an increasingly important because the next merger in a market is kind of more likely to have a coordinated effects component if the market is already fairly concentrated

MR. TEDDY DOWNEY: Very interesting. You answered the next question as well. So I'm going to skip a question about market structure and collusion as the industry becomes more consolidated. I want to bring up another point, which is in your paper you suggest that you did a comprehensive search. And you sort of find one of these like big examples of public statement, collusion or potential collusion occurs every year or every two years maybe. But when I listen to earnings calls, I am very surprised at the language that I hear. I'll bring up a recent one. I think it was Uber and maybe some of the other food delivery companies and they were talking about the need for consolidation and the need for price rationalization. I'm pretty sure Lyft and Uber talk about that type of stuff all the time. And I am wondering if perhaps this is even more how confident you are and how comprehensive this list is or if there might be more out there that require some additional scrutiny or maybe broadening the number of types of statements that you're pulling in. I'm curious what you think about that?

PROFESSOR JOSEPH HARRINGTON: Oh, I think—and here I'm just speculating. But what we have in the study could be very much at the tip of the iceberg. Because we held a fairly high standard for what we included, which is these are cases that have been pursued as these are episodes in pursuit of legal cases. So that there was enough evidence that someone was to pursue it. And as well, our examination of that evidence made us fairly confident that these announcements were intended to coordinate competitor's conduct.

So an episode for which no one brings a legal case would not be included in our study. Now, we could look at those cases. But as I said, we only wanted to include ones that we had a high level of confidence. So it would require further investigation. So that's in terms of why so few cases are actually in our study.

But there's a kind of broader point here that if there's some key judicial decisions made, guidelines put out by the DOJ, there could potentially be kind of an onslaught of cases. But right now, bringing a case of this sort to the courts is a challenge because the courts aren't particularly receptive to them. Even though I look at them and look at the evidence and I see this as just because this occurred privately, there's no doubt that that would have been illegal. And whether it occurs privately or publicly, there's harm to consumers from higher prices. So it could be one of the things where a few key cases could clearly signal that, hey, these things can actually be pursued effectively in court, and then we might see kind of many more of them.

MR. TEDDY DOWNEY: Yeah. We've got another question here about some of the misunderstandings about the legality and the protection of saying stuff like this in an earnings statement. You get into the law around this sort of fake lawfulness of saying collusive stuff in an earnings call. And you point to some case law showing that these statements are covered by SEC law, but that doesn't preclude them from antitrust enforcement. Can you talk a little bit more about that?

PROFESSOR JOSEPH HARRINGTON: Well, I mean, a company, a public company, certainly is required to provide certain information and certain accurate information. But what we're talking about here is something kind of well-short of what's put into that bin. What we're talking about here is announcements, which are intended to influence the conduct of rivals. And there's nothing in securities law which says that you have to inform the market of your intent to try to influence a rival's conduct. So if I go back now to thinking about what kind of guidance to provide, I mean, that really should be what the focus is. Talk about your own company. Talk about your own plans. But be very careful about talking about what rivals are going to do in the future. And certainly what rivals ought to do in the future. If rival conduct is important to informing capital markets, those analysts can go to those rivals and ask them the information. So the information can be had. And it just creates such a risk when one company starts speaking about the future conduct, whether it's predicting it or recommending it, of rival companies.

MR. TEDDY DOWNEY: And I really want to quickly get on this point, just stay on it. Do you think it's the misunderstanding of the law around how—I guess how important do you think this misunderstanding on the public statements? Because that's where a lot of the collusion is. That's where you saw a lot of collusive comments and there's sort of this deference by the law enforcement. Do you think they're sort of mis-reading the law? Or they're just getting it wrong? I mean, there's good law that they could just be bringing these cases. They don't have to worry about whether or not these statements are covered by the SEC. And you also make a point that it's actually worse when they're saying this type of stuff in the SEC earnings calls, regulated earnings calls, because there's some level of commitment to doing, you say you're going to do, when you make a statement in an earnings call. So it's actually worse in some ways and calls for more attention, not deference. Is that a fair recap of what you've got in the paper?

PROFESSOR JOSEPH HARRINGTON: That's right. That's right. If we go back to the first bag fee example, AirTran has to be really careful if it ever comes out and says that it won't take the lead, but it will follow. It is under some sort of limited kind of commitment to do because it's provided this information in that form. While if it had just kind of said that on the side to someone at Delta, there would be no such kind of commitment. So there's definitely that.

In terms of the court's deference, here once again I can just speculate. But I'm guessing that what they're concerned about is that there may be—that them overstepping kind of themselves in that there may be pro-competitive rationales for these announcements. And so that's why they don't want to put them in the per se category.

