

Lina Khan Explains the F.T.C.'s Aggressive Strategy | DealBook Summit 2023

Please welcome Andrew Ross Sorkin and his guest chair of the Federal Trade Commission Lina Khan Lina Khan is here everybody Uh You were just meeting Bob Iger for the first time You don't like to meet do you like to meet CEOs By the way we're always happy to meet CEOs as part of our process And so you know oftentimes if we've done an investigation and gotten a recommendation to move forward as part of that we usually sit down both with the lawyers but also often they bring the execs And so we meet as part of that process Let me properly introduce Alina Khan She is of course possibly one of the most consequential figures in the world of business right now She runs a Federal trade Commission She is the youngest chair in the history of the FTC in September She made her biggest and boldest move yet along with 17 states filing an antitrust lawsuit against Amazon accusing the company of illegally using its market power to raise prices and exclude competition We're going to talk about that She famously wrote a paper about Amazon while at Yale law school and it was titled Amazon's antitrust paradox in more than two years at the helm of the agency is now investigated and challenged nearly 40 mergers There are a lot of ceos who are scared of Lina Khan Nice to see you Great to be here You've been involved in a whole number of cases some of which never went to court some that went to court uh where you didn't win I'm curious what your idea and I think a lot of the businessman is trying to figure out what your idea of winning is What does it mean to win for you in your role So look the Federal trade Commission has an incredibly important job right We're the main cop on the beat uh for unfair methods of competition or unfair deceptive acts or practices across a huge chunk of the economy Uh So we have a big job we have limited resources and so we have to think about how can we have the greatest impact on what we identify as some of the biggest problems And so we are focused very much on areas like health care on food and agriculture Uh really spent a lot of time talking to market participants businesses big and small to understand where are their choke points And what can we be doing The other big thing for us is to have impact we're focused not just on bringing individual lawsuits but also on bringing in issuing rules So these are market wide rules that we've issued on areas like non-compete junk fees I think big picture success for us looks like making sure the public knows that

the FTC is in their corner fighting for them against illegal business How much of your business then is about deterrence meaning that nobody even does the deal because they're too scared to bring it to you I mean look as a law enforcer with limited resources you want to promote deterrence right And there are a few components of that one is you need to be clear about what the rules are right So bright line rules that are making clear what is permitted what's not permitted And so that's why we at the FTC actually prefer those types of per se prohibitions rather than complex regulations that oftentimes favor big incumbents over small businesses and start ups The other factor for us is how do we make sure we're addressing root problems and the kind of root culprits And so you know as an enforcer sometimes there can be a temptation to jack up or juice up your enforcement numbers but going after low level players right So go after all these mobsters rather than focus your energy on the boss at the top And we're really focused on actually looking upstream And so for example we recently brought a lawsuit for a private equity roll up And as the anesthesiology market a lot of people in private equity that are not worried about you They weren't before And as part of that we name not just us anesthesiology partners but also the private equity firm Walsh Carson that we believe had orchestrated the whole scheme And so you want clear rules you want to be you know holding not just the low level people accountable but also the folks at the top that also includes individual CEO S which we've done as well But what do you feel I'm just curious as a human uh you brought these cases and there's a number of them that you've lost big ones I'm talking about Microsoft Activision I'm talking about the meta the meta deal Do you on a day like that Do you say to myself do you say to yourself We shouldn't have done that We should have done that We missed something What what do you think Look whenever we bring a case we wanna win it and we only bring it because we believe the facts and the law and on our side and that we should win it Of course when we have setbacks we're disappointed Uh we look at those cases closely we try to figure out what went wrong What could we have done better Uh If we believe that the court made you know errors uh then we have the opportunity to appeal the big picture Um You know we are quite pleased with our efforts right So we have filed overall 11 lawsuits against mergers in five instances the companies abandoned outright and a whole set of other instances the company settled and we had two losses one of which is currently on appeal Separate from that there were 14 deals that were abandoned just after we started investigating And before we had the chance to actually file a lawsuit

So big picture of course the two cases that we lost we would have wanted to win But we're quite pleased overall with our fair to say that you have a much more aggressive approach to antitrust than has been a historic case Historically the case I mean you are approaching this in a way that most people that were in your seat before did not And people are looking at this and they're saying to themselves you know what does it mean What does it mean for business What does it mean for deal making Is she right Are the courts all going to ultimately decide that actually she's not right By the way if they do that would you change if if if you started losing more cases do you say I'm not going to bring the next case Do you do you sit and play the odds before you bring the case A lot of lawyers in the room probably you know get asked you know what do you think that you know before bringing a case any kind of case They say what's the chance we're going to win Is there a number that you say to yourself it's got to be 70% otherwise I'm not going to do it Well look it's it's very fact specific It's very case specific Uh It's also dependent on resources I mean we're a fairly small agency all things considered around 1200 people And so we max out a capacity and so we have to pick our battles pretty carefully uh with M and a of course it's also a fluid environment And so you don't know when you're deciding today what lawsuits to bring what proposed deals may come down the pipe in two weeks and a month in two months And so uh the decision making there can be quite dynamic just to zoom out in terms of the current antitrust environment This is not happening in a vacuum right In June 2021 President Biden signed an executive order where he said unfortunately for the last few decades competition has been declining across the American economy be it in our airline sector be it in our telecom sector Uh Really excessive consolidation and concentration now looks to be a systemic feature of our economy rather than isolated And after saying that he charged both the FTC the DOJ but really agencies across the board with reinvigorating our competition tools and making sure that consumers workers businesses uh innovation our democracy are all better positioned Once we have more competition how much do you think that you have to be a crystal ball um sort of uh looking down what's going to happen and how much do you worry that you'll be wrong So it's a really good question and there's no doubt that the merger enforcement part of our work is intrinsically predictive right The law anticipates that and they say that the responsibility and obligation on the FTC is not to predict with total certainty what's going to happen We deal in probabilities not certainties And so what we are engaged in is a risk

assessment If this deal goes through uh what's the likelihood that it may substantially lessen competition or tend to create a monopoly And so we look at the evidence right We look at the documents uh are the company's documents showing that right now they're actually competing head to head with this firm be it on lower end prices or fighting for the same talent pool or investing in R and D Uh We talked to other market participants uh be it their customers or and we also think about not just competition today but competition in the future Where is this market going And we've seen in areas like platforms the direct threat is not coming from an exact replica but you know Microsoft was threatened by Netscape in the middleware companies And so you need to also have a sense of where is the market going One of those is I wanted to ask you this and I'm going to bring something up that you're probably not gonna love I don't even know if you're going to remember this This goes to the crystal ball issue though And it really is an interesting thing because regulators do have to decide what they think is about to happen Right So uh several years ago and we just had David Zaslav here Time Warner that I should say AT&T was going to merge Time Warner and AT&T together In fact making Del Rahiem up up there was at the DOJ at the time and when the the judge lost when when the when when when when they when he lost the case effectively and and the deal was allowed to go through you said the following you said the DOJ should appeal the decision and ask the DC circuit to overturn judge Leon's misguided opinion This is when you were at open markets you said with Time Warners must have content including March Madness and HBO AT&T will be able to hobble rival content distributors and dictate the terms on which competitors can participate in the market Furthermore the merger creates an effective duopoly distribution between AT&T and Comcast AT&T will be able to use Time Warner's programming as a weapon to defend its business model stifle existing competition uh and existing uh threats and steer the trajectory of the industry I I bring you this because I think we all now know uh AT&T is a complete mess Um A T it's it's uh T Mobile is now the largest uh uh telephone provider in the country Um David Zaslav S uh job is as challenging as ever Now that is a challenged business The entire thing was a challenged business Now maybe you sh weren't supposed to know that at the time I don't know But I I bring this to you because I'm curious how you think about that just as a sort of thought experiment Yeah it's a good question And of course you know when you're an academic or an outsider researcher you don't have access to the same information as an enforcer Big picture There is