I think back, for example, to—it's a different case, but it makes the point—the container case where the companies were privately exchanging prices. They weren't discussing prices or agreeing upon them, but they were exchanging price info. And these were privately negotiated prices with customers. So one company would call up another one and ask what price have you been selling it for? The courts there chose not to make that per se illegal. They ultimately found the firms guilty because there was evidence of effect, but they did not want to make an exchange, a private exchange, of prices per se illegal because they think that there could be some pro-competitive rationales.

Now, I don't think there actually are, but I think it's that mentality that's kind of prevented them from being as tough with public analysis as they are with private. Here is the role for economists to sort of educate them that, well, in a lot of these cases that we're looking at here, there are not pro-competitive rationales. And the only rationale one can come up with is the anti-competitive one.

And that's what I think will be needed for the courts to apply kind of the per se standard to these public announcements.

MR. TEDDY DOWNEY: We've got another question from the audience here. Aside from the egregious invitations to collude, what sort of scrutiny should there be a firm statement of their own future strategy that is independent of rivals conduct? What tools can antitrust use to tackle passive collusion aside from merger breakups and being more favorable to discovery? And lastly, would you support antitrust agencies having UK CMA like remedy powers under their more robust market study, marketing investigation regime?

PROFESSOR JOSEPH HARRINGTON: Let me say, yeah, yeah. Taking the last one, yeah, I think the market study approach is a productive one. And it's just a bit more proactive. And so I think it's something that DOJ, the U.S. agencies ought to pursue. There isn't that kind of tradition here, but we've seen particular instances in the UK where it's really made a difference. And the thing is if we have some concern about a market, we don't necessarily need to wait until there's a very clear violation of the law before we actually do some investigating. So I'm all for that. And let's see. And then what was the second question?

MR. TEDDY DOWNEY: The second question was what tools can antitrust use to tackle passive collusion aside from merger breakups and being more favorable to discovery?

PROFESSOR JOSEPH HARRINGTON: Yeah, that's a good question.

MR. TEDDY DOWNEY: If Section 5 is one of the ways that you could enforce it more with more penalties, couldn't you do a rulemaking or pass a legislative ban on the types of communications that you think are per se illegal?

PROFESSOR JOSEPH HARRINGTON: Well, let me put it this way. It doesn’t matter what you're going to put in the tacit collusion category. Because what I'm describing here—and we talk about in the study—is not tacit collusion. I mean, this is express communication. It’s just a little bit more subtle than perhaps what you’d see in your typical cartel. So the tacit collusion, here I imagine that it's actually technically lawful. And I don't think there's much we can do other than at the time of merger—this is one big reason why going back to coordinated effect is really important. Because if there's a market where we're concerned that tacit collusion could emerge, and here we have a merger being considered in that market, this may be the only opportunity to prevent that tacit collusion. So dealing with tacit collusion is a real challenge. And I don't have much to add to what's out there right now. And the first question was?

MR. TEDDY DOWNEY: What sort of scrutiny should there be of firm's statements of their own future strategy?

PROFESSOR JOSEPH HARRINGTON: Yeah, from their own strategy. What we focused on in this study is announcements where they're making reference to competitors. There's also another class, which has been well recognized, of announcements made about your own future conduct. An example, probably the most well-known example, is advanced price analysis, where a firm may announce a future price increase which consumers cannot act on until the future. This is potentially an invitation to its competitors to make similar announcements. And if they do, then everyone will consummate those future price increases when the time comes. And if the rivals do not make the same advanced price announcements, then the original announcer retracts their announcement. So it's a costless way of leading on price. If you were to raise your price hoping that other firms would match it, while you're waiting for them to match it, you would be losing market share because you have a higher price. But here you're announcing a future price increase. You're not transacting on it. And now you're giving the competitor an opportunity to match it or not.

And so that's a case of point. That's another phenomenon. There's a number of cases. You know, there was originally an airlines case. There's a case of container shipping. That one the European Commission handled a few years back. Israel has wrestled with this. Australia has in the banking industry. And we're still in search of a clearly defined legal rule with regards to that. And there that's more problematic than I would say what we're looking at in this study. Because with advanced price announcement, there is a pro-competitive rationale which you just cannot initially dismiss. It's going to have to be handled on a case-by-case basis, which is you're informing consumers, your buyers, of a possible future price increase. And indeed, that was the airlines defense with this case a couple of decades ago was that when they were pre announcing price increases, they were saying they were informing their customers.

MR. TEDDY DOWNEY: Yeah, it's a little tricky to argue that you're informing your customers on an earnings call, but I could see them making the argument. It's just not that compelling if you just kind of peel back the onion a little bit.

PROFESSOR JOSEPH HARRINGTON: Yeah, exactly, exactly. That's why I feel like in these announcements we cover in our study—and this is something we explicitly deal with within the paper—is there really isn't a plausible, much less compelling, pro-competitive rationale for these announcements.