a fundamental question in antitrust enforcement which is when faced with uncertainty how do you balance the error costs right Is it better if you if you might get it wrong is it better to get it wrong in the direction of acting or is it better to get it wrong in the direction of not having acted And for you know several decades there had been the view that it was better to err on the side of being hands off the view being that even if you were to have monopoly power that monopoly power would be dissipated by entry by market forces And whereas it would be difficult to undo or fix the harms of an erroneous government decision I think we're at a stage where we realize that that inaction that bias in favor of inaction has had enormous costs right across our economy And so that's why you're seeing this rebalance that's going on right now to make sure that we're not you know following that course and erring on the side of not acting what about I want to talk about Amazon because that was actually about what your paper was originally about And now you you brought the case effectively and it's one of the first cases where you have a company that ostensibly has provided lower prices I say ostensibly because you don't believe that they have ultimately but that the prime membership program and everything else um is effectively a monopoly power Now they look at this and say look we're we're a retailer and in the context of retail they would say we're 4% of retailers 7% of retail and retail is this this big thing You are defining it in the context of your case simply among this idea of sort of super retailers right And there's probably only one or two or three in that category at all maybe one actually And so I'm curious how you think about part of it is about market size and constructing that size and then the market power that you have in that size Yeah I mean this is one of the core parts of antitrust analysis is how you're defining the relevant market millions of dollars get spent on this particular part of the fight And oftentimes antitrust cases you know fall and rise based on whether you win on market definition Um in the complaint we lay out why we believe that the online superstore market is the right way to look at this Uh We point to you know factors like depth and quality um range of selection that we believe set you know online superstars superstores apart from from the other stores Uh We also rely on not just what's known as indirect evidence where you're you know drawing the market and calculating the shares but also what's known as direct evidence of monopoly power And so this is when you're looking at the company's behavior right If you have a monopoly one sign of that can be if you sorry I should be clear if you have a monopoly that's managed to insulate itself from competition one sign of that can be that the monopoly is

able to harm its customers with impunity And we lay out in the complaint a whole set of evidence that suggests Amazon has been able to do that just that it's been able to do that We allege uh with the set of customers on the seller side So it now it has steadily raised the fees that it charges these sellers It now on average takes close to 50% of the cut So one out of every \$2 it's also steadily been degrading the shopping experience by flooding its search page with ads Um sometimes they're relevant But as our complaint found they actually also have been jacking up what what are basically junk ads irrelevant ads And so we lay out in the complaint a portrait of we believe a company that has you know through anti competitive practices shielded itself off from competition and is now exploiting that power through customers people's own ability And you'd think on the internet you'd be able to click off and find whatever you want I mean do you subscribe to Prime By the way I don't you don't subscribe to prime I do not why I just haven't I mean look this is not an area where I believe people through their consumer experiences need to stand up But just personally I haven't no the reason I ask is so I'm a prime subscriber I happen to be a prime subscriber I by the way the experience thus far seems good to me But who might I say But I also think that if I wanted to see other prices or wanted to go to another site I could do that remarkably easily I mean I don't even have to walk outside to do it And so it's a very interesting thing to think that they have this quote unquote monopoly power over all of these consumers who have chosen hopefully through their own free will to become prime subscribers No Yeah I mean look this was um you know an argument that we've heard in other contexts as well You know Google famously has argued that competition is just a click away And certainly you know I think especially in the early two thousands there was a view that there are very few switching costs that you know all you have to do is type a different uh website address Um and that that means that you're not really gonna see monopoly power in the digital age I think two decades on we've seen that that is flatly untrue right There are all sorts of ways in which the power of defaults in which consumer behavior uh in which you know behavioral economics has shown that actually this stuff can be quite sticky And once you're in a particular ecosystem there are all sorts of ways that companies can keep you in that ecosystem in ways that make it especially important that you're you know promoting competition and preventing lock in Um We had a number of merger or we had a number of media company CEO S you just met Bob Iger And there's a big question about whether there should be deals allowed I just mentioned uh a deal in the

past that was allowed And uh here we are now there's been a lot of those companies that are waiting thinking what's gonna happen with this election What's gonna are you still going to be in this role next year What do you think of the the the media landscape right now And what do you think also of C OS who are saying Maybe I should wait maybe I shouldn't wait maybe I should try to wait you or maybe you're going to take me to court now But you know in a couple of years from now you're not going to be in this role anyway So look our job is to enforce the laws that Congress has charged us with Um and so you know we look at the deals that come in through the door We have been you know doing a reassessment So we issued this past summer draft merger guidelines that we believe provide the market with a clear sense of what are the tools and analytical frameworks that we at the antitrust agencies are going to be using when these deals come in And so you know that really lays out our approach and we're going to continue kind of faithfully following it There's a big question about whether the laws as they are written today makes sense I imagine you might think that there should be more that the laws should be changed in Europe They actually did change the laws they they they have changed the laws Do you think the laws in the US need to be changed Well that's ultimately a decision for Congress to make Um you know they have done various investigations and inquiries and identified where those can be updated for us at the FTC We certainly see that you know for example um currently the the Harsco Rin Act only gives the agencies 30 days to make an assessment about whether a deal requires a closer look That law goes back to the 19 seventies If you look at the legislative history lawmakers assumed that the agencies would only get 100 and 50 merger filings a year We're obviously in a very different environment we get up to you know 3000 filings deals have become much more complex And so you know being tethered to that 30 day period for example can be quite limiting It's also clear that you know the courts are currently engaged in an assessment of how these age old principles right The Sherman Antitrust Act 1890 the FTC Act 1914 Clinton Act 1914 how these old laws apply in very new contexts including digital markets And so I think there is an open question right now and we have a whole set of cases that are working their way through the courts about you know how the courts will apply these principles in these new markets And I know Congress is watching very closely as well We're going to run out of time I want to open up to questions Maybe I don't know if me and Drahan might even have one But before we do that I have I do have one more for you which is one of the other things

you've gone after is non compete It's a big issue in the world of business What do you think of what's happened here And do you do you believe that there should be a effectively a federal ban on non competes So that's what we proposed effectively in January We proposed a rule that would eliminate the vast majority of non competes Are there times when a non-compete is valuable Is there a time when you'd say to yourself You know what I'm gonna pay as a as a business leader for the privilege I'm gonna pay that employee more for that I'm not talking and I agree with you by the way you look at the hairdressers and some of the other sort of um uh workers that are under non-compete that may be unfair But is there a moment or period of time where you'd say in this context I'm ok with a non-compete maybe And those are some of the questions that we ask Um we got 20,000 comments Um a whole set of those comments were actually not just from the low wage you know security guard workers or fast food workers Uh but from doctors from engineers uh from technologists uh from journalists And they shared stories about a how oftentimes they're actually not in a position to really bargain with their future employer when they're signing that contract but also that there can be all sorts of other ramifications right And so we're looking at the impact not just on workers where we assess you know that worker wages are down to the tune of up to \$300 billion because of these non competes But also the effect on competition as a whole Right Because if you have a worker who's effectively locked into a job that's bad Not just that for that worker but also for other workers who won't have the opportunity if that job were ever to open up And we've also found that sometimes it's you know with higher skilled workers or workers with greater expertise that you might have the greatest prospect for those individuals to go and start their own businesses And so from a competition perspective I mean these things are called non competes And so we think you know they deserve an enormous amount of scrutiny and that the economy on the whole would probably be healthier without them We're over time But let me get a microphone to make it because I know he did have a question be Del Rahim who I should say used to run the Antitrust division at the Department of Justice actually sat on the stage several years ago I think actually talking about that deal by the way maybe you can comment on you guys were actually in sync on that Oddly enough that particular you know I think when David bought Time Warner was without direct TV which really caused a competitive concern So I supported Lena's comments with uh with respect to the appeal we appealed and lost again Um Lena congratulations on your accomplishments and your

tenure at the FTC I'm gonna ask you a question about more government institutional design and you know in practice I get asked by boards about a particular merger and how do you predict this And a lot of times it depends which agency gets to see it They have different legal standards different procedures which is difficult to make a decision Um because a bunch of mergers you don't know where it goes and there's been so you have the FTC and DOJ do and antitrust there's been a lot of enforcement actions that you probably would have supported But unfortunately for you the commission was deadlock 22 or historically Microsoft later googled both 22 votes and the enforcement action wasn't brought until the justice department had to come in Do you think we need two antitrust agencies at the federal level anymore Do we need competition enforcement of competition or is it time to redesign the government and merge those two agencies It's an interesting question and you know the FTC is not just a competition agency but also consumer protection agency but on the competition front I mean obviously there are areas where the Antitrust division and the FTC overlap but there are also really important ways in which they differ So the Antitrust division has criminal enforcement authority which we at the FTC Don't the ftc's authorities are actually broader than what the doj enforces So we have something called our unfair methods of competition authority which extends beyond the four corners of the Sherman Act or the Clayton Act We also have more policy tools so we can promulgate rules we can do market studies And so I actually see for the most part a lot of complementarity between the two agencies It's certainly true that in some prior eras there was a lot of friction between the agencies Turf wars I have a great relationship with our current a Jonathan Cantor and our agencies have a great partnership and we think that we are you know both stronger as a result of that I'm gonna k everybody Thank you Thank you very very much