MR. TEDDY DOWNEY: I guess this will be the last question. We're out of questions from the audience. So this will be the last question. Which is you are an economist. You teach economics. And you are digging really a lot into the law here. Looking at this from a business standpoint, from an economic standpoint, do you think that helped you see past kind of what the lawyers are missing here? I mean, I find this really fascinating. Because I talk to a lot of economists that work in antitrust and they're always—not always, I shouldn't say always—the vast majority of the time they're coming up with excuses for there not to be enforcement. Whereas here you're pointing out a weakness in the law and you're using all this kind of compelling business and economic analysis. Is that due to a different approach? Do you think it was helpful for you in terms of seeing that under unenforced that? I'm curious how you think your background and approach helped you here?

PROFESSOR JOSEPH HARRINGTON: Yes. Well, it definitely did help me. For example, let's take collusion. When I use that term and I talk about unlawful collusion or lawful collusion, I know some lawyers will be perplexed by that. You know, isn't all collusion unlawful? And my answer is collusion is an economic phenomenon which existed before any antitrust laws. So it was around and it existed prior to anything being unlawful. And so collusion is all about competitors trying to achieve some common understanding that they're going to compete less aggressively and it could be in a variety of dimensions. And so I think about it in those terms, which is, okay. How can they achieve—we always know that if they're right now competing, what we know for economic theory is there's always a way in which all the firms could be made better off if they were coordinated in a certain way.

And one of the challenges to that is how do they communicate that? Well, obviously if they all get together in a room, they can do so. But there's many other ways they can do so. And understanding those other ways, I would just say for lawyers and the legal cases, have been very instructive on that, and probably more so than economists. But just from the economic perspective is just identifying what is this collusive phenomenon? And it's unrelated to the law. The law is really more about how is it they get to that collusive outcome? What are the communication methods? And so here it's a matter of expanding what is kind of a well-defined set of communication practices? So it can be well-defined. We can articulate it to business executives to say, okay, you do this, this is a violation of the law. And that's really important. It can't just be some sort of abstract definition of what is illegal communications? It has to be operationalized so the executives understand that.

And that's what we're trying to do here is to expand the realm of what could be well-defined illegal communications? But all of it, whether it's illegal communications or not, it's causing harm to consumers. And it's just a matter of how can we define the law appropriately so that we can prosecute and provide clear guidance to companies whether or not in violation of the law?

MR. TEDDY DOWNEY: Well, actually I'm going to ask you one more question, which is there is a lot more crime—or I shouldn't say crime. I noticed what I tend to see is just a lot more flagrant violation of law out in the open. It's like you're actually looking at the law and saying just because you're doing it out in the open doesn't make it okay. Are you concerned, given the court's deference to these sort of frankly implausible reasons for engaging in collusion, these kinds of collusive statements, are you concerned that this sort of trend of just violating the law out in the open, not being enforced, it's going to be harder to push for the type of enforcement that you're looking for?

PROFESSOR JOSEPH HARRINGTON: Well, I'm not sure if there's a trend or not. It's hard to say. But thinking more to I think what your key point is, if plaintiffs—and there are some current cases in process, in pork and in broiler chicken, for example—if the plaintiffs lose those cases—and I think what I see in terms of evidence is probably compelling—if they lose those cases, that's going to be bad news for consumers. Because what it's going to signal to executives is that, oh, yeah. We can say these things and we're not going to be convicted. We're not going to be found guilty. And so we're at the stage where there's a lot of lack of clarity about both what is illegal and what's not and what the courts will actually do.

So a few judicial decisions could potentially have a real impact. And it's akin to, for example, I've seen many jurisdictions around the world in the last 20, 25 years, all of a sudden start prosecuting cartels. And the first few cases that they prosecute can be really important for the future. Because if they don't win these cases, then all of a sudden the business community sees enforcement as weak. And similarly here, I would be concerned that losing these cases might kind of just open up yet more in terms of kind of these open public announcements that coordinates conduct.

MR. TEDDY DOWNEY: Yeah, and just to add to that point, I mean, we are seeing some pretty—I don't know how robust it is, but at least some pretty aggressive enforcement in this generic drug market, which you point out. Which they're actually bringing those cases and they're actually throwing some people in jail. I don't know if they put anyone—they have, I think. Well, I don't remember actually. But they're aggressively enforcing some of these generic drug cases. So in some of these markets, they are pushing the law. And then to your point about sort of if they bring more cases, they put out guidance, ostensibly that could lead to more success in the courts as well.

PROFESSOR JOSEPH HARRINGTON: Right. It’s a dynamic there.

MR. TEDDY DOWNEY: Yeah. So, I mean, look, we think this is very important work. We are excited to cover this here at *The Capitol Forum* going forward. And just want to thank you so much, not only for doing this work, but also for doing the conference call and sharing this all with our audience. It's very, very interesting stuff.

PROFESSOR JOSEPH HARRINGTON: It was a pleasure. Thank you for inviting me, Teddy.